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AN OVERVIEW AND ANALYSIS OF THE NEW RULES OF PROFESSIONAL CONDUCT FOR ARMY LAWYERS

by Major Bernard P. Ingold*

I. INTRODUCTION

In October 1987 The Judge Advocate General of the Army promulgated a new set of rules to govern the conduct of all uniformed and civilian Army attorneys.[1] The new rules (hereinafter Army Rules) replace the ABA Model Code of Professional Conduct, which had for over a dozen years served as the standard of ethical responsibility for Army lawyers.[2] The new Army Rules are generally based on the ABA Model Rules with several changes to accommodate peculiarities of military practice.[3]

This article begins by reviewing the history of ethical standards for lawyers in this country up through adoption of the ABA Model Rules of Professional Conduct. The article addresses some of the common

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[1]Dep't of Army, Pam 27-26, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter R.P.C.]. The Army was the first service to adopt the ABA Model Rules of Professional Conduct. The Navy adopted a modified version of the Model Rules in November 1987, but it did not include the comments that accompany the Model Rules. The new Army Rules are applicable to all attorneys certified by The Judge Advocate General, lawyers employed by the Army, and civilians practicing in courts-martial.

[2]The Model Code of Professional Responsibility was made applicable to Army attorneys by regulation. Army Reg. 27-3, Legal Services: Legal Assistance, para. 1-9 (1 Apr. 1984) [hereinafter AR 27-3]. In 1973 The Judge Advocate General adopted the Model Code to govern the conduct of lawyers participating in courts-martial. In 1982 the Model Code was made applicable to all Army lawyers.

[3]The Army Rules were drafted by an inter-service committee appointed in 1984 by the service Judge Advocate Generals. For a history of the development of the service rules see Albertson, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 Fed. Bar News & J. 334 (1988).

criticisms made about the Model Rules and considers whether these Rules are appropriate for Army implementation. Part III contains an in-depth analysis of each rule in the new Army Rules. The article concludes in Part IV by evaluating the Army Rules and by making some recommendations for improvement.

II. HISTORY OF LEGAL ETHICS

A. THE ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY

There was no formal attempt to codify rules of professional standards for the legal profession until 1887, when Alabama adopted the Canons of Professional Responsibility.[4] Although several other states subsequently passed codes, there was no uniformity in the standards being adopted. In 1908, after a three-year study, the American Bar Association promulgated the Canons of Professional Ethics.[5] These Canons, though frequently amended, survived for over one-half of a century. Although they were criticized for being duplicative, too vague for adequate enforcement, and devoid of clear organization,[6] there was no movement to reform the rules until 1964, when a special committee of the ABA began work on drafting a new code of ethics. The committee completed its work in 1969, and the ABA promulgated a new set of disciplinary rules, the Model Code of Professional Responsibility, which for the first time provided mandatory standards.[7] Most of the states adopted the Model Code within the next few years with only minor modifications.

A unique innovation of the new Code was the division into three parts: Canons, Ethical Considerations (EC), and Disciplinary Rules (DR). The nine canons were general restatements taken from the predecessor canons. The Ethical Considerations were intended to be aspirational goals for the legal profession. The mandatory provisions of the Code were contained in the Disciplinary Rules.

The tripartite division of the Code never worked as its drafters

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[4]Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978). These Canons were largely based on the efforts of two 19th century legal scholars, George Sharswood, Dean of the University of Pennsylvania Supreme Court, and another legal ethics expert, David Hoffman, a Baltimore attorney.

[5]Canons of Professional Ethics (1908). These rules were proposed by the ABA and adopted in various forms by the states. The rules were largely patterned after the Canons adopted by the Alabama bar.

[6]Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 443, 445 (1985).

[7]Model Code of Professional Responsibility (1969) [hereinafter Model Code].

intended.[8] Although the Code represented a needed move toward clearer standards and an emphasis on stricter enforcement, confusion existed among members of the bar on how to interpret the separate provisions of the Code. The distinctions between Ethical Considerations and Disciplinary Rules were often blurred, leading to uneven enforcement among the states. Moreover, the Code was largely ineffectual in dealing with the problems of lawyers committing negligence, engaging in marginal misconduct, and charging excessive fees.[9]

Several internal inconsistencies exacerbated the difficulties in resorting to the Code to resolve ethical problems. For example, Canon 4 exhorted attorneys to hold secrets and confidences of a client inviolate.[10] Code provision DR 7-102 required disclosure, however, of a client's past fraud to a tribunal or an affected person.[11] Subsequently, in response to the conflict, DR 7-102 was amended to prohibit disclosure of any information "otherwise privileged."[12] This amendment completely negated DR 7-102(B) because the phrase "otherwise privileged" was construed to cover all information a lawyer had about the case.

Another shortcoming of the Code was its failure to effectively control lawyer advertising and commercialization. This shortcoming led the Supreme Court to declare several prohibitions unconstitutional. The Supreme Court has, for example, struck down the blanket suppression of lawyer advertisement,[13] the broad prohibition against lawyer solicitation,[14] and the regulations against group legal

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[8]*See* Gaetke, *Why Kentucky Should Adopt the ABAs Model Rules of Professional Conduct*, 74 Ken. L.J. 581 (1985); Denecke, *Complexities of Modern Practice Require Changes in Oregon Ethics Code*, 19 Willamette L. Rev. 621, 629 (1983); Sutton, *How Vulnerable is the Code of Professional Responsibility*, 57 N.C.L. Rev. 497, 505-09 (1979).

[9]For a complete analysis of the Code's shortcomings in this regard see Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 450-51 (1985).

[10]Model Code DR 4-101 (1981).

[11]Model Code DR 7-102(B)(1) (1969).

[12]Model Code DR 7-102(B)(1). A majority of states refused to adopt this amendment. For a discussion of this issue see Giffin and Mason, *The New ABA Ethics Rules: A Change for the Better?* 39 J. Mo. Bar 534 (1983).

[13]Bates v. Arizona, 433 U.S. 350, *reh'g denied*, 434 U.S. 881 (1977).

[14]*In re* R.M.J., 455 U.S. 191 (1982) (amended DR 2-101 held unconstitutional; states can prohibit advertising only if it is inherently misleading); Oralik v. Ohio State Bar Assn., 436 U.S. 447, *reh'g denied*, 439 U.S. 883 (1978) (lawyer's in-person solicitation of employment could be prohibited even in the absence of specific harm); *In re* Primus, 436 U.S. 412 (1978) (solicitation of prospective litigants by nonprofit organizations which engaged in litigation as a form of political expression could not be completely restricted).

services.[15] As a result of these decisions the ABA moved to amend the Code nine times.[16]

B. THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

Although in existence for only slightly over a decade, the ABA Code quickly became in need of overhaul. A developing consensus of the bar was that the substantive rules of the Code envisioned law practice in a simplistic litigative setting not related to modern legal reality.[17] Moreover, many provisions of the Code were rendered obsolete by Supreme Court cases and other developments. Finally, the division of the Code into three statements was largely a failure.

The process of developing a new set of rules began in 1977 when the ABA appointed a commission to reexamine the Model Code.[18] Although the commission concluded that the Code was in need of comprehensive revision, they did not set out to establish an entire new body of law. Rather, they incorporated the legal principles contained in case law and the Code. The drafters did, however, close some gaps, clarify several ambiguities, and completely revise the format and structure of the Code.[19]

In August 1983, after six years of debate, the ABA approved the new Model Rules.[20] Since then over one-half of the states have adopted some version of the Model Rules to regulate the conduct of licensed attorneys.[21]

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[15]United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) (Court held unconstitutional an attempt to prohibit, as solicitation, a union from advising members to secure legal services).

[16]The Model Code was amended in 1970, 1974, 1975, 1976, 1977, 1978, 1979, and twice in 1980. American Bar Association, Annotated Code of Professional Responsibility, Preface (1982).

[17]R. Aronson, J. Devine, & W. Fisch, Problems, Cases and Materials in Professional Responsibility 511 (1985); G. Hazard, Ethics in the Practice of Law, 6-7 (1978); Waters, *Overview of the Model Rules*, 24 Washburn L.J. 443, 452 (1985). Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977).

[18]This commission, entitled Commission on Evaluation of Professional Standards, was known informally as the Kutak Commission. The Commission published its first draft on January 30, 1980.

[19]*See generally* Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 Am. B. Found. Res. J. 1016.

[20]The ABA House of Delegates adopted the Model Rules of Professional Conduct on August 2, 1983. G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, at xxxi (1985). *See generally Lawscope, ABA Annual Meeting*, 69 A.B.A. J. 1365 (1983).

[21]As of January 1, 1989, 31 states have adopted some version of the Model Rules: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada.

While the Rules have generally been hailed by the bar and legal commentators, they are not without their critics. Perhaps the strongest criticism of the Rules to date is from Stephen Gillers in his law review article, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules.*[22] In a scathing commentary, Gillers argues that the ABA Rules are "astonishingly parochial, self-aggrandizing [and] favor lawyers over clients, other persons and the administration of justice in every line, paragraph, and provision that permits significant choice."[23]

Another critic of the Model Rules, Richard L. Abel, maintains that they were drafted with an "amorphousness and ambiguity that render them virtually meaningless."[24] To support this assertion, Abel points out that the Rules are not sufficiently precise, resorting to unascertainable goals such as "legitimate purposes," "requirements of fair dealing," and "act with reasonable promptness and diligence."[25]

The task confronting the drafters of the Rules, however, was to draft rules that would cover a wide range of contexts. Some flexibility is absolutely essential to accommodate these possibilities. Moreover, to set the standards too high would lead to uneven enforcement.[26]

Both Abel and Gillers also point out that the Rules do little more than state what is either morally or legally expected of lawyers anyway.[27] Ethical standards are significant, however, in expressing shared values and thereby limiting attorneys' perspectives in determining the propriety of certain conduct.[28] Rules also help lawyers

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New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See American Bar Association/Bureau of National Affairs, Lawyer's Manual on Professional Conduct, 01:3 (1988) [hereinafter cited as ABA/BNA Law. Man. Prof. Con.].

[22]Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules,* 46 Ohio State L.J. 243 (1985).

[23]*Id.* at 245. Gillers concedes, however, that the Rules "read better than the Code and fill some critical gaps."

[24]Abel, *Why Does the ABA Promulgate Ethical Rules?,* 59 Tex. L. Rev. 639, 642 (1981). Abel submits that the lawyers who drafted the Rules would be the first to attack them on grounds of vagueness when representing other attorneys accused of violating them.

[25]*Id.* at 642. Abel also argues that the Rules suffer the defect of being both underinclusive and over-inclusive.

[26]*See* Sutton, *How Vulnerable Is the Code of Professional Responsibility?,* 57 N.C.L. Rev. 497, 506 (1979). Another author who believes that recourse to "weasel words" is defensible is Professor Deborah Rhode. *See* Rhode, *Why the ABA Bothers: A Functional Perspective on the ABA Code,* 59 Tex. L. Rev. 689 (1981).

[27]Gillers, *supra* note 22, at 265. Abel, *supra* note 24, at 645.

[28]*See* Rhode, *supra* note 26, at 709. *See also* R. Under, Law in Modern Society 30 (1976).

deal with clients who ask them to undertake improper means to pursue cases.

Another deficiency of the Rules, according to their critics, is that they fail to prescribe a disciplinary mechanism or to specify penalties for violations.[29] The critics do not suggest, however, that state mechanisms for enforcement have somehow been inadequate in dealing with lawyer misconduct. Moreover, it would be altogether impossible for the drafters of the Rules to prescribe penalties for certain violations, given the myriad facts and circumstances that could apply to each case.

Perhaps the most significant objection voiced over the Rules is that they are self-serving and expedient to the bar.[30] The Model Rules, though admittedly protectionist, are a significant improvement over the Code. For example, the Rules loosen the traditional prohibitions on advertising[31] and commercial solicitation,[32] even though this was not favored by a majority of the bar. Moreover, the Rules also address with greater specificity areas of courtroom decorum,[33] commingling of funds,[34] and conflicts of interest.[35]

One area that was not substantially improved in the Model Rules is an attorney's pro bono responsibilities. The Rules retain the largely hortatory language, urging lawyers to contribute toward public interest activities without imposing any specific minimum requirements.[36]

A positive step in the Model Rules is the rejection of the concept of the one dimensional lawyer operating in a simple litigative setting. The Rules recognize that lawyers operate in different capacities with divergent responsibilities. A lawyer can be called upon in today's complex world to represent, advocate, mediate, or advise. Moreover, even when serving as advocates, lawyers practice in widely divergent

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[29]Abel, *supra* note 24, at 649. Of course the Code also does not mention penalties or furnish a mechanism for processing state disciplinary proceedings.

[30]Abel, *supra* note 23, at 653-667. Gillers, *supra* note 22, at 245. Another commentator has pointed out that it is not altogether surprising that the legal profession took care of its own in the Rules, given the fact that only one of the Kutak Commission's members is not an attorney. *See* Rhode, *supra* note 26, at 690.

[31]Model Rules of Professional Conduct Rule 7.2 (1983) [hereinafter Model Rules].

[32]Model Rule 9.3.

[33]Model Rule 3.5.

[34]Model Rule 1.5.

[35]Model Rule 1.7.

[36]Model Rule 6.1. This Rule has not been included in the Army Rules of Professional Conduct for Lawyers. The comments to Model Rule 6.1 indicate that Rule 6.1 is not intended to be enforced through the disciplinary process.

tribunals, such as civil, criminal, and administrative. The Model Rules respond to these developments by organizing the Rules according to specific professional functions and by delineating standards addressing the different roles a lawyer assumes.

Perhaps the most significant development in the new Rules was rejection of the three part format of the Model Code. The more effective format used by the drafters was to state a rule and follow it with official comment, similar to a restatement of laws format.

This development is significant, because it represents the final abandonment of referring to aspirational standards in a lawyer code of ethics. The Rules now simply set forth a positive statement defining minimum acceptable behavior that can be enforced through the disciplinary process. According to the commission chairman, the philosophy of this approach was that good standards should be considered matters of law and not morality.[37]

The new form and structure of the Rules are also significant because "characteristics influence, if not determine, one's perception of the importance of content."[38] The new format of the Rules represents a clearer, more intelligent framework to define ethical standards and impose disciplinary sanctions.[39]

C. THE ARMY RULES OF PROFESSIONAL CONDUCT FOR LAWYERS

The adoption of the Model Rules in 1983 forced the uniformed services to reconsider their own standards of professional responsibility. Although The Judge Advocate General (TJAG) of the Army directed judge advocates and civilian attorneys to follow one ethical standard, the ABA Model Code,[40] these lawyers obviously referred to their own licensing state's interpretation of the Code. The result was a lack of uniformity on the ethical standards applicable to Army attorneys.[41]

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[37]Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A. J. 47 (1980). *See also* Model Rules Preface.

[38]Patterson, *An Analysis of the Proposed Model Rules of Professional Conduct*, 31 Mercer L. Rev. 645, 646 (1980).

[39]A number of authors conducting comprehensive reviews of the Model Rules have reached this conclusion. *See, e.g.*, Stevens, *Wyoming Rules of Professional Conduct: A Comparative Analysis*, 23 Land and Water L. Rev. 463 (1988); Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 443 (1985); Patterson, *supra* note 38.

[40]Army Reg. 27-1, Legal Services: Judge Advocate Legal Services, para. 5-3 (1 Aug. 1984) [hereinafter AR 27-1].

[41]As one author has cogently pointed out, service attorneys could be licensed in one of fifty-four different jurisdictions, all with potentially different interpretations of the

This situation was clouded further as more and more states adopted the ABA Model Rules. Army lawyers licensed in these states were required to comply with two different, and in some cases inconsistent, sets of ethical rules. In cases of direct conflict, there was no guidance as to which standard should supersede.

Clearly, there was an urgent need for adopting one standard for all Army attorneys. The committees appointed by the service Judge Advocate Generals appropriately rejected the ABA Code as the model to serve for these uniform rules. The Code no longer reflected the minimal standards that the legal community felt appropriate. The format of the Code proved unworkable and far less superior to the clearer framework furnished by the Rules. Most importantly perhaps, the Code did not provide clear guidance for resolving many ethical problems unique to attorneys in the military.

The decision to use the Model Rules as the basis for an Army code of ethics was sound. Although there are several areas in which the Model Rules are either irrelevant or inappropriate to the practice of law in the military, the working group was able to devise rules that clearly responded to the unique problems. For example, the proscriptions in these Rules implementing the rule of imputed disqualification could not realistically apply to a single military office tasked to provide diverse legal services to a large community. Another major problem area not adequately addressed in the Model Rules or the Code is the proper role for Army judge advocates when a conflict arises between the Army's interests and the interests of a local commander or command. The Army Rules' resolution of these unique problems will be addressed in Part III.

Perhaps the most significant issue facing the drafters of the Army Rules was to determine whether The Judge Advocate General possesses the authority to promulgate rules governing professional conduct for all Army attorneys and to discipline attorneys for violating those rules. Although the Rules themselves do not contain a clear statement of the basic authority for promulgating the Rules, there is a reference to the fact that the Rules implement Rules for Courts-Martial 109, Manual for Courts-Martial, 1984.[42] This rule, when read

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same ethical standard. Albertson, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 Fed. Bar News & J. 334, 335 (1988).

[42]Rule 109 states that each Judge Advocate General may "prescribe rules . . . to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the Code and this Manual." Rule 109 also authorizes TJAG to suspend attorneys for violating these standards. Manual for Courts-Martial, United States, 1984, Rule for Courts Martial 109.

in conjunction with Article 27 of the Uniform Code of Military Justice,[43] provides a compelling legal basis for The Judge Advocate General's authority to prescribe rules and discipline for lawyers practicing in proceedings under the Uniform Code of Military Justice.[44]

The Rules, however, are clearly intended to extend beyond regulating professional conduct in courts-martial to all judge advocates and civilian employees under The Judge Advocate General's disciplinary authority. Although the source of authority is perhaps not as direct, a strong argument can be made that The Judge Advocate General has the inherent authority to prescribe standards for all uniformed Army judge advocates, even when they are not practicing before courts-martial.

Congress has directed that all officers in the Judge Advocate General's Corps have qualifications equal to those of the civilian bar. The Judge Advocate General is tasked with the responsibility for assigning duties[45] and directing members of the Judge Advocate General's Corps in the performance of those duties.[46] The Judge Advocate General cannot adequately discharge these important statutory functions without possessing the inherent power to prescribe standards of professional conduct and to adopt a disciplinary mechanism for enforcement.

The Judge Advocate General's authority to prescribe rules for civilian employees under his disciplinary jurisdiction[47] is a more difficult question. The Judge Advocate General of the Army is the delegated approval authority for all assignments, promotions, and transfers of Army civilian attorneys working outside the office of the Secretary of the Army, the Office of the U.S. Army Corps of Engineers, and the Army Materiel Command.[48] This authority includes, by necessary

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[43]Under article 27, Uniform Code of Military Justice, the TJAG must certify as competent officers who serve as military judges, trial counsel, and defense counsel in courts-martial. Uniform Code of Military Justice art. 27, 10 U.S.C. § 827 (1982) [hereinafter UCMJ].

[44]Another author has also reached this same conclusion, Albertson, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 Fed. Bar News and J. 334, 336 (1988). The author does not consider, however, whether authority exists to extend the Rules beyond court-martial tribunals.

[45]10 U.S.C. § 3037(c) (1982). This statutory responsibility is implemented by AR 27-1, para. 2-2(f)(2).

[46]UCMJ art. 6. This statutory duty is implemented by AR 27-1, para. 2- 2(5)2.

[47]AR 27-1, para. 2-2(v). The Judge Advocate General of the Army has qualifying authority for all civilian attorneys below the grades of GS-16 (not including SES attorneys) who are not assigned to the U.S. Army Corps of Engineers (USACE) and the U.S. Army Materiel Development and Readiness Command.

[48]Army Reg. 690-300, Civilian Personnel, Employment, para. 7-2(a), (c.11, 15 May 1983).

implication, the power to prescribe standards regulating professional conduct as a condition to continued employment. It is illogical to conclude that The Judge Advocate General has the authority to apply ethical standards of separate states to govern civilian attorney conduct, but yet does not have the authority to impose an independent set of ethical rules.

A problem could arise if a civilian attorney is directed to pursue a course of conduct under the Army Rules that is clearly inconsistent with his or her licensing state code. Before taking action that would violate one of the applicable standards, a civilian attorney should consult with his or her superiors and attempt to find a practical solution. If the civilian attorney is directed to comply with the Army Rules, a refusal could serve as grounds for taking adverse action. The fact that the attorney has complied in good faith with the standard of his licensing jurisdiction should in every case, however, be considered strong evidence in mitigation.

III. AN OVERVIEW OF THE ARMY RULES OF PROFESSIONAL CONDUCT FOR LAWYERS

A. SCOPE OF THE RULES

The Army Rules are divided into eight broad categories[49] relating to specific duties or functions of the lawyer. Unlike the ethical considerations under the ABA Code, the new Rules are, for the most part, specific and mandatory. The failure to comply with a rule is grounds for invoking the disciplinary process against an attorney.[50] The decision to impose discipline will depend on all of the facts and circumstances of the case as they existed at the time of the conduct in question.[51] A lawyer's reasonable resolution of an ethical issue is not, according to the scope section of the Rules, open to unbridled second guessing.[52] Rather, reviewing authorities must appropriately take cognizance of the fact that attorneys often must make ethical resolutions on an uncertain or incomplete state of the evidence.

Even if a violation of a rule is found, it does not give rise to a civil

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[49]Although the Army Rules contain eight chapters, the Army did not adopt any of the rules contained in section six of the ABA Model Rules dealing with lawyers doing public service. This section has been reserved for possible future use.

[50]R.P.C. Scope.

[51]*Id.*

[52]*Id.*

action against either the attorney or the United States.[53] Despite this disclaimer, however, it is unrealistic to expect that the rule will be ignored in malpractice litigation.[54] The Rules may also not be used as procedural weapons by opposing parties in collateral proceedings.[55] Rather, the overriding purpose of the Rules is to provide guidance to lawyers and furnish the framework for regulating professional conduct.

B. CHAPTER 1: THE CLIENT-LAWYER RELATIONSHIP

1. Rule 1.1: Competence

Rule 1.1 affirmatively defines the standard of competence for all Army attorneys.[56] This rule, which has no direct counterpart in the ABA Model Code,[57] particularizes the elements of competent representation to include the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation."[58] This rule is intended to provide a strong, positive commitment to provide competent professional service. Relevant factors to determine if a lawyer has the required knowledge and skill include the relative complexity of a matter, the lawyer's general experience, the lawyer's training and education, the preparation and study the lawyer is able to devote to the matter, and whether it is possible for the lawyer to consult with others on the matter.[59]

New judge advocates often face some legal matters for which they

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[53]The new Rules explicitly state that a "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis for civil liability." R.P.C. Preamble. *See also* Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates, American Bar Association 30 (1987).

[54]*See generally* Farve and Strong, *The Model Rules of Professional Conduct: No Standard For Malpractice*, 47 Montana L. Rev. 363 (1986); Hoover, *The Model Rules of Professional Conduct and Lawyer Malpractice Actions: The Gap Between the Code and Common Law Narrows*, 22 New Eng. L. Rev. 595 (1988).

[55]R.P.C. Scope.

[56]R.P.C. Rule 1.1.

[57]The closest Model Code rule provided that a "lawyer shall not handle a matter which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it." Model Code DR 6-101(A)(1) (1980). Model Code DR 6-101(A)(2) further required preparation adequate under the circumstances.

[58]R.P.C. Rule 1.1. This standard was derived from legal malpractice cases. A violation of Rule 1.1 will not, however, give rise to a civil cause of action against the attorney or the U.S. Government. *See supra* notes 53 and 54 and accompanying text.

[59]R.P.C. Rule 1.1 comment.

have received no specialized training. The mere fact that a newly admitted lawyer is unfamiliar with a problem, however, will not alone serve to disqualify him or her.[60] The Rules recognize that the competence needed to provide adequate representation can be obtained through study or through consultation with a lawyer of established skill.[61] Nevertheless, judge advocates are often called upon to provide assistance in a matter that exceeds their competence. If this occurs, an attorney should refer the matter to another attorney who is qualified to handle the matter.[62]

A fundamental concern in this area is whether the attorney or the supervisor has the responsibility for determining if the attorney is competent to handle a particular assignment. According to the comments to Rule 1.1, the supervisory attorney has the responsibility for making this initial determination.[63] All judge advocates, however, have the responsibility to inform their supervisors if they believe they are not competent to handle a particular case or issue.

Judge advocates are sometimes called upon in an emergency to render legal opinions on matters outside their immediate expertise. They may provide assistance when referral to another attorney would be impractical, even if they do not have the skill ordinarily required.[64] The assistance provided in these emergency situations, however, should be limited to that necessary in the circumstances.[65]

2. Rule 1.2: Scope of Representation

Army Rule 1.2 states that, subject to three exceptions, a lawyer must abide by a client's decision concerning the objectives of representation and must consult with the client concerning the means of the representation.[66] The three exceptions to this rule are when the lawyer limits the objectives of the representation after consultation,[67] when the client engages in criminal or fraudulent

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[60]R.P.C. Rule 1.1.

[61]R.P.C. Rule 1.1 comment.

[62]*Id.*

[63]*Id.* This is reinforced by R.P.C. Rule 5.1(d), which provides that supervisors are responsible for ensuring that subordinate judge advocates are properly trained and competent to perform duties to which they are assigned.

[64]R.P.C. Rule 1.1 comment.

[65]*Id.*

[66]R.P.C. Rule 1.2. This rule has no direct counterpart in the Model Code, but much of it reflects preexisting law.

[67]R.P.C. Rule 1.2(c). The comments to this provision provide, however, that a client may not be asked to agree to representation so limited as to deprive him of adequate right to counsel.

conduct,[68] and when the client expects assistance not permitted by law or the rules of professional responsibility.[69]

Under Army Rule 1.2 a lawyer is required to exercise his professional independent judgment throughout the representation of the client, to include deciding the means of accomplishing the client's objectives.[70] Although the line between objectives and means will sometimes be blurred, the comments provide explicit guidance on what decisions are exclusively the client's.[71] A lawyer may not, according to Rule 1.2, take independent action on behalf of a client without at least consulting with the client.[72]

The comments to Rule 1.2 address the dilemma faced by an attorney who learns that the client is engaged in criminal conduct. Unless required under Rule 1.6, a lawyer shall not reveal the client's intention to commit an offense.[73] A lawyer shall not, however, continue to assist a client in conduct the lawyer knows is criminal or fraudulent.[74] Rule 1.2(e) requires a lawyer to consult with a client regarding the limits of the lawyer's conduct when the lawyer learns that a client expects assistance not permitted. This provision, which has been characterized as a "Miranda warning," has been criticized as inconsistent with the traditional lawyer-client relationship.[75] The fact is that a lawyer, by advising a client he may have to make certain disclosures against the client's interests, will undoubtedly inhibit the attorney-client relationship. In the long run, however, an attorney is more candid and useful to the client by revealing the limitations on his authority. A more practical and perhaps more dif-

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[68]R.P.C. Rule 1.2(d). This rule is similar to paragraph (d) of DR 7- 102(A)(7), which provided a lawyer "shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." *See also* Model Code DR 7-102(A)(6) and EC 7-5.

[69]R.P.C. Rule 1.2(e).

[70]R.P.C. Rule 1.2(a). The lawyer is the decisionmaker on all technical and legal tactical matters. He should, however, consult with the client concerning the means.

[71]R.P.C. Rule 1.2 comment. Examples of client decisions in a legal assistance setting include the decisions to accept a settlement offer or to agree to pay a specific amount of family support. Examples of such decisions facing a criminal accused are the decisions to plead guilty, to waive an affirmative defense, to waive trial by members, or to testify.

[72]*Id.* The lawyer also has the duty to ensure that the client's decision is an informed one.

[73]*Id.*

[74]The rule does provide, however, that the lawyer "may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law." R.P.C. Rule 1.2(d).

[75]*See* Freedman, *Lawyer-Client Confidences: The Model Rules Radical Assault on Tradition*, 68 A.B.A. J. 429, 431 (1982).

ficult problem for counsel is to determine exactly when the disclosure is necessary.

An attorney may occasionally be called upon to represent a client who possesses unpopular views or who has engaged in distasteful conduct. Rule 1.2 encourages lawyers to provide representation to these clients by specifying that their representation does not constitute an endorsement of the clients' views or activities.[76]

3. Rule 1.3: Diligence

A common complaint made by clients against attorneys is that they have procrastinated or taken an unnecessary delay in accomplishing the objectives of the representation. Rule 1.3 responds to this complaint by requiring all attorneys to act with reasonable diligence and promptness when representing clients.[77] Army Rule 1.3 also adds a phrase not found in the ABA Model Rules, requiring lawyers to consult with clients as "soon as practicable and as often as necessary after undertaking representation."[78] To comply with this rule, it is obvious that judge advocates should carefully manage their caseloads to ensure that all clients can be effectively represented.[79]

It is interesting to note that none of the Army Rules retain the requirement found in the Code imposing a duty on counsel to represent a client "zealously."[80] Although the comment to Rule 1.3 does state that a lawyer should represent a client with zeal, the emphasis of the black letter rules is on more positive terms such as competence and diligence. This shift away from vague concepts contained in the Model Code such as zealousness and negligence toward more objective standards is commendable.[81]

Although an attorney is not bound to press for every advantage, the comments to Rule 1.3 recognize that precedent may sometimes re-

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[76]R.P.C. Rule 1.2(b). Violations of this rule could lead to disbarment. *See In re* Blankenburg, 654 P.2d 195 (Ariz. 1984) (attorney disbarred for failure to return files and take action requested by clients).

[77]R.P.C. Rule 1.3.

[78]*Id.* The requirement to consult with a client continues until the relationship is terminated.

[79]*Id.*

[80]Model Code DR 7-101(A).

[81]Two commentators have cogently reflected that the word "zeal is as difficult to define as it is archaic, and it provides a potential warrant for mindless fanaticism." R. Underwood & W. Fortune, Trial Ethics 1.3, at 6 (1988). *See also* G. Hazard, Jr. and W. Hodes, The law of Lawyering: A Handbook on the Model Rules of Professional Conduct 47 (1985); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973).

quire an attorney to pursue certain matters on behalf of a client.[82] A lawyer, however, retains the discretion in determining the means by which a matter should be pursued.[83]

According to the comments to Rule 1.3 a lawyer must carry through to conclusion all matters undertaken for a client.[84] A lawyer should ensure that the client understands exactly when the lawyer-client relationship is terminated. For example, a legal assistance attorney who has prepared a will for a client should inform the client that he will no longer be representing him in the matter and will not be looking out for changes in the law that may impact on the validity of the will. If the representation of a client has not produced completely successful results, a lawyer should advise his client of all appeal rights before terminating responsibility for the matter.[85]

4. Rule 1.4: Communication

A logical extension of Rule 1.2 and Rule 1.3 is the requirement in Rule 1.4 to keep a client informed about the status of a matter and to respond to all requests for information.[86] A second part to Rule 1.4 requires lawyers to explain a matter to a client in enough detail so the client can make an informed decision regarding the representation.[87] The comments to Rule 1.4 recognize that the adequacy of the communications will depend upon the circumstances.[88]

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[82]For example, United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), requires appellate defense counsel to bring to the court's attention matters asserted by the client as grounds for relief. *See also* United States v. Knight, 15 M.J. 202 (C.M.A. 1983) (appellate defense counsel must invite the attention of military appellate courts to errors specified by the accused); United States v. Hullum, 15 M.J. 261 (C.M.A. 1983) (appellate defense counsel should contest appropriateness of sentence received by accused when the issue is squarely raised in the record).

[83]R.P.C. Rule 1.3 comment. An appellate defense attorney therefore may decide not to raise a matter being urged by a client as grounds for relief as an assignment of error and not to prepare an appellate brief on the issue. *See* Jones v. Barnes, 463 U.S. 745 (1983) (criminal defendant's right to counsel is not violated when appointed defense counsel refuses to raise colorable issues in appellate brief).

[84]R.P.C. Rule 1.3 comment.

[85]*Id.*

[86]R.P.C. Rule 1.4(a). Some states have questioned whether this duty should be made aspirational instead of mandatory. The potential harm with a mandatory rule, they fear, is that the rule could serve as a license to harass attorneys who fail to act even though there is no harm to the client. *See, e.g.*, Report of the Special Committee of the Kentucky Bar Association, Model Rule 1.4 (March 1986).

[87]R.P.C. Rule 1.4(b). If the Army is the client, the duty to communicate extends only to appropriate officials of the Army. Although Rule 1.4 reflects preexisting law, it has no direct counterpart in the disciplinary rules of the Model Code. *See* Model Code EC 7-8, which provides that lawyers shall exert their best efforts to ensure that all decisions of clients are made only after clients have been informed of all relevant considerations. *See also* Model Code EC 9-2.

[88]R.P.C. Rule 1.4(b).

For example, practical exigencies will sometimes limit the time for consultation. A lawyer cannot always be expected to consult with a client concerning every trial strategy in detail. The guiding principal, according to the comments, is for the lawyer to fulfill the client's reasonable expectations for information.[89]

There may be some instances when withholding information from a client is justified. For example, disclosure is not required if court rules provide that information should not be revealed to a client or if regulations restrict the release of classified information. Information may also be withheld if a client would react imprudently to the information, such as when a client may be harmed by disclosure of a psychiatric diagnosis.[90] Under no circumstances, however, should an attorney withhold information to further his own interests or for his own convenience.

5. Rule 1.5: Fees

Army Rule 1.5 includes the same comprehensive rule regulating civilian fee arrangements that is contained in the ABA Model Rules of Professional Conduct.[91] The rule will apply to all private civilian lawyers practicing in Army courts-martial. The primary reason for including the rule was to provide judge advocates with a generally accepted standard to consider allegations about fee irregularities involving civilians appearing in Army tribunals.[92]

Army Rule 1.5(c) adds several broad prohibitions restricting activities of reserve judge advocates.[93] Generally, reserve judge advocates shall not accept payment or compensation for representing a client in a matter in which the advocate saw the client in an official capacity.[94] The Army Rules do not automatically disqualify a reserve attorney from all future contact with a client first seen in an official capacity. The client may, for example, retain the reserve judge advocate in his private capacity to work on a "wholly unrelated matter."[95]

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[89]R.P.C. Rule 1.4 comment. A large proportion of complaints made to disciplinary committees is the lawyer's failure to keep the client informed. *See* Guadineer, *Ethics and Malpractice*, 26 Drake L. Rev. 88 (1977).

[90]*Id.*

[91]R.P.C. Rule 1.5.

[92]*Id.*

[93]R.P.C. Rule 1.5(f).

[94]R.P.C. Rule 1.5 comment. The rule should be interpreted broadly enough to also prohibit reserve judge advocates from requesting compensation. Thus, a reserve judge advocate who requests payment for services rendered while in an official capacity should be subject to discipline. To eliminate any possible ambiguity in this regard, however, Rule 1.5(e) should be amended to clearly proscribe making requests for payments.

[95]R.P.C. Rule 1.5(f). This prohibitions are also contained in AR 27-1, para. 1-8(b), and in AR 27-3. Thus, for example, a reserve judge advocate who sees a client while

6. Rule 1.6: Confidentiality of Information

The lawyer's duty of confidentiality has ancient origins stemming from the law of evidence[96] and the broader law of agency.[97] The modern justification for the rule is to promote effective legal representation by encouraging clients to converse fully and frankly with their lawyers.[98]

The Code rules regarding confidentiality did not fully reflect the scope of an attorney's duty as a fiduciary and led to a restrictive definition of confidence.[99] The ABA Model Rules, in response to these criticisms, defined confidences much more broadly than the Code and avoided the terms "secrets" and "confidences."[100] The new rule adopted by the Army enlarges the confidentiality requirement to apply to all information about a client "relating to the representation."[101] This new single standard replaces the two-pronged duty of DR 4-101, which distinguished between "confidences" and "secrets."[102]

Under Army Rule 1.6, a duty of confidentiality extends to information obtained prior to the formation of the attorney-client relationship and continues after the relationship has terminated. There is no requirement under the rule for a client to ask that information be kept confidential or for the lawyer to determine if a release of information would be embarrassing.[103]

The new Rules impose a specific duty on attorneys to ensure that all subordinates understand and comply with the rule of confidentiality.[104] Supervisory attorneys must therefore use reasonable care in keeping privileged information confidential.[105]

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working on active duty as a legal assistance attorney cannot undertake to represent the client in the same general matter for a fee.

[96]*See* American Bar Association, Annotated Model Rules of Professional Conduct 64 [hereinafter Annotated Model Rules].

[97]E. Weeks, Treatise on Attorneys and Counsellors at Law 293-321 (1982); 8 Wigmore, Evidence 2292 (Chadbourn Rev. 1970).

[98]Trice v. Comstock, 121 F. 620 (8th Cir. 1903). *See generally* Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Calif. L. Rev. 487 (1928).

[99]Upjohn Co. v. United States, 449 U.S. 383 (1981).

[100]Model Code DR 4-101 defined secrets as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

[101]R.P.C. Rule 1.6.

[102]Model Code DR 4-101.

[103]R.P.C. Rule 1.6.

[104]R.P.C. Rules 3.8(e) and 5.3(b).

[105]R.P.C. Rule 1.6. For example, attorneys should use care in determining whether an employee should be included in a conference with a client. *In re* Agnew, 311 N.W.2d 869 (Minn. 1981).

A question that frequently arises in the military is whether attorneys should disclose information to the chain of command about whether or not a soldier has appeared for an appointment. If the attorney has never seen the soldier, releasing information that he has failed to appear for an appointment would not violate the rule. The analysis is more complicated, however, if an attorney in the office has formed an attorney-client relationship with the soldier. Information relating only to whether the client has appeared for an appointment may be released.[106] The central purpose for the rule of confidentiality, to foster full and frank communication, is not furthered by withholding information that a soldier has not appeared for a scheduled appointment. This information does not arguably "relate to the representation" of a client and should not, absent compelling circumstances,[107] fall within the rule. Under no circumstances, however, should an attorney disclose to the chain of command the subject matter of the soldier's visit or any other information concerning discussions with the soldier. Because the release of information to the command will depend on the facts and circumstances, an office standard operating procedure should address the area and require that all requests for such information be forwarded to the office supervisor so that the policy is uniformly applied.

The familiar rule that a client may expressly consent to otherwise protected disclosure has been retained under Rule 1.6.[108] Moreover, Army Rule 1.6 recognizes, as does the Code, that a client impliedly consents to disclosure of information to further the purposes of the representation. Under this theory, a lawyer in a trial defense office may freely disclose information to a legal clerk for the preparation of necessary legal documents.[109] Attorneys may also, for example, release information during negotiations with opposing parties to facili-

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[106]The duty of confidentiality has traditionally been limited to communications and therefore has not been viewed as prohibiting the release of information relating to the identity and location of a client. Annotated Model Rules at 66. *See also In re* Grand Jury Proceeding, 680 F.2d 1026 (5th Cir. 1982); Comment, *The Attorney-Client Privilege as Protection of Client Identity: Can Defense Attorneys be the Prosecution's Best Witness?*, 21 Am. Crim. L. Rev. 81 (1983); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1411 (1978).

[107]A compelling circumstance might be if the client has specifically requested that such information be withheld. *In re* Koziov, 79 N.J. 232, 398 A.2d 882 (1979); Brennan v. Brennan, 281 Pa. Super. 362, 422 A.2d 510 (1980). Trial defense counsel should also be sensitive to the fact that disclosure of such information to the command may make it necessary for them to appear as a witnesses against their clients and thereby to withdraw. *See* R.P.C. Rule 3.7.

[108]R.P.C. Rule 1.6(a).

[109]R.P.C. Rule 1.6(a). Although information about clients can pass freely among lawyers in one legal office without violating Rule 1.6, it would be advisable to restrict the information flow to avoid disqualifying others due to a conflict of interest.

tate a satisfactory conclusion.[110] Under both of these examples, however, a client could instruct the attorney to limit the release of particular information.[111]

Perhaps the biggest break from the Code in the Army Rules relates to an attorney's obligation to reveal information regarding a client's prospective crime. The Code approach to this issue was to give the attorney the discretion to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."[112] This discretion existed regardless of the seriousness of the prospective crime. The Code rule led to widespread disagreement concerning an attorney's duty to reveal information[113] and placed attorneys in the uncomfortable dilemma of choosing between prevention of harm or protection of the client.

Army Rule 1.6 attempts to resolve this dilemma by removing discretion and mandating disclosure to the extent the lawyer "reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system."[114]

The Army Rule is unique in this regard because there is no mandatory disclosure under either the ABA Code[115] or ABA Model Rule 1.6.[116] The ABA Model Rule instead gives the attorney discretion to reveal information relating to a client's intention to commit an offense involving imminent death or substantial bodily harm.[117] Under both the ABA and Army versions of Rule 1.6, however, an attorney has no discretion to reveal information concerning a client's intention to commit any type of lesser offense, for example, fraud, theft, or absence without leave.

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[110]R.P.C. Rule 1.6(b).
[111]R.P.C. Rule 1.6 comment.
[112]Model Code DR 4-101(c).
[113]Annotated Model Rules at 26. *See also* R.P.C. Rule 1.6 comment.
[114]R.P.C. Rule 1.6(b).
[115]Model Code DR 4-101(c)(3).
[116]Model Rules Rule 1.6.
[117]*Id.* An ABA opinion predating enactment of the Model Rules required disclosure under DR 4-101(c)(3) if the lawyer reasonably believed "beyond a reasonable doubt" that a client intends to commit a crime. ABA Comm. on Professional Ethics and Grievances, Formal Op. 314 (1965). It is highly doubtful that lawyers must meet this high standard under the new Model Rule. Rather, mandatory disclosure should be made if an attorney reasonably believes a client intends to commit a serious offense.

Even though Army Rule 1.6 removes the lawyer from the uncomfortable position of determining whether or not to release damaging information, implementing the new rule in practice will not be entirely free of difficulty. Counsel must still speculate whether a prospective offense constitutes either a threat to national defense interests or is likely to result in imminent death or substantial bodily harm. The comment to Army Rule 1.6(b) provides only minimal guidance for determining whether conduct constitutes a sufficient threat to national security by stating that it is triggered by receipt of information that a client is threatening to release classified locations of a special operations unit or intends to sabotage a vessel or aircraft.[118] There are certain offenses, such as selling drugs to members of special military units or subjecting a child to sexual abuse, however, that are not so easily categorized.

Another problem facing counsel in this area is to determine just how serious the client is about committing the threatened offense before making mandatory disclosure. Clients often make threats in the course of receiving advice from their attorneys that they have no intention in carrying out. Under these circumstances, counsel should investigate the nature of the threat and ask for clarification, if possible. If the lawyer reasonably believes that harm is likely to result after making a "good faith inquiry into the threat," disclosure is mandatory.[119]

Counsel must also decide to whom to make disclosure once he has determined that it is mandated. The comment to Rule 1.6 states that disclosure should be limited to that reasonably necessary to prevent the harm.[120] Accordingly, counsel should limit release of the information and should report the intended offense to the disciplinary chain of command only as a last resort.

A final exception to the rule of confidentiality permits attorneys to disclose information to establish a claim or defense in a controversy between the lawyer and the client or to respond to allegations "in any proceedings concerning the lawyer's representation of the client."[121] Although the phrase "in any proceeding" is not defined or explained in the comments, it should be interpreted broadly enough for an attorney to disclose otherwise confidential information during formal

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[118]R.P.C. Rule 1.6(b) comment.
[119]R.P.C. Rule 1.6(a) comment.
[120]R.P.C. Rule 1.6(b).
[121]R.P.C. Rule 1.6 comment. The leading case recognizing this "self defense" exception to client confidentiality is Meyerhofer v. Empire Fire and Marine Insurance Company, 497 F.2d 1190 (2d Cir. 1924).

and informal investigations, such as an Inspector General's investigation. Disclosure under this exception is, however, limited to that reasonably necessary to vindicate the attorney.[122]

Many states have included another exception to the rule of confidentiality allowing lawyers to reveal information necessary to rectify the consequences of a client's criminal or fraudulent act, in the furtherance of which the lawyer's services have been used.[123] The ABA Model Rules and the Army version of Rule 1.6, however, do not include this exception. This omission is an unfortunate departure from the ABA Code, which also required disclosure to rectify frauds perpetuated during the course of representation.[124]

7. Rule 1.7: Conflicts of Interest—General Rule

The touchstone of the conflict of interest rules under Rule 1.7 is loyalty to the client.[125] Rule 1.7 contains the general conflict of interest proposition that loyalty to a client prohibits representing a client if the representation will be directly adverse to another client or to the lawyer's own interests.[126] The rule, however, allows representation in either situation if "[t]he lawyer reasonably believes the representation will not be adversely affected or will not adversely affect the relationship with the other client."[127] In addition, the clients concerned must consent to the representation after consultation. Under a test provided in the comment to Rule 1.7, representation would be unreasonable if a disinterested lawyer would conclude that the client should not agree to representation under the circumstances.[128]

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[122]R.P.C. Rule 1.6(e).

[123]Nine jurisdictions would permit disclosure to resolve the consequences of criminal or fraudulent acts where the lawyer's services had been used: Connecticut, District of Columbia, Maryland, Michigan, Nevada, New Jersey, Pennsylvania, West Virginia, and Wisconsin. Of all the new rules, Rule 1.6 is the Model Rule most often changed by jurisdictions adopting the new Rules. For a discussion of the various approaches taken toward the rule by adopting jurisdictions, see Kuhlman, *Guest Commentary: Pennsylvania Considers the ABA Model Rules of Professional Conduct*, 59 Temple L.Q. 419 (1986).

[124]Model Code DR 7-102(B)(1) (1978). Disclosure is not required under the Code, however, if protected as a privileged communication. Using a lawyer's services to commit a fraud, however, is not considered privileged. Clarke v. United States, 289 U.S. 1, 15 (1932).

[125]R.P.C. Rule 1.7 comment. The comment to Rule 1.7 states that loyalty is "an essential element in the lawyer's relationship to a client."

[126]R.P.C. Rule 1.7.

[127]*Id.*

[128]R.P.C. Rule 1.7 comment. The rule therefore presupposes that when the risk to loyalty is too great, representation is absolutely forbidden. Rules 1.5 and 1.8 provide specific examples where the risk of disloyalty is too high. For example, Rule 1.5(d)(2)

The standard under Army Rule 1.7 is actually lower than under the ABA Model Code. Under Army Rule 1.7 a lawyer must only "reasonably believe" that the representation will not be adversely affected by the representation of both clients, whereas the Code required that it be "obvious" that the lawyer could adequately represent the interests of both.[129] This lower standard allows an attorney to represent a client even though there may be a potential conflict with another client.[130] Thus, the mere possibility of conflict will not preclude dual representation. Accordingly, a legal assistance attorney could draft a bill of sale for the seller and buyer of a used automobile or a will for a husband and wife. A conflict of interest could easily arise in the latter situation, however, if either husband or wife were previously married and had children by their former marriages. The attorney in common representation cases should consider both the duration and intimacy of his relationship with the clients involved, the likelihood of conflict, and the likelihood of prejudice to either party.[131] Before undertaking dual representation, the attorney should fully explain the implications of the representation and disclose the advantages and risks involved.

Although not specifically prohibited under Rule 1.7, trial defense counsel should rarely undertake to represent multiple accuseds in a criminal case. The comment to Rule 1.7 strongly discourages dual representation in criminal cases because the potential for a conflict of interest is so "grave."[132]

There are obvious cases where an attorney should not undertake representation of a client. For example, a lawyer should not allow his own personal or financial interests or those of potential clients to have an adverse affect on the representation of a client. If such an impermissible conflict of interest exists, the attorney is precluded from representing a client. If a direct conflict arises after representation has been accepted, the lawyer must seek to withdraw.[133]

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prohibits contingent fees in criminal cases. Rule 1.8(d) prohibits a lawyer from acquiring "literary or media rights" in the subject of the representation.

[129]Model Code DR 5-105(c).

[130]R.P.C. Rule 1.7(a).

[131]R.P.C. Rule 1.7 comment.

[132]R.P.C. Rule 1.7 comment. *See also* American Bar Association Standards Relating to the Administration of Criminal Justice, The Defense Function, 4-3.5(b). *See generally* Geer, *Representation Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1978).

[133]R.P.C. Rule 1.7 comment. R.P.C. Rule 1.16 further delineates the guidelines for withdrawal from representing a client.

8. Rule 1.8: Conflict of Interest—Prohibited Transactions

Army Rule 1.8 prohibits an attorney from engaging in ten specific transactions. The purpose behind these restrictions is to ensure that dealings between a lawyer and client are fair and reasonable and to prevent attorneys from exploiting information relating to the representation of a client.[134]

The first restriction in Rule 1.8 applies to lawyer's business transactions and states that an attorney may not enter into a business transaction with a client, or acquire a possessory security or other pecuniary interest adverse to a client, unless: 1) the transaction is fair and reasonable to the client and disclosed to the client in writing; 2) the client is given time to seek advice of independent counsel; and 3) the client consents in writing.[135] This restriction does not apply to standard commercial transactions between lawyer and client where a lawyer obtains no advantage because of the attorney-client relationship.[136]

Rule 1.8(b) prohibits lawyers from using information relating to the representation of a client to the disadvantage of the client,[137] preparing instruments giving substantial gifts to the lawyer or the lawyer's family,[138] negotiating for literary or media rights prior to completion of a case,[139] providing financial assistance to a client,[140] and accepting compensation from a client.[141] Additionally, Rule 1.8 prohibits an attorney from representing a client if an adverse party is represented by a person related to the attorney (spouse, sibling, parent, or child), unless the client consents.[142] This disqualification rule is not imputed to all lawyers in the same office.[143]

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[134]R.P.C. Rule 1.8 comment.

[135]R.P.C. Rule 1.8(a).

[136]R.P.C. Rule 1.8(a). This rule is substantially similar to Model Code DR 5-104(a), which provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless the client has consented after full disclosure." *See also* Model Code EC 5-3.

[137]R.P.C. Rule 1.8(b). This restriction governs use of client information while Rule 1.6 applies to disclosure.

[138]R.P.C. Rule 1.8(c).

[139]R.P.C. Rule 1.8(d).

[140]R.P.C. Rule 1.8(e). A civilian counsel may, however, pay court costs and expenses of litigation when representing an indigent client in a court-martial.

[141]R.P.C. Rule 1.8(f).

[142]R.P.C. Rule 1.8(i). The approach taken by the drafters to the rule governing interspousal conflicts is criticized in Word, *Risk and Knowledge in Interspousal Conflicts of Interest: The Search For Competent Counsel Through Model Rule 1.8(i)*, 7 Whittier L. Rev. 943 (1983).

[143]R.P.C. 1.8(i) comment.

The final prohibition in Army Rule 1.8 precludes lawyers from acquiring proprietary interests in litigation in which they represent a party.[144] This rule, however, is subject to exceptions that have developed in case law and in the Rules.[145]

The list of prohibited transactions is designed as a supplement, not as a substitute, for other standards of conduct regulations governing Army officers. Department of Defense and Department of Army regulations affect the lawyer-client relationship by prohibiting acceptance of gifts from clients or other entities and by limiting the business relationship that a lawyer may have with a client.[146]

9. Rule 1.9: Conflict of Interest—Former Client

The lawyer's duty to avoid a conflict of interest precludes him from representing a client who has materially adverse interests to those of a former client. Army Rule 1.9 embodies this professional duty by prohibiting a lawyer who has represented a client in a matter from representing a second client in the same or substantially the same matter.[147] A client can waive the disqualification rule in 1.9 by consenting to the representation after full disclosure.[148]

The question of what is substantially related will depend on the specific facts of each case and the lawyer's involvement in the transaction.[149] Obviously, a lawyer who has been directly involved in a particular matter is disqualified from subsequently representing a second party with materially adverse interests.

Army Rule 1.9 focuses upon the degree of relationship between the former and present cases and the potential for misuse of confidential information. The underlying question, according to the comment to Rule 1.9, is whether the lawyer was so involved in a particular matter

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[144]R.P.C. 1.8(j).

[145]R.P.C. Rule 1.8(j) comment. R.P.C. Rule 1.5, for example, permits contingent fees.

[146]Dep't of Defense Directive 5500.7, Standards of Conduct (6 May 1987); Army Reg. 600-50, Personnel: Standards of Conduct for Department of Army Personnel (26 Jan. 1988) [hereinafter AR 600-50].

[147]R.P.C. Rule 1.9. There was no similar rule in the ABA Model Code. Rule 1.9 incorporates a standard developed in case law that disqualified an attorney from representing a client if the new matter was "substantially related" to the former representation. T.C. Theatre v. Warner Brothers Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). *See* Freeman v. Chicago Musical Instrument, 689 F.2d 715 (1982). *See also* Lasalle Nat'l Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983); General Electric Co. v. Valeron Corp., 608 F.2d 265 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980).

[148]R.P.C. Rule 1.9 comment. Because the disqualification rule is designed to benefit the former client, it can be waived. *See, e.g., In re* Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976).

[149]R.P.C. Rule 1.9 comment.

that he would be justly regarded as switching sides in the matter if he accepted subsequent representation.[150] Another factor to consider is whether the subsequent representation will entail using information acquired in the course of representing a former client. An attorney may not subsequently use confidential information to the client's disadvantage and should decline accepting representation if use of confidential information is necessarily involved.[151]

10. Rule 1.10: Imputed Disqualification

One of the most striking departures that an Army Rule makes from its Model Rule counterpart is the rejection of the automatic imputed disqualification rule.[152] Under Army Rule 1.10, attorneys working in the same military law office are not automatically disqualified from representing a client solely because any one of them would be disqualified under the conflict of interest rules.[153] The Army's approach, therefore, allows defense attorneys working in the same trial defense counsel office to represent co-accuseds at separate trials.

Although Army Rule 1.10 does not automatically disqualify all attorneys in an office based upon one attorney's conflict of interest, attorneys in the same office must still consider the underlying facts of a particular case to determine if representation would be appropriate.[154] Several factors counsel should consider in making this functional analysis are whether confidentiality of the clients can be preserved, whether the attorneys involved can preserve their independence, and finally, whether counsel involved can avoid positions adverse to their clients.[155]

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[150]*Id.* For a discussion of the special problems presented in a criminal law context, see Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L.J. 1, 23 (1983).

[151]*Id.*

[152]*Compare* R.P.C. Rule 1.10 *with* Model Rule 1.10. This departure is justified because military legal service typically requires representation on opposing sides by judge advocates and lawyers employed by the Army. The ABA historically has struggled over the proper application of the imputed disqualification rule to military legal offices. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 343 (1977); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1235 (1972). An insightful article predating adoption of the Army Rules which discusses the rule of imputed disqualification as applied to military legal offices is Fulton, *ABA Informal Opinion 1474 and Proposed Rules of Professional Conduct: Some Ethical Aspects of Military Law Practice*, The Army Lawyer, March 1982, at 1.

[153]R.P.C. Rule 1.10.

[154]R.P.C. Rule 1.10 comment.

[155]*Id.*

The comments to Army Rule 1.10 add the important caveat that Army policy may address the issue of imputed disqualification in certain contexts.[156] Current Army policy, for example, discourages one legal assistance office from representing both spouses involved in a domestic dispute.[157] While this policy commendably resolves a conflict problem in favor of the client, it does hold potential for significant problems if not carefully implemented. The policy may require appointment of counsel who may not be trained to perform legal assistance services and who may be unfamiliar with the legal principles applying to divorce and separation. Every effort should be made to ensure that clients who are referred to offices not routinely involved in legal assistance nevertheless receive competent representation. If this is not done, a situation will develop where the first client to seek help will always hold an unfair adversarial advantage over the opposing party.

11. Rule 1.11: Successive Government and Private Employment

The main purpose of Army Rule 1.11 is to prevent a lawyer from using public office to benefit a private client.[158] The movement of attorneys from the public sector to the private sector creates a potential conflict of interest if the attorneys subsequently become involved on behalf of private parties with a government agency that formerly employed them.[159] Accordingly, the rule prohibits an attorney from representing a private client in a matter in which he "personally and substantially" participated as a public employee.[160] The rule also precludes the law firm in which the disqualified lawyer is associated from accepting representation in such a matter unless the disqualified lawyer is screened and written notice is given to the appropriate agency.[161]

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[156]*Id.*

[157]*See* AR 27-3; Policy Letter 85-11, Office of The Judge Advocate General, U.S. Army, subject Legal Assistance Representation of Both Spouses, 30 Dec. 1985, *reprinted in* The Army Lawyer, Feb. 1986, at 4.

[158]R.P.C. 1.11 comment. The movement of attorneys from government service to private practice is often referred to as the "revolving door." See Revolving Door, 445 A.2d 615 (D.C. 1982). *See generally* Professional Responsibility Note, 35 Cath. U.L. Rev. 1225 (1986).

[159]R.P.C. Rule 1.11 comment. Rule 1.11 essentially eliminates the "appearance of impropriety" test of Model Code DR 9-101(B).

[160]R.P.C. Rule 1.11(a).

[161]R.P.C. Rule 1.11(a)(1). Insulating the disqualified attorney from participating in a matter which is undertaken by his firm is referred to as erecting a "Chinese wall" between the firm and the attorney. *See generally* Lipton & Mazur, *The Chinese Wall Solution to the Conflict Problems of Securities Firms*, 50 N.Y.U.L. Rev. 459 (1975). In effect the new rule has codified the Chinese wall doctrine. *See* Note, *Updating A Code of Professional Responsibility: Amend or Replace?*, 16 Cap. U.L. Rev. 241 (1986).

Another restriction in the rule prohibits lawyers from using confidential information about a person gained while in public service against that person when representing another client with adverse interests in a private capacity.[162] Unless the disqualified attorney is "screened," his law firm is also disqualified from undertaking representation.

The final prohibition in Rule 1.11 precludes a government lawyer from participating in a matter in which he participated "personally and substantially" while in private practice.[163] An attorney in public service is also prohibited from negotiating for employment with a party or its attorney in such a matter.[164]

It is highly unlikely that The Judge Advocate General possesses the authority to impose disciplinary sanctions on attorneys who have left government service and violated the prohibitions of Rule 1.11 as private practitioners. Thus, the rule merely serves as a statement of policy to guide state disciplinary committees. Since Army Rule 1.11 essentially restates Model Rule 1.11, attorneys who violate it will be subject to discipline through state proceedings.

12. Rule 1.12: Former Judge or Arbitrator

Army Rule 1.12 extends substantially the same restrictions of Rule 1.11 to judges and arbitrators. A lawyer who has left public service may not represent a client in any matter in which he appeared as a judge or an arbitrator, unless all parties consent after disclosure.[165] Neither judges nor arbitrators may negotiate for employment with a party or its attorney in a matter in which they "personally and substantially participated."[166]

13. Rule 1.13: Army As a Client

One of the most controversial provisions of the Rules, Army Rule 1.13, provides guidance to help Army attorneys resolve their ethical

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[162]R.P.C. Rule 1.11(b).

[163]R.P.C. Rule 1.11(c)(1). Rule 1.11 broadly restates the Ethics in Government Act, 18 U.S.C. 207(a) (1982). This Act makes it a criminal offense for government employees who participated in a particular matter to "switch sides" by representing another person or organization in the same matter. Former government employees are prohibited for a period of two years from representing another person against the government in connection with a matter in which the United States has a direct and substantial interest and which was pending when the employee left government service. 18 U.S.C. § 207(b)(i) (1982). *See also* 18 U.S.C. § 2397(b) (1982), which places additional restrictions on former senior employees. *See generally* AR 600-50.

[164]R.P.C. Rule 1.11(e)(2).

[165]R.P.C. Rule 1.12.

[166]*Id.*

responsibilities when they are advising Army officials who act or intend to act in a manner inconsistent with the Army's legal interests. It sets forth the basic premise that judge advocates and lawyers employed by the Army normally represent the Army acting through its officers and employees.[167] The two most obvious exceptions to this general rule are when attorneys are designated to represent individual clients as legal assistance attorneys or trial defense attorneys.[168]

Rule 1.13 takes the position that an attorney faced with evidence that an agency official intends to violate the law must first ascertain whether or not the act or omission constitutes a violation of a legal obligation to the Army or a violation of law that could be imputed to the Army.[169] If it is either, the attorney should "proceed as is reasonably necessary in the best interest of the Army."[170] Among the remedial measures recommended are to advise the head of the organizational element to consult with other counsel, request reconsideration of the decision, advise that a separate legal opinion be sought, or refer the matter to or seek guidance from a higher authority in the technical chain of supervision.[171] If all of these measures fail and the official insists on violating the law, the lawyer must terminate representation.[172]

The version of Rule 1.13 adopted by the Army has been criticized because it discourages whistle blowing.[173] The remedial measures listed in the rule do not include the option of referring the matter to parties outside the agency, but instead encourage attorneys to keep the matter within Army supervisory and technical channels. Moreover, the rule advises attorneys to fashion remedial measures that will minimize disclosure to outside parties.[174]

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[167]R.P.C. Rule 1.13.

[168]R.P.C. Rule 1.13(f). AR 27-3, para. 2-3; AR 27-1, para. 2-4(b).

[169]R.P.C. Rule 1.13(b). The original version of Rule 1.13 added the requirement that the violation of law be "likely to result in substantial injury to the organization." The deletion of this phrase suggests that even minor legal violations require Army attorneys to take measures suggested in Rule 1.13 to prevent the misconduct.

[170]R.P.C. Rule 1.13(b).

[171]*Id.* Counsel obviously must exercise good judgment and tact when selecting one of these remedial measures. It would be discomforting, for instance, for a commander to hear from his staff judge advocate that he should seek a legal opinion from another attorney.

[172]*Id.*

[173]*See* Burnett, *The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers*, The Army Lawyer, Feb. 1987, at 19.

[174]R.P.C. Rule 1.13(b).

While attorneys are often in an excellent position to play the role of public watchdog, due consideration must also be given to maintaining some semblance of client confidentiality in an organizational setting. The rule adopted by the Army appears to have struck a fair balance to these competing interests.

14. Rule 1.14: Client Under a Disability

Army Rule 1.14, which has no counterpart in the Code, recognizes that a minor or otherwise impaired person may not be in a position to make decisions about legal representation.[175] The rule directs Army attorneys to maintain a normal attorney-client relationship with a client even when it becomes apparent that the client's ability to make informed decisions is impaired due to being a minor or having a mental disability.[176] If the lawyer concludes that the client cannot adequately act in his own best interests, the lawyer may seek to have a guardian appointed or take other protective action.[177]

15. Rule 1.15: Safekeeping Property

A lawyer who fails to keep property of clients and third parties separate from his own violates Rule 1.15 and is subject to discipline.[178] A lawyer who receives funds or property belonging to a client or third party must promptly notify the owner and deliver the property upon request.[179]

Although not expressly prohibited, judge advocates should seldom agree to take possession of property owned by clients or other third parties.[180] In the unusual case in which a judge advocate holds property owned by others, he must exercise the care required of a professional fiduciary to ensure that the Army does not become responsible for claims.[181]

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[175]R.P.C. Rule 1.14(a). This rule is based on the premise that clients lacking "legal competence" often have the ability to understand, consider, and decide issues affecting their interests and may still be able to aid the lawyer. Rule 1.14 is extensively analyzed in Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma?*, 50 Mo. L. Rev. 494 (1984). The author submits that Rule 1.14 needs an "outer limit" on the advocacy required under the rule. *Id.* at 515.

[176]R.P.C. Rule 1.14.

[177]R.P.C. Rule 1.14(b). The comment to Rule 1.14 provides that a lawyer may seek guidance from a diagnostician to determine competency. *See generally*, Allee, *Representing Older Persons: Ethical Dilemmas*, Prob. & Prop. J., Jan.-Feb. 1988.

[178]R.P.C. Rule 1.15(b).

[179]R.P.C. Rule 1.15 comment.

[180]R.P.C. Rule 1.15 comment.

[181]*Id.*

16. Rule 1.16: Declining or Withdrawing Representation

A lawyer who agrees to represent a client is generally obligated to continue the representation to completion. Army Rule 1.16 recognizes, however that under certain circumstances it would be inappropriate for attorneys to continue representation. Army Rule 1.16 distinguishes between situations in which an attorney must not represent a client or must withdraw from representing a client and situations in which a lawyer has permission to withdraw from representation.[182] Withdrawal under Rule 1.16 is mandatory if: 1) the representation violates any of the other Army Rules; 2) the lawyer's physical or mental condition materially impairs his ability to represent the client; or 3) the client dismisses the attorney.[183]

If grounds for mandatory withdrawal do not exist, a lawyer may withdraw if the withdrawal can be accomplished without a materially adverse effect on the client's interests.[184] Moreover, permissive withdrawal is also possible under Rule 1.16 if the client persists in a course of conduct the lawyer believes is criminal or fraudulent or finds repugnant or imprudent, the client fails to fulfill an obligation to the lawyer or uses the lawyer's services to perpetrate a fraud or crime, or if the representation will result in an unreasonable financial burden on the lawyer.[185] The rule also contains a final "catch all" authorizing permissive withdrawal if "other good cause for withdrawal exists."[186]

Even if good cause for withdrawal exists, an attorney appointed to represent a client must continue to represent the client until "competent authority" relieves him.[187] What constitutes competent authority depends on the circumstances. In most cases, the competent authority will be the official appointing or authorizing the attorney to represent a client or clients, such as the staff judge advocate in the case of a legal assistance attorney. The competent authority for granting permission to withdraw in any case that has gone to trial, however, is the trial judge.[188] Lawyers should seek guidance from

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[182]R.P.C. Rule 1.16.
[183]R.P.C. Rule 1.16(a).
[184]R.P.C. Rule 1.16(b).
[185]R.P.C. Rule 1.16(b). This rule does not make a significant departure from Model Code DR 2-110(B). This Code rule required mandatory withdrawal if the client was bringing legal action for purposes of harassment, continued employment would result in a violation of the rules, he could not carry out the representation due to a mental or physical condition, or the client discharged the attorney.
[186]R.P.C. Rule 1.16(b)(2).
[187]R.P.C. Rule 1.16 comment.
[188]R.P.C. Rule 1.16(b) comment.

their supervisors if they are asked to reveal confidential information to justify withdrawal. Trial judges should be sensitive to this issue and accept generally asserted reasons for withdrawal.

A lawyer may not withdraw from representing a client regardless of any grounds for doing so, permissive or mandatory, if ordered to continue to represent the client by a tribunal or competent authority.[189] Accordingly, an attorney whose request for withdrawal is denied faces both contempt and disciplinary sanctions if he refuses to continue the representation, even if good cause for withdrawal exists.

If proper authority to withdraw has been received, the attorney must take reasonable steps to avoid foreseeable prejudice to the client.[190] In all cases, these steps should include giving timely notice to the former client, surrendering papers and property to which the client is entitled, and cooperating with the client's new counsel.[191]

C. CHAPTER 2: THE LAWYER AS ADVISOR

1. Rule 2.1: Advisor

Rule 2.1 directs a lawyer to use independent judgment and render honest, candid, and independent advice to his client.[192] While a lawyer may give advice in a form more palatable to the client, the lawyer cannot avoid rendering advice that is unpleasant or different from what the client wants to hear.[193]

In presenting advice, a lawyer should refer not only to legal matters, but also to moral, economic, social, political and other factors.[194] It may be inappropriate in some instances for a lawyer to confine his advice to strictly legal considerations. For example, advice omitting significant practical considerations such as cost, effects on other people, or impact on reputation is of little value to a client and therefore professionally inadequate.

Almost all legal issues involve moral and ethical considerations. Although an attorney is not, according to the comment to Rule 2.1, a

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[189]R.P.C. Rule 1.16(c).
[190]R.P.C. Rule 1.16 comment.
[191]*Id.*
[192]R.P.C. Rule 2.1. This rule was similar to Model Code DR 5-107(B), which provided that a lawyer could not allow another to regulate his advice to a client. *See also* Model Code EC 7-8.
[193]R.P.C. Rule 2.1 comment.
[194]*Id. See also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 346 (1982).

moral advisor, it is proper nonetheless for him to refer to non-legal effects, especially if clients are not sophisticated.[195] A competent lawyer should also recognize when a problem involves questions better resolved in another professional field and make an appropriate recommendation.[196]

A lawyer is not ordinarily expected to render advice until asked.[197] A lawyer may, however, initiate giving advice to a client if it would be in the client's best interests. This is especially appropriate for judge advocates serving as staff officers.

2. Rule 2.2: Intermediary

Rule 2.2 gives an attorney specific ethical guidance for acting as an intermediary between two individuals.[198] The rule recognizes, for the first time, that an attorney can become involved in a matter involving more than one party. The rule generally allows mediation if the individuals involved consent after consultation, if the lawyer believes the matter can be resolved in the best interests of both individuals, and if the lawyer reasonably believes there will be no improper effect on the lawyer's duty to each individual.[199] A lawyer must withdraw if, after entering into mediation, one of the required conditions is no longer satisfied.[200]

The role of mediator will generally be limited to Army attorneys serving in legal assistance offices. Legal assistance attorneys may, for example, see both the seller and the buyer of a used car or arrange a property settlement between two individuals.[201] While arguably permitted under Rule 2.2, legal assistance attorneys should refrain from negotiating the details of a divorce settlement between husband and wife. The possibility of a breakdown in negotiation and the potential for overreaching are too great to assume this role.[202]

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[195]*See* R.P.C. Rule 2.1 comment. *See also* Annotated Model Rules at 190.

[196]*Id.*

[197]*Id.*

[198]This rule has no direct counterpart in the Code. Model Code EC 5-20, however, permitted arbitration or mediation with the consent of the clients involved.

[199]R.P.C. Rule 2.2(a).

[200]R.P.C. Rule 2.2(c). *See also* R.P.C. Rule 1.16.

[201]R.P.C. Rule 2.2 comment.

[202]Courts have, however, concluded that representation of two spouses may be appropriate under some instances. Halverson v. Halverson, 3 Wash. App. 827, 479 P.2d 161 (1970); Levine v. Levine, 436 N.E.2d 476 (N.Y. 1982). For a comprehensive article addressing the application of Model Rule 2.2 to lawyers involved in divorce mediation, see Note, *Model Rule 2.2 and Divorce Mediation: Ethics Guideline or Ethics Gap?*, 65 Wash. U.L.Q. 223 (1987). The article points out that Rule 2.2 offers no guidance to lawyers providing non-representational divorce mediation.

Before assuming the role as intermediary, an attorney should consider several factors to assess if it would be appropriate.[203] One significant factor is that, because the attorney represents neither party in mediation, there are no attorney-client privileges. Mediation would also not be appropriate if the lawyer could not maintain impartiality or if contentious litigation were imminent. Finally, if the lawyer anticipated representing one of the parties on a continuing basis, mediation would not be proper.

3. Rule 2.3: Evaluation for Use by Third Parties

Rule 2.3 provides general standards to govern evaluations prepared on a client's behalf for use by third parties. The rule permits attorneys to undertake an evaluation of a matter for someone other than a client if the undertaking will not cause a conflict of interest or harm a client and the client consents after representation.[204] Army attorneys may, for example, prepare a brief setting forth the Army's position on a matter for another branch of the executive agency or for Congress.[205] Since the evaluation involves a departure from the normal attorney-client relationship, the lawyer must be satisfied that making the evaluation is compatible with other functions undertaken on the client's behalf.[206] For example, a lawyer's obligation to maintain confidentiality may conflict with the lawyer's duty to third parties not to provide false or misleading information.[207]

D. CHAPTER 3: THE LAWYER AS AN ADVOCATE

1. Rule 3.1: Meritorious Claims and Contentions

Rule 3.1 attempts to balance an attorney's duty to use legal process for the client's fullest benefit and his countervailing duty not to abuse the legal process. The rule requires a minimum degree of merit in asserting claims in litigation by broadly prohibiting attorneys from asserting or defending frivolous matters.[208] In a departure from the

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[203]R.P.C. Rule 2.2 comment.
[204]R.P.C. Rule 2.3.
[205]R.P.C. Rule 2.3 comment.
[206]*Id. See also* Annotated Model Rules at 196-97.
[207]The comments to Rule 2.3 specifically state that legal questions of whether a legal duty to the third party arises when the evaluation is presented to a third party is beyond the scope of the Rules. R.P.C. Rule 2.3 comment.
[208]R.P.C. Rule 3.1. This rule departs from the Model Code test, which prohibited lawyers from knowingly asserting a false claim. The new rule places a burden on the attorney when he has a reasonable belief that an action or claim has no frivolous motive.

Code standard, Rule 3.1 requires attorneys to make a sufficient inquiry to form a reasonable belief that no frivolous motive is involved in a particular claim. Frivolous, in this context, is defined as taking action solely for the purpose of harassing or maliciously injuring a person or if the attorney is unable to argue in good faith for an extension, modification, or reversal of law.[209] An action is not frivolous merely because the lawyer believes the position asserted is not likely to prevail.[210]

Rule 3.1 does contain two important exceptions. Criminal defense attorneys and attorneys representing clients in board proceedings can insist that the government establish every element of an offense; defending a case in this manner would not be considered frivolous under this rule.[211] Moreover, a lawyer may be required by court precedent to advance non-meritorious claims on behalf of an accused.[212]

Rule 3.1 is not the only standard for counsel practicing before federal courts. Rule 11 of the Federal Rules of Civil Procedure imposes more extensive and specific obligations on counsel and subjects them to sanctions for violations.[213] Among other things, the rule specifies that all pleadings and documents filed with a court be well grounded in fact and warranted by existing law or good faith argument for extension, modification, or reversal of existing law.[214] Sanctions may be imposed for actions that are patently non-meritorious.[215] Counsel should also be aware that the Rules of the Supreme Court provide for sanctions if an appeal or petition for writ of certiorari is frivolous.[216]

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[209]R.P.C. Rule 3.1 comment.

[210]R.P.C. Rule 3.1.

[211]R.P.C. Rule 3.1. This portion of the rule is based on the requirement under constitutional law for the government to bear the burden of proof as to every element of the offense. An accused has the right to insist on this proof even if he does not have a valid defense.

[212]*See, e.g.*, United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982); R.P.C. Rule 3.1 comment.

[213]Fed. R. Civ. P. 11; 2A J. Moore & J. Lucas, Moore's Federal Practice, para. 11.01[3] (2d ed. 1984). Although much has been written on Rule 11, the leading article on the rule is Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).

[214]Rule 11 applies to *all* persons filing papers in court, even pro se litigants. The rule also specifies that papers may not be interposed for improper purposes, such as to delay or to harass. Fed. R. Civ. P. 11.

[215]The court is directed under Rule 11 to impose on counsel or the client sanctions, including reasonable expenses such as attorney's fees. For examples of how the sanctions have been imposed, see Dallo v. I.N.S., 765 F.2d 581 (6th Cir. 1985); Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir. 1985); Dore v. Schultz, 582 F. Supp. 154 (S.D.N.Y. 1984); and Teduschi v. Smith Barney, Harris Upham & Co, 579 F. Supp. 657 (S.D.N.Y. 1984). *See generally* Schwarzer, *supra* note 210, at 190-91, for a compilation of cases.

[216]Rule 49.2, Rules of United States Supreme Court. *See* Talamini v. Allstate Insurance, 470 U.S. 1067 (1985).

Legal assistance attorneys often have difficulty identifying the limits of advocacy when representing clients before other federal agencies, such as the Internal Revenue Service. The guidance, based on Model Rules 2.1 and 3.1, is that a lawyer may advise the statement of positions most favorable to the client if the lawyer has a "good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for extension, modification, or reversal of existing law."[217] Good faith in this context requires some realistic chance of success if the position is litigated. Thus, under this liberal standard, legal assistance attorneys involved in preparing soldiers' tax returns may take positions most favorable to clients if the lawyers have good faith beliefs in the validity of the positions.[218] The attorney is not required to attach a rider to the return to explain the client's position.

2. Rule 3.2: Expediting Litigation

In recognition of the heavy price to the public and to the accused exacted by delays in litigating a case, Rule 3.2 imposes a duty on all attorneys to "make reasonable efforts to expedite litigation."[219] This new rule shifts the emphasis from avoiding delay to a positive duty to expedite litigation. The test for determining compliance with this duty is whether a competent lawyer acting in good faith would regard the action as having some substantial purpose other than delay.[220] It is no defense to assert that similar conduct is tolerated by the bar or bench or that delay serves the attorney's own interests.[221]

3. Rule 3.3: Candor Toward the Tribunal

Army Rule 3.3 addresses some of the most troubling propositions in the new Rules. Rule 3.3 rejects the position that a client's interests dominate over the lawyer's duty to the tribunal; an attorney's allegiance implies obligations even at the expense of a client. The rule identifies four situations in which the lawyer's duty of candor outweighs the duties to a client. The first two subsections of Rule 3.3(a)

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[217]ABA Comm. on Professional Ethics and Grievances, Formal Op. 85-352, Reconsideration of Opinion 314 (1985).

[218]*Id.* Legal assistance attorneys should, however, advise a client about all the potential consequences associated with taking a position not supported by substantial authority. A classic article discussing the proper role of the lawyer in representing taxpayers is Paul, *The Lawyer as Tax Advisor*, 25 Rocky Mt. L. Rev. 412 (1953).

[219]R.P.C. Rule 3.2. Neither the rule nor the commentary provide a measure for what constitutes "reasonable efforts." Rule 11, Federal Rules of Civil Procedure, similarly prohibits counsel from filing papers for purposes of delay.

[220]R.P.C. Rule 3.2 comment.

[221]*Id.*

prohibit attorneys from knowingly making false statements of material law or fact to a tribunal[222] or to fail to disclose a material fact to avoid assisting a criminal or fraudulent act by the client.[223]

Rule 3.3 also requires mandatory disclosure to tribunals of "directly adverse" legal authority from the controlling jurisdiction when not disclosed by opposing counsel.[224] The phrase "directly adverse" is not defined in the rule or its comments, and if it is subsequently interpreted narrowly, counsel will rarely be required to disclose adverse legal authority. It is also important to recognize that this rule does not preclude a lawyer from arguing that the adverse legal authority should be distinguished or reversed.

Rule 3.3(a)(4) continues the general approach that if the interests of the client and the tribunal conflict, the interests of the tribunal should prevail. This subsection requires counsel to refuse to offer evidence that he knows to be false.[225] This blanket prohibition against offering false evidence applies whether the evidence comes from the client or others. If counsel subsequently learns that offered evidence is false, he must promptly disclose the knowledge to the tribunal.[226] This duty exists even if the lawyer must disclose information that would be protected under R.P.C. Rule 1.6. Note, however, that disclosure is required only when the lawyer knows the evidence is false. Thus, it would seem that disclosure is not permitted if counsel merely has some doubt about the truth or falsity of the evidence.

Perhaps the most troublesome dilemma for any counsel is what action to take when he learns that a client has unexpectedly committed perjury.[227] Rule 3.3a directs counsel to take remedial measures. The

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[222]R.P.C. Rule 3.3(a)(1). This prohibition apparently supersedes any conflicting obligations under R.P.C. Rule 1.6.

[223]R.P.C. Rule 3.3(a)(2). Thus, a lawyer's silence could be construed as corroborating a fraudulent statement.

[224]R.P.C. Rule 3.3(a)(3). This portion of the rule reenacted a similar requirement contained in the Model Code. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84-1501 (1984) (counsel must disclose adverse decision of appellate court handed down after trial of the case).

[225]R.P.C. Rule 3.3(a)(4). According to the definitions, the word "knows" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances." R.P.C. Definitions.

[226]R.P.C. Rule 3.3(a)(4). If the attorney knowingly presents perjured evidence, he would violate Rule 1.2(1) (prohibiting assistance of crime and fraud) as well as Rule 3.4. Rule 1.16 also mandates withdrawal under these circumstances.

[227]The issue of how to deal with client perjury has generated a significant amount of legal commentary. *See generally* Note, *Mandatory Disclosure: California Bar Refuses to Adopt Proposed Rule to Confront Client Perjury*, 15 Pepperdine L. Rev. 65 (1987); Moser, *Client Perjury: The Lawyer's Dilemma*, 29 S. Tex. L. Rev. 263 (1987); Note:

approach taken under the rule is first to require counsel to persuade the accused to reveal the perjury.[228] If the client refuses to accept this advice, counsel should seek withdrawal from the case if that act will remedy the situation.[229] The rule further requires counsel to disclose the falsehood if withdrawal is impossible. At this point, the trial judge must then decide whether to declare a mistrial, disclose the perjury to the court members, or do nothing.[230]

The comments to Army Rule 3.3 discuss three other methods of dealing with a client who intends to commit perjury. The traditional method of allowing the accused to testify in a narrative form without assistance from the attorney is not one of the recommended remedial measures.[231] Another alternative noted disapprovingly is to simply permit the client to testify falsely and not reveal the perjury.[232] This approach again involves the attorney in the perjurious activity. The third method, and the one recommended by the Rules, is to disclose the fraud if that will remedy the situation.[233] This alternative achieves the stated goal of not assisting in the criminal activity.

If the lawyer discovers that the accused has presented false evidence, the lawyer must take "reasonable remedial measures."[234] The Rules require disclosure to the court if "necessary to avoid assisting a criminal or fraudulent act by the client."[235] This obligation, however, continues only for the duration of the proceedings. Thus, if an Army attorney learns a client has committed perjury after trial, he is not required under the Rules to reveal the misconduct.

Rule 3.3(c), which was not found in the Code, gives an attorney the

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Client Perjury and the Constitutional Rights of the Criminal Defendant, 52 Mo. L. Rev. 485 (1987); Reiger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 149 (1985); Wolfram, *Client Perjury*, 50 S. Cal. L. Rev. 809 (1977).

[228]R.P.C. Rule 3.3 comment. It is difficult to conceive of a situation where withdrawal will remedy the act of perjury.

[229]R.P.C. Rule 3.3 comment.

[230]*Id.*

[231]R.P.C. Rule 3.3 comment. This is the alternative suggested by American Bar Association Standards Relating to the Administration of Criminal Justice, The Defense Function § 4-7-7. The narrative approach has been criticized because it unavoidably involves the attorney in the perjury to the court and implicitly reveals confidential information. *See* Note, *Nix v. Whiteside, Removing the Client Perjury Skeleton From the Defense Counsel's Closet*, 22 New England L. Rev. 75, 691 (1988).

[232]R.P.C. Rule 3.3 comment.

[233]*Id.* This is also the alternative recommended by the ABA in an ethics opinion issued to guide attorneys facing this troublesome dilemma. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987).

[234]R.P.C. Rule 3.3(c).

[235]R.P.C. Rule 3.3.

discretion to not present evidence if he has reasonable doubts about its integrity.[236] If the attorney is genuinely uncertain, he can present the evidence without violating Rule 3.3. On the other hand, the attorney can withhold the evidence in such cases and avoid charges of incompetent representation. This rule may serve as a defense for a lawyer accused of malpractice for refusing to present evidence that he suspects is false. To avail themselves of this defense, lawyers who refuse to present evidence should be prepared to develop a factual basis supporting the belief.

The final section of Rule 3.3 imposes greater duties of candor on lawyers appearing before ex parte tribunals.[237] In these cases, attorneys must make full disclosure of all material facts and of all adverse precedent.

4. Rule 3.4: Fairness to Opposing Party and Counsel

The notion of fairness is made an explicit duty of Army attorneys under Rule 3.4. This rule implements a lawyer's duty of fairness to opposing parties and counsel and delineates a number of actions a lawyer may not use in representing a client. For example, a lawyer may not obstruct another party's access to evidence,[238] falsify evidence,[239] make frivolous discovery requests,[240] or request another person to refrain from giving relevant information.[241] Army attorneys are specifically prohibited from paying compensation to a person for testifying a certain way or make payment contingent upon the outcome of the case.[242]

A familiar restriction retained in the rule prohibits counsel from referring to inadmissible evidence or to any matter that will not be supported by admissible evidence.[243] An attorney is also precluded, under Rule 3.4(d), from stating a personal opinion as to the credibility

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[236]R.P.C. Rule 3.3(c). Under the Model Code, a lawyer is obligated to offer any evidence desired by a client unless the lawyer has actual or constructive knowledge of its falsity. Model Code EC 7-27.

[237]R.P.C. Rule 3.3. Tribunal does not include non-adjudicative proceedings before administrative agencies.

[238]R.P.C. Rule 3.4(a).

[239]R.P.C. Rule 3.4(b).

[240]R.P.C. Rule 3.4(c).

[241]R.P.C Rule 3.4(e). This prohibition has no counterpart in the Model Code.

[242]R.P.C. Rule 3.4(b) It is proper, however, to pay reasonable witness expenses and to compensate an expert for testifying. *See* Rule 3.4 comment. The prohibition against offering inducements prohibited by law is unnecessarily vague. *See* Model Code DR 7-109(c).

[243]R.P.C. Rule 3.4(d). *See* Model Code DR 7-106(C)(3). *See generally* American College of Trial Lawyers, Code of Trial Conduct ' 23(e) and (f) (1972); Edwards v. Sears, Roebuck and Co., 512 F.2d 276 (5th Cir. 1975).

of a witness, the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused.[244] This rule finds its justification in the fact that court members could easily misconstrue statements of personal opinion as statements of knowledge. The line between proper advocacy and improper statements is often difficult to draw. For example, counsel frequently suggest their belief or disbelief in a witness's testimony by using body language or voice inflection. Thus, as the ABA Standards of Criminal Justice point out, this rule may require "little more than a linguistic game."[245]

The comments to Army Rule 3.4 address the responsibilities of an attorney who receives an incriminating item of physical evidence from a client. The bar has long taken the position that the lawyer-client privilege will not permit a lawyer to withhold evidence. The comments to Rule 3.4 retain this basic premise. Thus, a lawyer in receipt of contraband must always surrender it to proper authority.[246] Stolen property received by an attorney may be surrendered either to the rightful owner or the authorities.[247] When surrendering evidence, an attorney is not required to reveal the source of the evidence. Indeed, the lawyer must use a method of returning the item that best protects the identity of the client, the client's connection with the item, and the client's privilege against self-incrimination.[248]

The best approach to avoiding problems in this area is merely for counsel to refuse to accept the item. When doing so, however, counsel should inform the client about the attorney's ethical responsibilities in the matter and render advice regarding the best course of action to

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[244]R.P.C. Rule 3.4(d). *See, e.g.*, Burger v. United States, 295 U.S. 78 (1935). This does not preclude counsel from making a logical argument based on the facts presented. For example, counsel may urge in closing argument that the evidence points to only one conclusion. The rule should also not be interpreted in a way that restricts counsel from commenting on what the evidence shows about the credibility of a witness.

[245]American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 3-5.7.

[246]R.P.C. Rule 3.4 comment. The leading case in this area is probably *In re* Ryder, 263 F. Supp. 360 (E.D. Va) (per curiam), *aff'd per curiam*, 381 F.2d 713 (4th Cir. 1967). (In *Ryder* an attorney was suspended for holding money he knew his client had stolen and a weapon used in committing the theft. The lawyer-client privilege was held inapplicable.). *Accord In re* January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976); People v. Lee, 3 Cal. App.3d 514, 83 Cal. Rptr. 715 (1970). For a case reaching an opposite conclusion *see* State v. Olwell, 64 Wash.2d 828, 394 P.2d 681 (1964) (communication with a client includes client's delivery of a knife to his attorney).

[247]R.P.C. Rule 3.4 comment. *See generally* Abramovsky, *Confidentiality: The Future Crime-Contraband Dilemmas*, 85 West. V.L. Rev. 929 (1983).

[248]*Id. See also* People v. Belge, 83 Misc.2d 186, 372 N.Y.S.2d 798, *aff'd*, 50 A.D.2d 1088, 376 N.Y.S. 771 (1975), *aff'd*, 359 N.E.2d 370, 390 N.Y.S.2d 867 (1976).

return the item.[249] An attorney is subject to discipline if he advises a client to either falsify or to destroy evidence.[250]

5. Rule 3.5: Impartiality and Decorum of the Tribunal

Rule 3.5 further implements the lawyer's duty of candor and fairness by forbidding improper influence over court members and judges.[251] Unless permitted by law, military counsel may not hold ex parte communications with a judge or any member of a tribunal.[252]

The difficulty with Rule 3.5 is that it is unnecessarily overbroad. It does not make sense to prohibit counsel from communicating with a military judge and court members altogether. The qualifying phrase "as permitted by law" does not furnish meaningful guidance to counsel. The rule could be substantially improved by making the rule applicable only to communications regarding a "pending matter." As it is now written, the rule bars ex parte communications even if it is clear that no intent was made to influence a judge or court member. Such a broad sweep ignores the practical realities of practicing law in the military. The final prong of Rule 3.4 precludes counsel from engaging in conduct intended to disrupt a tribunal.[253] This is a narrowing of the prior Code rule, which exhorted counsel not to engage in "undignified or discourteous conduct."[254]

6. Rule 3.6: Tribunal Publicity

Rule 3.6 addresses the difficult problem of extrajudicial comment by attorneys by attempting to strike an appropriate balance between the integrity of the adjudicative process against a lawyer's freedom of speech. The Rules provide a broad restraint on counsel from making any public statements that would have a substantial likelihood of materially prejudicing an adjudicative proceeding.[255] Subsection 6 of the rule contains seven types of statements likely to have an imper-

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[249]R.P.C. Rule 3.4 comment.

[250]*See, e.g.*, Bar Association v. DeVall, 59 Cal. App. 230, 210 P. 279 (1922); *In re* Blatt, 65 N.J. 539, 324 A.2d 15 (1974); The Florida Bar v. Simons, 391 So.2d 684 (Fla. 1980).

[251]R.P.C. Rule 3.5.

[252]R.P.C. Rule 3.5(b). A lawyer must exercise caution when discussing a case with court members after trial. The phrase "unless permitted by law" is a more general term than is used under the Code. *See* Model Code DR 7- 110(B), which specified when ex-parte communications were prohibited. Apparently, these prohibitions are intended to be included in the more general language of Rule 3.5. *See also* Annotated Model Rules, at 233.

[253]R.P.C. Rule 3.5(c). Thus, counsel should refrain from "abusive and obstreperous" conduct. *See* Hawk v. Superior Court, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974).

[254]Model Code DR 7-106(c)(6).

[255]R.P.C. Rule 3.6(a). This language is intended to approximate the "clear and present" danger test regarding protected speech.

missible prejudicial effect. These presumptively impermissible statements relate generally to the guilt and character of parties or witnesses, the possibility of a guilty plea, results of pretrial examinations or tests, and comments about matter likely to be inadmissible at trial.[256] The rule also contains a checklist of permissible statements an attorney may make. These basically relate to the general nature of the claim or defense, scheduling information, information of public record, the status of an investigation, and a warning of danger if there is reason to believe there is the likelihood of substantial harm to an individual or to the public interest.[257]

Army Rule 3.6 contains the reminder that release of information may be governed by other laws, such as the Freedom of Information Act or the Privacy Act.[258] Accordingly, even if a statement is permissible under Rule 3.6, counsel must consult all applicable laws and regulations before making public release. Judge advocates should also consult policy letter 86-3 for guidance on handling relations with the media.[259]

Some commentators have suggested that Rule 3.6 is subject to constitutional challenge since it, in essence, places a permanent gag order on counsel.[260] The new rule, however, takes a different approach from the constitutionally infirm provisions of the Code which used a "list" approach of prohibited statements.[261] The implication of Rule 3.6 is that the interests of a fair trial override an attorney's right to free speech and therefore justify a blanket rule. Although no rule can strike a balance to satisfying both of these interests completely, Rule 3.6 establishes a more reasonable standard than was contained in the Model Code. While the rule will likely be

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[256]R.P.C. Rule 3.6(b).

[257]R.P.C. Rule 3.6(c).

[258]R.P.C. Rule 3.6(d). The Freedom of Information Act is codified at 5 U.S.C. § 552 (1982). The Privacy Act is codified at 5 U.S.C. § 552(a) (1982).

[259]Policy Letter 86-3, Office of The Judge Advocate General, U.S. Army, subject: Relations with the News Media, 17 March 1986, *reprinted in* The Army Lawyer, May 1986, at 4.

[260]Specifically, Rule 3.6 has been criticized for being overbroad and vague and fails to satisfy the test for prior restraints on speech. Comment, *Gag Me With a Rule—Arizona Rules of Professional Conduct 3.6 (1985)*, 114 Ariz. St. L.J. 115, 143 (1987). *See also* Bulmer, *The New Rules of Professional Conduct, Part III*, 40 Wash. St. B. News (1986).

[261]Two courts have identified constitutional infirmities in the Model Code standards. Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers, Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See also* Markfield v. Association of the Bar, 49 A.2d 516, 370 N.Y.S.2d 82, *appeal dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612 (1975).

challenged in a controversial case, it should survive constitutional scrutiny.[262]

7. Rule 3.7: Lawyer as Witness

Rule 3.7 retains the long-standing rule that prohibits a lawyer from acting as an advocate in the same matter in which he also appears as a witness.[263] Under the rule, an attorney is required to decline representing a client if it is "likely" that the lawyer will be a necessary witness.[264]

There are several exceptions to the general rule of disqualification. An attorney may appear if the testimony is uncontested or relates to the nature of legal services provided.[265] Another important exception allows an attorney to be a witness if disqualification "would work a substantial hardship on the client."[266]

Subsection b of Rule 3.7 clarifies that an attorney may appear as an advocate in a case in which members of his office will be called as a witness unless the rules of conflicts of interest apply.[267] This will allow, for example, a trial counsel to act as an advocate in the same court-martial in which the staff judge advocate appears as a witness to testify.

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[262]At least two authors agree with this conclusion. *See* Kuhlman, *Pennsylvania Considers the A.B.A. Model Rules of Professional Conduct*, 59 Temple L.Q. 419 (1986); Swift, *Model Rule 3.6 An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 Bost. U.L. Rev. 1003 (1984). One author, however, believes that Rule 3.6 will not survive constitutional challenge. *See* Comment, *Gag Me With a Rule—Arizona Rules of Professional Conduct* 3.6 (1985), 19 Ariz. St. L. J. 115, 128 (1987).

[263]R.P.C. Rule 3.7. This rule finds its origins in the law of evidence. *See* 6 Wigmore, Evidence 597 (Chadbourne rev. ed. 1979). The prohibition rests on the rationale that when a lawyer acts in a dual role as advocate and witness, he may be more impeachable and thereby will be detrimental to the client. *See, e.g.*, Model Code EC 5-9; Sutton, *The Testifying Advocate*, 41 Tex. L. Rev. 477 (1963).

[264]R.P.C. Rule 3.7. The attorney facing this question should consider the availability of other witnesses and the likelihood for the need of testimony.

[265]R.P.C. Rule 3.7(a)1 and (a)(2). Thus, for example, an attorney could testify regarding when he received notice of the government's intention to proceed to trial.

[266]R.P.C. Rule 3.7(a)3. The comments to the rule explain that whether prejudice will result will depend on the nature of the case, the importance and probable tenor of the testimony, and the probability that the testimony will conflict with other testimony. It has been observed that Rule 3.7 significantly liberalizes the Model Code standard that made it necessary to find that the client would suffer substantial hardship "because of the distinctive value of the lawyer or the law firm in the particular case." Model Code DR 5-101(B). *See* R. Underwood & W. Fortune, Trial Ethics § 4.2 (1988).

[267]R.P.C. Rule 3.7(b). The Model Code required imputed disqualification of the firm of the testifying advocate. The drafters of the Model Rule concluded that the disqualification rule of 3.7(a) would not be applied vicariously because the interests protected by the rule are not threatened in these instances. *See* Annotated Model Rules at 252.

Counsel can avoid potential problems under Rule 3.7 by having a neutral observer present when conducting witness interviews.[268] This tactic not only reduces the need for the lawyer to testify if the witness subsequently makes an inconsistent statement, but it should also eliminate controversy over what was actually said.

Other jurisdictions have added yet another exception to the general rule of disqualification where the lawyer has been called by the opposing party and the court rules that the lawyer may continue.[269] This exception prevents opposing parties from abusing the general rule by calling opposing counsel as a witness. In cases where an attorney is legitimately called by an opposing party to give prejudicial testimony, the trial court has the discretion to allow the attorney to continue.[270] This exception eliminates a potential for abuse and should be added to the Army Rules.

8. Rule 3.8: Special Responsibilities of a Trial Counsel

Rule 3.8 contains a special set of rules for a trial counsel to ensure that he properly discharges his heavy responsibility to seek justice in criminal cases. Although many of the principles in Rule 3.8 are constitutionally mandated, it is nevertheless worthwhile to make trial counsel's public responsibility and duty of good faith a matter of professional discipline as well.[271]

It has long been viewed as improper for prosecutors to bring charges when there is no probable cause. This traditional limitation on prosecutorial discretion is retained under Rule 7.3, which requires trial counsel to recommend to the convening authority that a charge or specification that is not warranted by the evidence be withdrawn.[272] Trial counsel must also ensure that reasonable efforts

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[268]This approach is recommended by the American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 3-3.1(f) (1979). Defense Function Standard 4-4.3(1) also contains this recommendation. *See also* R. Underwood & W. Fortune, Trial Ethics § 4.5 (1988).

[269]*See, e.g.*, Washington Rules of Professional Conduct, Rule 3.7(c). For a discussion of the strengths and weaknesses of Model Rule 3.7 see Wydick, *Trial Counsel as Witness: The Code and The Model Rules*, 15 U.C. Davis L. Rev. 672 (1982). *See generally* Note, *Application of the Advocate Witness Rule*, 1982 So. Ill. L.J. 291 (1982); Note *The Advocate Witness Rule: If Z, Then X. But Why?*, 52 N.Y.U.L. Rev. 1365 (1977).

[270]*See* Aronson, *An Overview of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 874 (1986).

[271]Indeed, trial counsel enjoy absolute immunity from civil liability under federal law and under most state law. *See generally*, Alderstein, *Ethics Federal Prosecutors and Federal Courts: Some Recent Problems*, 6 Hofstra L. Rev. 755 (1978).

[272]R.P.C. Rule 3.8(a). This is substantially similar to Model Code DR 7-103(A). Trial counsel also have a duty to reveal to the court or convening authority defects in jurisdiction over the accused or the offense. Note, *Professional Responsibility*, The Army Lawyer, June 1978, at 11.

are made to preserve the accused's right to counsel and concomitantly may not seek waiver from an unrepresented accused of important pretrial rights.[273] The Rule also complements constitutional protections and imposes on trial counsel the duty to disclose not only all information and evidence that tends to negate guilt, but also all unprivileged mitigating evidence.[274] This rule has been criticized for not going far enough. Some believe that the rule should also prohibit prosecutors from intentionally avoiding information favorable to an accused. This obligation is, however, contained in the ABA Standards of Criminal Justice, which are applicable to judge advocates.[275]

Finally, trial counsel have the affirmative responsibility to prevent persons associated with law enforcement from making extrajudicial statements prohibited under Rule 3.6.[276] According to the comments to the rule, counsel can discharge this responsibility by, inter alia, conducting training of law enforcement personnel and properly supervising the activities of subordinates.[277] This rule should not be construed to hold trial counsel responsible for the acts of personnel over whom they exercise no control.

9. Rule 3.9: Advocate in Non-adjudicative Proceedings

Rule 3.9 requires Army attorneys appearing before legislative and administrative tribunals to conform to the rules requiring candor, fairness, and decorum.[278] Counsel must also divulge to the tribunal his or her representative status.[279] Moreover, the duties of diligence, competence, and loyalty also apply to lawyers practicing before these forums.

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[273]R.P.C. Rule 3.8(b) and (c). This rule does not, however, preclude the lawful questioning of a suspect who has knowingly waived his rights to counsel and silence. R.P.C. Rule 3.8 comment. This rule probably goes beyond constitutional requirements.

[274]R.P.C. Rule 3.8(d). *See also* American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 3-3.11 (2d ed. 1980); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). This rule is similar to Model Code DR 7-103(B).

[275]*See* American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 3-3.11. This standard does not require counsel to search for exculpatory evidence.

[276]R.P.C. Rule 3.8(e). *See* Note, *Professional Responsibility*, The Army Lawyer, May 1976, at 4, for an example of how commanders can improperly use information received from trial counsel to manipulate an accused.

[277]R.P.C. Rule 3.8 comment. A related requirement is imposed under R.P.C. Rule 5.3.

[278]R.P.C. Rule 3.9. The specific rules referred to are Rules 3.3(a)-(c), 3.4(a)-(c), and 3.5.

[279]R.P.C. Rule 3.9.

E. CHAPTER 4: DEALINGS WITH THIRD PARTIES

1. Rule 4.1: Truthfulness in Statements to Others

A lawyer does not generally have a duty to advise third parties of facts unknown to them.[280] Army Rule 4.1, however, prohibits attorneys from knowingly making a false statement of material fact or law to a third person and affirmatively requires them "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[281] Since almost all information relating to representation is considered confidential under Rule 1.6, an attorney will seldom be required to disclose information to third parties to avoid a fraudulent act.

Although not specifically mandated under Rule 4.1, a lawyer should also disclose facts to prevent a prior statement from being materially misleading.[282] Similarly, a duty of disclosure arises when a lawyer has made a statement believed to be true when it was made but subsequently discovered to be false.[283]

The duty imposed under Rule 4.1 extends to "third persons" and not to tribunals.[284] Thus, for example, it would be improper for trial counsel to make an inaccurate statement of law to an unrepresented accused. Although the term "third persons" is not defined in the Rules, it probably extends to corporations, trusts, associations, and organizations.[285]

2. Rule 4.2: Communication with Person Represented by Counsel

Rule 4.2 continues the traditional prohibition against communicating about the subject of representation with a third party known to be represented.[286] This rule does not prohibit communication with a par-

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[280]R.P.C. Rule 4.1 comment. A misrepresentation can occur, however, if a lawyer affirms a statement of another party the lawyer knows is false.

[281]R.P.C. Rule 4.1. This rule is substantially similar to Model Code DR 7-102(a)(5), which stated that "[i]n his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact."

[282]People v. Berge, 620 P.2d 23 (Colo. 1980); Smith v. Pope, 103 N.H. 555, 176 A.2d 321 (1961).

[283]Failure to disclose under these circumstances could be tortious or criminal. *See* Annotated Model Rules at 265-66 and cases cited therein.

[284]The duty to disclose to tribunals is covered by R.P.C. Rule 3.3.

[285]Annotated Model Rules at 264.

[286]R.P.C. Rule 4.2. The rule is almost identical to Model Code DR 7-104(A)(1). *See generally* Annot., 26 A.L.R. 4, 430 (1983). This rule is clearly violated when a trial counsel bypasses opposing counsel to talk directly with an accused. The rule is

ty concerning matters outside the scope of representation.[287] For example, a legal assistance attorney could communicate with the husband of a client in a domestic relations matter about an unrelated military administrative matter, such as an administrative elimination action.

Rule 4.2 does not prohibit represented parties from communicating directly with one another.[288] Whether an attorney has an obligation to dissuade his client from contacting a represented third party is open to question.[289] Although an attorney may not attempt to circumvent a rule through the acts of another,[290] the most logical approach is this area would be to avoid requiring counsel to discourage clients who are represented from communicating with one another. It is unrealistic to expect parties, especially in domestic relations cases, from stopping communications the instant they retain counsel. Indeed, in some cases, communications could lead to beneficial results, such as reconciliation or avoiding litigation. The rule should therefore be interpreted to bar only counsel from making contact with represented adverse parties.

It is noteworthy that Rule 4.2 does not retain the Model Code provision *prohibiting counsel from advising* an individual who has retained other counsel on the same general matter.[291] This Code prohibition was construed to bar legal assistance attorneys from providing legal assistance to persons who established an attorney-client relationship with another attorney unless the relationship was terminated by the client or the other attorneys withdrew or approved.[292] The drafters' decision to eliminate this prohibition is commendable;[293] considering the important interests at stake, clients should be free to determine whether the representation they are receiving is competent and in their best interests.

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violated, for example, if an assistant trial counsel talks to an accused after trial without the consent of his defense counsel in an attempt to convince the accused to cooperate. This was considered a violation of the Code even though the accused consented after he was advised of his rights. *See* Note, *Professional Responsibility*, The Army Lawyer, June 1977, at 16.

[287]R.P.C. Rule 4.2 comment.

[288]R.P.C. Rule 4.2 comment.

[289]Formerly, lawyers were required to dissuade clients from talking to one another. *See In re* Marietta, 223 Kan. 11, 569 P.2d 921 (1977); ABA Comm. on Professional Ethics and Grievances, Formal Op. 75 (1932).

[290]R.P.C. Rule 8.4 prohibits a lawyer from attempting to circumvent an ethical prohibition through the acts of another.

[291]Model Code EC 2-30.

[292]*See* Note, *Professional Responsibility*, The Army Lawyer, May 1978, at 22.

[293]It is not altogether clear why this prohibition was left out of the Model Rules. The prohibition could have been viewed as impinging first amendment freedoms.

The comments to Rule 4.2 resolved a question of some concern to military attorneys by providing that the rule does not prohibit a lawyer from talking to the commander of a represented party.[294] Thus, a legal assistance attorney may properly contact the commander of a soldier not supporting the lawyer's client and request help in enforcing the obligation.

3. Rule 4.3: Dealing with an Unrepresented Person

Rule 4.3 permits attorneys to communicate with third parties who are not represented.[295] When doing so, however, the attorney must not state or imply that he is disinterested.[296] If the lawyer knows that the third party is confused about the lawyer's role, he has a professional duty to take reasonable steps to correct the misunderstanding.[297] Since an unrepresented person could easily be misled concerning the lawyer's role in communications, the lawyer should not render any advice to the third party other than the advice to seek counsel.[298]

4. Rule 4.4: Respect for the Rights of Third Persons

The responsibility a lawyer has to diligently represent his client does not imply that he may completely disregard the rights of a third party.[299] To maintain respect for the rights of third parties, Rule 4.4 prohibits an attorney from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[300]

Rule 4.4 is intended to proscribe conduct designed solely to degrade or embarrass a person.[301] The rule is intended to prohibit tactics designed to inconvenience a person or delay proceedings.[302] Similarly, an attorney may not harass, entice, induce, or exert influence on

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[294]R.P.C. Rule 4.2 comment.

[295]R.P.C. Rule 4.3. Rule 4.3 has no direct counterpart in the Model Code.

[296]*Id.*

[297]R.P.C. Rule 4.3 comment.

[298]*Id. See also* Model Code DR 7-104(a)(2), which provides that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel."

[299]R.P.C. Rule 4.4 comment. Rule 4.4 largely restates the provisions of Model Code DR 7-102(A).

[300]R.P.C. Rule 4.4.

[301]Annotated Model Rules at 276.

[302]R.P.C. Rule 4.4 comment. *See generally* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 557 (1963).

jurors or witnesses.[303] The rule does not, however, prohibit an attorney from attempting to undermine the credibility of a truthful witness within the rules for impeachment.[304]

Rule 4.4 also does not preclude counsel from taking legal action on a client's behalf even if it burdens a third party. For example, defense counsel may advise an accused to assert his right to the assistance of individual defense counsel or to compel the attendance of witnesses who reside at distant locations, knowing that such assertions will increase the probability of a lighter sentence under a pretrial agreement.[305]

Although not specifically addressed in Rule 4.4, attorneys should not make derogatory remarks about opposing counsel or judges. Counsel who verbally abuse or write disparaging remarks about opposing counsel will be subject to discipline.[306] Counsel should also refrain from undertaking any offensive tactics.[307]

Interestingly, Rule 4.4 does not prohibit counsel from bringing or threatening to bring criminal charges solely to gain an advantage in a civil matter. This restriction, formerly contained in Model Code DR 7-105, prompted considerable litigation and was not evenly applied.[308] In Army practice, the rule was interpreted as prohibiting legal assistance attorneys from referring to the possibility of court-martial charges for nonsupport in letters seeking compliance with support obligations.[309]

The decision to drop the restriction from new Model Rule 4.4 was

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[303]ABA Comm. on Professional Ethics and Grievances, Formal Op. 319 (1968). Many states have enacted statutes to protect the rights of witnesses. *See* Ariz. Rev. Stat. Ann. § 32-363 (1956); Cal. Bus. & Prof. Code § 6068 (West 1963); Mont. Code Ann. § 26-2-401 (1979).

[304]Fair and objective cross examination is always permissible. Trial counsel must, however, restrict the manner and tenor of cross-examination if he knows the witness is being truthful. *See* American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 3-5.7.

[305]ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1424 (1982). This opinion is discussed in Fulton, *supra* note 152, at 2.

[306]Note, *Professional Responsibility*, The Army Lawyer, Sept. 1978, at 25 (JAG lawyer given administrative letter of reprimand for writing letter to a soldier stating that he has shown himself "to be nothing more than a lowly, dishonest welsher").

[307]*See, e.g., Professional Responsibility Note*, The Army Lawyer, July 1978, at 22 (TJAG Professional Responsibility Committee concluded that a JAG officer's conduct in preparing and forwarding UCMJ charges as a joke against another JAG lawyer was appropriate).

[308]*Compare* Wis. State. Bar Committee on Professional Ethics, Formal Op. E-87-5 (1987) *with* DeCato's case, 117 N.H. 885, 379 A.2d 825 (1977).

[309]*Professional Responsibility Note*, The Army Lawyer, May 1977, at 19.

not an oversight.[310] The drafters of the Model Rules concluded that this type of bargaining did not violate public policy.[311] Moreover, the laws against extortion were considered adequate to deter attorneys from using threats of criminal prosecution inappropriately.[312]

New Army Rule 4.4 should not be interpreted broadly to restrict Army attorneys from mentioning that a particular course of conduct, nonsupport of dependents for example, could be punishable under the Uniform Code of Military Justice. The evils to be avoided in this area, overreaching and deceit, can easily be controlled through the criminal process or informal disciplinary channels. A rule limiting attorneys' freedom in this area has proved unworkable in the past. It will inevitably lead to confusion and uneven application and inappropriately restrict attorneys from the good faith negotiation of criminal and civil matters in the same context.

Army attorneys should, however, continue to exercise good professional judgment in this area, particularly when writing to unrepresented parties. It would be inappropriate, for example, to tell an opposing party that criminal prosecution will be pursued because the prosecutor or commander may refuse to refer charges.[313] The safest approach to pursue, at least until further guidance is issued, is to merely state that a client may seek legal redress or initiate further legal proceedings.

F. CHAPTER 5: LEGAL OFFICES

1. Rule 5.1: Responsibilities of The Judge Advocate General and Supervisory Lawyers

The articulation of standards for lawyers having supervisory responsibility over other attorneys in Rule 5.1 is one of the most positive, compelling contributions made by the new Rules. Rule 5.1(b) makes clear that supervisory attorneys must reasonably ensure that other lawyers under their authority conform to the Rules.[314] The measures required to comply with the rule will obviously depend on the

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[310]*See* Kuhlman, *The Right Choice*, 73 A.B.A. J. 120 (Nov. 1987).
[311]*Id.* at 121.
[312]*Id.* at 121.
[313]The Philadelphia Bar Association Professional Guidance Committee concluded that even though the new Rules omitted the prohibition against threatening criminal action in a civil matter, letters from lawyers threatening criminal prosecution are inappropriate and prohibited by the tenor of the Rules. Philadelphia Bar Association Professional Guidance Committee, Opinion 88-20 (1988).
[314]R.P.C. Rule 5.1. There is no counterpart to Rule 5.1 in the Code.

nature of the office and its practice. It is improper in every case, however, for a supervisor to merely assume that a subordinate will inevitably comply.[315]

A dramatic shift under the rule is to impose imputed liability on a supervisor for the violation of a rule by another if the supervisor either ratified the conduct or failed to take remedial action upon discovering a violation.[316] A supervisor transgresses from his professional obligation by failing to rectify harm caused by a subordinate. Although Rule 5.1 does create new supervisory duties under these circumstances, it does not otherwise impose vicarious disciplinary liability upon a supervisor who has not participated in the violation.

A further requirement added to the Army Rule requires supervisory judge advocates to ensure that subordinates are properly trained and competent to perform the jobs to which they are assigned.[317] Under the Rules, the supervisor and not the subordinate is responsible for making the determination that the subordinate is competent to perform a particular duty.

2. Rule 5.2: Responsibilities of Subordinates

The Army Rules do not place the entire burden for compliance with the Rules on supervisors. Indeed, under Rule 5.2 a subordinate is not relieved of responsibility for a violation merely because he acted at the direction of another person, including supervisors.[318] If there is an arguable question of professional duty, however, a subordinate may rely on a supervisor's reasonable resolution.[319]

This rule rests on the assumption that there is a greater probability that a supervisory lawyer's opinion on an issue is correct. It is

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[315]R.P.C. Rule 5.1 comment. The comments highlight the special caution supervisors must exercise to avoid conflicts when rendering advice to subordinate lawyers. It is quite clear that a supervisor cannot advise both counsel appearing on opposite sides of a contested matter. The recommended approach is to refer one of the counsel to another supervisory lawyer in the office.

[316]R.P.C. Rule 5.1(c). On the other hand, a lawyer is not liable for the misconduct of a subordinate if he has no knowledge of the misconduct. *See, e.g., In re* Luce, 83 Cal. 303, 23 P. 350 (1890); *In re* Wilson, 170 N.Y.S. 725 (App. Div. 1918).

[317]R.P.C. Rule 5.1(d). This subsection is not found in the Model Rule 5.1. The steps should include educational programs and the initiation of sound procedures to screen for potential ethical issues. At the very least, supervisors should ensure that all judge advocates periodically study the Army Rules.

[318]R.P.C. Rule 5.2. Although this rule has no counterpart in the Code, courts imposed liability on subordinates for misconduct committed at the direction of a supervisor. *See, e.g.*, Attorney Grievance Committee v. Kahn, 290 Md. 654, 431 A.2d 1386 (1981); *In re* Knight, 129 Vt. 428, 281 A.2d 46 (1971).

[319]R.P.C. Rule 5.2(b). *See generally,* Levinson, *To a Young Lawyer: Thoughts on Disobedience*, 50 Mo. L. Rev. 483 (1985).

altogether reasonable to place final authority for resolving good faith ethical issues on the more experienced senior lawyer. The comments provide little guidance on what questions would be "reasonably arguable." The subordinate has the duty to determine whether an ethical resolution is arguable. Thus, before acting upon the advice of a supervisor, subordinates should, at a minimum, review applicable rules and determine for themselves whether the question is debatable.

3. Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

Rule 5.3 generally parallels Rule 5.1 and requires supervisors of nonlawyer assistants to ensure that the assistants' conduct conforms with the Rules.[320] Lawyers are required to give nonlawyer assistants appropriate instruction and supervision concerning professional standards.[321] Under Rule 5.1(c) a lawyer will be held responsible for a violation of the Rules by a nonlawyer if the lawyer directed the conduct or had direct supervisory authority over the person and failed to take remedial action upon learning of the violation.[322]

The rule applies to employees in addition to nonlawyer assistants. For example, under the Rules, trial counsel should supervise military police practices in the areas relating to ethical standards.[323]

4. Rule 5.4: Professional Independence of a Lawyer

The first part of Rule 5.4 contains restrictions on sharing fees to protect lawyers' professional independence of judgment.[324] Of more direct applicability to judge advocates is subsection (e), which states that a judge advocate is expected to provide unfettered loyalty and independence when representing individual soldiers or employees of the Army.[325] To encourage lawyers to exercise judgment solely for the benefit of their clients, the rule prohibits the exercise of independent judgment from serving as the basis for an adverse evaluation or disciplinary action.[326]

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[320]R.P.C. Rule 5.3. Like Rule 5.1, Rule 5.3 does not make supervisory lawyers vicariously liable for misconduct of nonlawyer personnel.

[321]R.P.C. Rule 5.3(b). Judge advocates should also adopt office procedures to ensure compliance with professional ethics.

[322]R.P.C. Rule 5.3(c).

[323]*See* American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function (1979); R.P.C. Rule 3.8(e).

[324]R.P.C. Rule 5.4(a)-(d). These provisions are substantially similar to Model Code DR 3-102(A), DR 3-103(A), and DR 5-107(B).

[325]R.P.C. Rule 5.4(e). This provision reinforces R.P.C. Rule 2.1, which requires attorneys to "exercise independent professional judgment" when representing a client.

[326]R.P.C. Rule 5.4 comment. The issue of the ethical propriety of a lawyer serving as counsel in a criminal matter when either the trial counsel, investigating officer, or military magistrate exercises command authority over the attorney and participates in writing his evaluation report was addressed in ABA Comm. on Ethics and Professional

Rule 5.4 provides an important, necessary standard for judge advocates. There is probably no situation more discomforting to a judge advocate than when he is asked or directed by a superior to take action contrary to the best interests of his client. Although these instances fortunately are rare, counsel in these circumstances should be able to turn to a standard for guidance.

Counsel exposed to outside pressure should make full disclosure of this fact to the client.[327] If either counsel or the client believe that the influence has or will impair the effectiveness of the representation, counsel should seek to withdraw. A military lawyer must also report any instance of improper command influence.[328] Neither the rule nor its comments suggest that counsel is free to ignore the direction of a superior. While subsection (f) gives the attorney the assurance that prejudicial action will not be taken against him for exercising professional judgment, it does not provide a defense to disobedience of an order.

Counsel, of course, could choose to disobey the order and assert that the order was unlawful. This course of action is fraught with difficulty for, as the comments point out, not all direction given to a subordinate is an attempt to improperly influence judgment.[329] Thus, counsel disobeying a superior assumes the risk of having the situation evaluated differently than he perceived. Noncompliance with the wishes of a superior has a more practical problem for the attorney. This course, even if it does not lead to direct prejudicial action, can present problems for counsel's career and his effectiveness in other cases. Thus, the safer course suggested by the Rules should be followed by a judge advocate confronting an unfortunate choice between obeying an order and withdrawing or disobeying and preserving unfettered loyalty to the client.

It is discomforting that Rule 5.4 does not go further to directly impose a requirement on all judge advocates to refrain from exerting pressure on subordinates to exercise less than unfettered loyalty and professional independence. The focus of the rule as it stands now is misguided because it places the responsibility for providing unfettered loyalty and professional judgment independence on a subordi-

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Responsibility, Informal Op. 1474 (1982). The ABA expressed the view that an attorney could serve as counsel in such proceedings after obtaining the client's consent after full consultation. This appears to be appropriate under R.P.C. Rule 1.7 as well.

[327]R.P.C. Rule 5.4 comment.

[328]R.P.C. Rule 5.4 comment.

[329]*Id.*

nate lawyer and does not provide a countervailing standard to guide a superior who may well be the source of the improper influence.

5. Rule 5.5: Unauthorized Practice of Law

The long-standing prohibition restricting lawyers from practicing law in a jurisdiction in violation of its regulations is retained under Rule 5.5.[330] Judge advocates must also refrain from aiding non-lawyers in the unauthorized practice of law.[331] The comments to Rule 5.5 clarify that a lawyer performing legal duties pursuant to a military department's authorization is not subject to state regulation.[332] Accordingly, legal assistance attorneys may perform legal assistance duties in states where they are not licensed to practice.

G. CHAPTER 7: INFORMATION ABOUT LEGAL SERVICES

The new Army Rules include five rules primarily applicable to civilian attorneys in fee generating practices regulating advertising and accepting cases. The rules were adopted by the Army to provide standards for judge advocates who are involved in considering alleged improper practices by civilian attorneys and not because The Judge Advocate General desires to regulate this aspect of civilian practice.[333]

1. Rule 7.1: Communications Concerning a Lawyer's Services

Army Rule 7.1 precludes lawyers from making false or misleading communications about themselves or their services.[334] The rule covers representations made through advertising and communications directly to a third party.[335] It is intended to prohibit lawyers from making statements about the favorable results obtained for clients because they could easily create unjustified expectations on the part of prospective clients.[336]

2. Rule 7.2: Advertising

Army Rule 7.2 permits civilian attorneys to advertise their services so long as the communications do not involve "solicitations."[337] The

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[330]R.P.C. Rule 5.5(a).
[331]R.P.C. Rule 5.5 comment.
[332]R.P.C. Rule 5.5 comment.
[333]Note, Dept. of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, p. 36.
[334]R.P.C. Rule 7.1.
[335]*Id.*
[336]R.P.C. Rule 7.1 comment.
[337]R.P.C. Rule 7.2. A note to Rule 7.1 states that the rule does not authorize judge

rule is primarily designed to prohibit false and misleading advertising.[335] Army Rule 7.2 contains several procedural requirements to ensure compliance. For example, lawyers are required to retain a copy of advertisements for at least two years.[339] The rule also requires that the name of at least one responsible attorney be stated in the communication and that a lawyer pay a reasonable cost for the advertisement.[340] In addition to regulating advertising, Rule 7.2 also prohibits attorneys from giving anything of value to any person in return for the referral of a case or client.[341]

3. Rule 7.3: Direct Contact with Prospective Clients

Under Army Rule 7.3 attorneys may not solicit employment from a person, unless the person is a former client or a relative.[342] The term "solicit" includes direct contact with a person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient.[343] The rule is not intended to prohibit general mailings.[344] Rule 7.3 was the first model rule to come under direct Supreme Court scrutiny. In *Shapero v. Kentucky Bar Association*,[345] the U.S. Supreme Court held that the blanket prohibition in Rule 7.3 against targeted direct mail solicitation by lawyers is inconsistent with the first amendment.[346] The Court opined that a state could require the filing of personalized solicitation letters to supervise mailings and to penalize actual abuses.[347] Until Rule 7.3 is revised, commanders should rely on installation solicitation regulations to

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advocates and lawyers employed by the Army to advertise. These employees must comply with Army regulations. For the history of the bar's efforts to regulate lawyer advertising, see Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978).

[338]R.P.C. Rule 7.2 comment.

[339]R.P.C. Rule 7.2(b). The rule requiring listing a responsible attorney on the advertisement is to ensure that the public knows who is responsible for its contents.

[340]R.P.C. Rule 7.2(d).

[341]R.P.C. Rule 7.2(c).

[342]R.P.C. Rule 7.3. Prospective clients often feel overwhelmed by legal problems confronting them and have an impaired capacity for exercising good judgment. Army Rule 7.3 is designed to prevent lawyers from exploiting this situation for personal pecuniary gain. In Ohralik v. Ohio State Bar Association, 436 U.S. 447, *reh'd denied*, 439 U.S. 883 (1978), the United States Supreme Court held that direct personal solicitation could be categorically prohibited. *See also In Re* R.M.J., 455 U.S. 191 (1982) (mailed announcement cards treated same way as newspaper and telephone advertisements); *In Re* Primus, 436 U.S. 412 (1978).

[343]R.P.C. Rule 7.3 comment.

[344]*Id.*

[345]108 S. Ct. 1916 (1988).

[346]At least two commentators anticipated that Rule 7.3 would be held constitutionally overbroad. *See* Gaetke, *Why Kentucky Should Adopt the ABA's Model Rules of Professional Conduct*, 74 Ken. L.J. 581 n.29 (1986); Stevens, *Wyoming Rules of Professional Conduct: A Comparative Analysis*, 23 Land and Water L. Rev. 461, 516 (1988).

[347]108 S. Ct. at 1925.

restrict hard-sell tactics by lawyers trying to reach potential clients on Army posts.[348]

4. Rule 7.4: Communication of Fields of Practice

Rule 7.4 permits a lawyer to disclose whether he does or does not practice in any particular fields of law.[349] A lawyer may not, however, state or imply that he is a specialist unless he is a patent attorney, admitted to practice before the United States Patent and Trademark Office, engaged in admiralty practice, or designated a specialist by an appropriate jurisdiction.[350]

5. Rule 7.5: Firm Names and Designations

Rule 7.5 regulates the use of firm names, letterheads, and other professional designations.[351]

H. CHAPTER 8: MAINTAINING THE INTEGRITY OF THE PROFESSION

1. Rule 8.1: Bar Admission and Disciplinary Matters

Rule 8.1 precludes applicants for admission to the Bar or for an appointment in the Judge Advocate General's Corps from knowingly making false statements of material facts or failing to disclose facts necessary to correct a misapprehension known to the person.[352] This rule does not, however, require an applicant to volunteer adverse information not specifically requested.

2. Rule 8.2: Judicial and Legal Officials

A lawyer is precluded under Rule 8.2 from making a statement known to be false, or with reckless disregard of the truth, concerning the qualifications of a judge, public official, or judicial candidate.[353] This rule does not prohibit counsel from expressing truthful and honest opinions on the professional or personal fitness of judicial officers.[354]

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[348]Army Reg. 210-7, Installations: Commercial Solicitation on Army Installations (15 Jan. 1979).

[349]R.P.C. Rule 7.4.

[350]R.P.C. Rule 7.4.

[351]R.P.C. Rule 7.5.

[352]R.P.C. Rule 8.1. This rule requires that the statement be knowingly false when made.

[353]R.P.C. Rule 8.2. This rule implements a standard articulated in New York Times v. Sullivan, 376 U.S. 254 (1964).

[354]Rule 8.2 comment.

3. Rule 8.3: Reporting Professional Misconduct

Traditionally very few disciplinary actions arise from lawyers' complaints.[355] Nevertheless, the Army Rules require attorneys to report another lawyer's violation of a rule if it raises "a substantial question as to that lawyer's honesty, trustworthiness, or fitness."[356] Subsection b contains a similar rule for reporting judicial violations. The term "substantial" refers to the severity of the violation and not to the degree of proof needed to establish the violation.[357] Accordingly, an attorney will not be required to invest time to investigate misconduct before making a complaint. Furthermore, there is no requirement under this rule for an attorney to confront a potential violator before reporting a serious offense.[358]

The rule requires reporting only the most serious offenses "that a self regulating profession must vigorously endeavor to prevent."[359] An attorney is not, however, required to report a serious offense if doing so would violate the confidentiality rules in Army Rule 1.6.[360] Beyond this guidance, the comments do not furnish specific examples of what conduct is substantial enough to trigger the need for reporting. It would appear, for example, that there would be no requirement to report the knowledge that a judge advocate is committing adultery with a member of the military community. In keeping with the general framework of the Rules, an attorney should in all doubtful cases consult with his or her superior to determine whether a report should be made. Serious ethical violations must be reported to The Judge Advocate General in accordance with the procedures contained in Army Regulation 27-1.[361]

Army attorneys should not overlook the possibility that they must report misconduct to their licensing state authorities also. Both the Model Code[362] and the ABA Model Rules[363] require lawyers to report

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[355]*See* Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 Utah L. Rev. 95; Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 Ariz. L. Rev. 509 (1978).

[356]R.P.C. Rule 8.3(a).

[357]R.P.C. Rule 8.3 comment. Note that the rule requires reporting only if an attorney has knowledge of an ethical violation. Rumors are not sufficient.

[358]R.P.C. Rule 8.3(c).

[359]*Id.*

[360]R.P.C. Rule 8.3(c).

[361]AR 27-1, chapter 5.

[362]Model Code DR 1-103(a). The Judge Advocate General is the official responsible for investigating alleged violations of the Army Rules of Professional Conduct. If an Inspector General receives a complaint concerning an attorney's ethical violation, he must refer the complaint to The Judge Advocate General for investigation. Army Reg. 20-1, Inspector General Activities and Procedures, para. 5-3(f) (16 Sept. 1986).

[363]Model Rule 8.3 is substantially the same as Army Rule 8.3.

to proper authority any unprivileged knowledge of another lawyer's misconduct. Because the penalties for failing to discharge this duty can be extremely severe,[364] Army attorneys should always consider reporting serious misconduct to appropriate state disciplinary committees.

4. Rule 8.4: Misconduct

Rule 8.4 contains a list of six specific types of action that will be considered professional misconduct. The drafters rejected the traditional concept of offenses involving moral turpitude because it was broadly interpreted to include crimes of personal morality. Among the offenses that reflect adversely on the fitness to practice law are violating any rule or assisting another to commit a criminal act adversely reflecting upon lawyer's honesty or trustworthiness, engaging in any conduct involving dishonesty, engaging in conduct prejudicial to the administration of justice, stating or implying an ability to influence a government official, or knowingly assisting a judicial officer in violating the Rules.[365] While not specifically stated in the rule, the comments to Rule 8.4 provide that judge advocates are expected to assume legal responsibilities extending beyond those of other citizens.[366]

5. Rule 8.5: Jurisdiction

Rule 8.5 bluntly states that "lawyers shall be governed by these Rules of Professional Conduct."[367] Army lawyers are also expected to comply with the rules of the jurisdiction in which they are licensed to practice.[368] The Army Rules will, however, be regarded as superseding any conflicting rules applicable in jurisdictions in which the lawyer may be licensed.[369]

An Army attorney could possibly be subject to three separate sets of ethical standards. For example, a legal assistance attorney licensed

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[364]For example, the Illinois Supreme Court recently suspended an attorney for one year for failing to disclose that his client's first attorney had converted client's funds and instead settling the matter. *In re* Himmel, Ill. Sup. Ct. No. 65946 (Sept. 22, 1988).

[365]R.P.C. Rule 8.4. The rule reflects the belief that while an attorney is subject to the entire range of criminal law, he should be "professionally answerable only for those offenses indicating a lack of a characteristic relevant to the practice of law." R.P.C. Rule 8.4 comment. This concept extends and redefines the traditional distinction between crimes involving "moral turpitude."

[366]R.P.C. Rule 8.4 comment.

[367]R.P.C. Rule 8.5.

[368]R.P.C. Rule 8.5 comment.

[369]*Id.* A lawyer's conduct is subject to regulation by a jurisdiction in which he is licensed to practice even though the conduct occurred elsewhere. *In re* Bever, 55 Ariz. 368, 101 P.2d 790 (1940).

in Minnesota and practicing law for the Army under the Expanded Legal Assistance Program in Massachusetts must comply with three separate ethical standards: the ABA Model Code of Professional Responsibility, the ABA Model Rules,[370] and the Army Rules of Professional Conduct. If a conflict in any of the standards arises, the attorney must follow the Army Rules unless he or she is actually practicing in a state court proceeding, in which case the Massachusetts rule should prevail.[371]

It is somewhat unsettling to learn that if a conflict exists, the rule of the state in which one is licensed to practice must give way to the Army Rules. Attorneys can take comfort, however, from the fact that very few differences of substance actually exist in the ABA Model Code, the ABA Model Rules, and the Army Rules.[372] If a difference of substance does exist, an Army attorney can usually avoid violating an ethical standard by following the rule with the most restrictive standard. For example, the three major ethical rules take different approaches in dealing with the prospective-crime exception to the rule of confidentiality.[373] An attorney will not violate either the ABA Code or the ABA Model Rule by following the most restrictive standard, Army Rule 1.6, and making mandatory disclosure of a threatened prospective offense involving imminent substantial bodily harm or death. Like the prospective crime exception in Rule 1.6, in most cases where a particular course of conduct is mandated under one set of rules, it is permissible under the others.[374] The attorney can satisfy the ethical obligations in these cases merely by pursuing the more stringent or mandated course of action.

Even if an attorney must violate a state rule to comply with the Army Rules, it is unlikely that he will ever be disciplined by his licensing state. Jurisdictions adopting the ABA Model Rules take an accommodating stance to choice of law problems and apply general

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[370]The ABA Model Code is in effect in Massachusetts, and Minnesota has adopted a variation of the ABA Model Rules. ABA/BNA Law. Man. Prof. Con. § 01:3 (1988).

[371]R.P.C. Rule 8.5 comment.

[372]The Model Rules were in fact designed to codify preexisting legal principles contained in the Code and established in case law. *See generally* Kutak, *supra* note 19.

[373]*Compare* R.P.C. 1.6(d) (mandating disclosure of a threatened offense involving a substantial likelihood of death or serious bodily harm) *with* Model Rule 1.6 (making disclosure of such a prospective offense voluntary) *and* Model Code DR 4-101(c)(3) (gives attorneys the option of revealing the client's intention to commit a crime).

[374]An example where an Army attorney might follow a stricter state standard is in the imputed disqualification area. The Army Rule rejecting the rule of imputed disqualification does not require that the attorney take the case. Thus, in some cases attorneys, particularly reserve attorneys, could choose to follow the more stringent rules of their licensing states. For a discussion of this issue see Burnett, *The Proposed Rules of Professional Conduct: Critical Concerns For Military Lawyers*, The Army Lawyer, Feb. 1987, at 24.

principles of conflicts of law.[375] Under reasoned application of these principles, an attorney practicing law in the military, complying in good faith with an Army Rule, should not be subject to discipline by a state whose only contact with the case is that it issued the attorney his or her license.[376] The comment to ABA Model Rule 8.5 suggests this conclusion by stating that the general authority of the states to regulate the practice of law must be reconciled with the authority of a federal tribunal to regulate practice before it.[377] To the extent that a state persists in applying its own set of standards, the attorney may have a defense to any disciplinary proceeding by arguing that the Federal Government has preempted the field.[378]

IV. EVALUATION OF THE ARMY RULES

Army attorneys must balance three competing interests when determining how to resolve ethical issues: the interests of the Army, the interests of the client, and the interests of the legal profession. Good ethical rules should not only provide clear guidance to attorneys to help them weigh these competing interests, but they should necessarily make the right decisions about which interests should prevail.

The new Army Rules pass the test of providing clear guidance to Army attorneys. There is now one standard uniformly applicable to all attorneys working for the Army regardless of where they have been licensed or where they are delivering legal services. This unified approach promotes precision in viewing and solving the unique ethical issues confronting Army attorneys.

The format and organization of the Rules are far superior to the bifurcated format of the predecessor Code. The comments to each rule provide greater interpretive guidance than was present under the Code. The logical order of the Rules and the clearer more consistent substance ensures that ethical issues will be solved correctly and efficiency.

Another striking achievement is that the Army Rules fill in many of the gaps left in the Model Code and address with greater specificity

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[375]Model Rule 8.5 comment.

[376]At least one author reaches this same conclusion. *See* Burnett, *supra* note 374, at 21.

[377]Model Rule 8.5 comment. Thus, for example, attorneys practicing in courts-martial should clearly not be subject to state regulation. *See, e.g.*, Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1926); Touche Ross & Co. v. SEC, 609 F.2d 70 (2d Cir. 1979); Koden v. United States Department of Justice, 564 F.2d 228 (7th Cir. 1977).

[378]In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), the U.S. Supreme Court held that the federal preemption doctrine applies to regulations as well as statutes.

several recurring troublesome areas. The shift away from vague proscriptions of negligence and the duty of zealous representation toward affirmative obligations of professional competence is a noteworthy accomplishment.[379] Army Rules 1.7 through 1.9 provide a more comprehensive and specific approach to the problems of resolving conflicts of interest issues, depending on whether representation will be directly adverse to other interests or to a former client.[380] The clear rejection of the automatic rule of imputed disqualification in Rule 1.10 provides Army attorneys for the first time with an appropriately accommodating standard responsive to the peculiar needs of the military.[381]

While the new Army Rules for the most part contribute toward greater clarity, some areas for improvement remain. For example, Rule 8.3 gives scant guidance as to when an ethical violation is substantial enough to trigger the requirement to report the violation.[382] Rule 1.6(b) dealing with the mandatory duty to report a prospective crime furnishes little help to counsel in making the potentially grave determination whether a threatened offense jeopardizes national defense interests or involves imminent harm to a third party.[383] The new duty to communicate with a client is also vague, uncertain, and could lead to enforcement problems.[384]

A broader and even more difficult inquiry is whether the new Army Rules make the right choices on the hard questions of professional responsibility. This author believes that, for the most part, they have.

In arriving at a rule for client confidences, the drafters of the Army Rules obviously confronted several competing interests head on: an Army attorney should not be a tool or instrument of crime or fraud; the integrity of the judicial system must be maintained; and the best possible legal representation should be given to every person. The law has long recognized that confidentiality is essential to enable persons to obtain thorough, competent professional advice. This shield of confidentiality should not, however, enable a client to use an attorney to accomplish illegal purposes. Therefore, as the drafters recognize, there are times when a client should not have a right to keep information confidential.

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[379]R.P.C. Rule 1.1.
[380]R.P.C. Rules 1.7 through 1.9.
[381]R.P.C. Rule 1.10.
[382]R.P.C. Rule 8.3.
[383]R.P.C. Rule 1.6(b).
[384]R.P.C. Rule 1.4. This view is shared by the authors of R. Underwood & W. Fortune, Trial Ethics 1.3 (1988).

The rule mandating disclosure of a confidence in order to prevent imminent death, serious injury, or harm to national defense interests is sound. It is simply inappropriate for judge advocates to become burdened with this information and to sit idly by. At the same time, however, the requirement that disclosure be made only to the extent necessary to prevent the harm ensures that the client's interests are not irrelevant even under these circumstances. Moreover, the rule requires mandatory disclosure only in the clearest and most egregious of circumstances. Rule 1.6 reaffirms the commitment to protect the public and to maintain the integrity of the legal system with an appropriate concern for the client's interest.

If anything, Army Rule 1.6 does not go far enough. The Army should adopt a provision in Rule 1.6, as have many other jurisdictions, allowing attorneys the option of disclosing information necessary to prevent the commission of future frauds. Moreover, attorneys should be permitted to disclose past frauds that used the lawyer's services.[385]

Another confidentiality issue addressed under the Army Rules is the attorney's duty to the organizational client. The problem in this area is what should a lawyer do when a commander or any other Army official engages in conduct likely to harm the interests of the Army. Under Army Rule 1.13 Army lawyers have the obligation to take reasonable measures to prevent harm. Depending on the circumstances, these measures may include referring the matter to higher authority or disclosing confidences of the person involved.

The approach taken under Rule 1.13 is defensible. The rule is justified because the relationship between the lawyer and the official exists only because of the official nature of their duties. Commanders and other officers in the Army derive their relationship with the attorney by virtue of their positions in the organization. The lawyer's obligation to these officials should be determined first by the rights and responsibilities the lawyer owes to the agency. If the official acts in a way that is inconsistent with the public interest, he is stripped of his official character and must face the consequences of his conduct without the benefit of representation from a government attorney.[386]

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[385]This was included in the initial rule proposed by the Kutak commission. For a compelling argument that attorneys should be given the discretion to disclose to prevent a fraud see Note, *Proposed Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions With Regard to Confidentiality*, 35 Baylor L. Rev. 561 (1983).

[386]An analogy supporting this conclusion is in *Ex parte* Young, 209 U.S. 123 (1907), where the Supreme Court held that a citizen of another state could sue the Attorney

Unlike the private practitioner who represents individual interests, the government lawyer has a special responsibility to the entire public interest. Accordingly, the lawyer is obligated to ensure that the government carries out its duties in accordance with the Constitution and applicable laws and regulations. This special responsibility cannot be discharged effectively unless it is construed broadly enough require government lawyers to represent government officials only when they act in accordance with the public interest.[387]

The command of Rule 1.13 does not require judge advocates to fundamentally change their relationship with commanders and other officials. First, the rule comes into play only when these officials act in an illegal way that will harm Army interests. Secondly, the rule gives attorneys considerable leeway in finding measures to resolve the situation.

The approach taken by Rule 1.13 has been criticized because it restricts lawyer's freedom of action in dealing with agency officials and causes the government lawyer to usurp the decisions that must be made by responsible officials.[388] The comment to Rule 1.13 clearly specifies, however, that attorneys should not intervene merely when poor policy decisions are being made. Moreover, Rule 1.13 does encourage Army attorneys to take an active role in finding acceptable solutions to problems faced by the officials they serve. It also places parties firmly on notice that a lawyer must not allow individual interests to override the lawyer's commitment to pursue the interests of the Army.

Undeniably, one of the most difficult choices facing the drafters of the Model Rules was to resolve the proper conduct of defense counsel when faced with a perjurious client. This choice inevitably requires weighing the constitutional guarantees of the accused, the duty to

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General of Minnesota. The Court concluded that if the Attorney General seeks to violate the Federal Constitution, he is stripped of his official character and subject to suit.

[387]A number of legal commentators have reached this conclusion. *See, e.g.*, Seasongood, *Public Service by Lawyers in Local Government*, 2 Syracuse L. Rev. 210 (1951). Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Fed. B.J. 61 (1978); Sehnapper, *Legal Ethics and the Government Lawyer*, 32 Rec. Ass'n Bar City N.Y. 649 (1977). Opinion 73-1 of the Federal Bar Association Ethics Committee also supports this conclusion. The opinion states that unless the lawyer is designated to represent an official in disciplinary or administrative proceedings, "the client of the federally employed lawyer, using the term in the sense of where lies his immediate professional obligation and responsibility, is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of public business." 32 Fed. B.J. at 72.

[388]*See* Josephson and Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict*, 29 How. L. Rev. 539 (1986).

preserve client confidences, and the duties of counsel as an officer of the court. The drafters appropriately elevate the duty of candor to the tribunal over the duty to keep client confidences secret.

The problem with Rule 3.3 is that it too does not go far enough. There is no sound reason for ending the requirements to disclose false evidence when the court-martial is adjourned. Why should a defense counsel who discovers perjury the day after trial not be required to report the evidence to the court? The approach taken by the rule rewards the accused who has been clever enough to mask the perjury from both the court and his counsel until after trial.

In military practice, the accused's defense counsel continues his representation of the accused beyond the termination of the proceedings up to the point the convening authority takes action on the case. Under the Rules the defense counsel may ignore the discovered fact that a client has committed perjury and yet request clemency or disapproval of the court's findings. A more logical point to terminate the requirement to disclose perjury is when the trial defense counsel is no longer involved in the case as the accused's attorney.

The Model Code's stringent requirement that attorneys report any misconduct has been severely relaxed under the Army Rules. Under Army Rule 8.3 the obligation to report an ethical question arises only when there is a "substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This lax standard gives lawyers, traditionally reluctant to report peer misconduct,[389] even more reassurance to look the other way when faced with the hard choice to report a violation.

A more rigorous reporting requirement should be reinstated in the Army Rules. The goal of maintaining the integrity of the legal profession cannot be realistically attained with the reporting requirement now contained in the Rules.

A final area that could stand reexamination is the lack of professional responsibility standards prohibiting supervisory judge advocates from exerting pressure on subordinates to compromise their professional independence. The potential problem of overreaching by superior attorneys is inadequately addressed in the Army Rules. Clients, counsel, and the military community should be given the reassurance that supervisors who exert improper pressure on sub-

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[389] *See* Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 Am. B. Found. Res. J. 917, 919-920. For a discussion of other solutions to the problem of lawyer's failure to comply with their obligation to report misconduct, see Note, *DR 1-103: Lawyer's Duty to Report Ethical Violations*, 10 J. Leg. Prof. 159 (1985).

ordinate counsel will be subject to discipline under a specific rule proscribing the misconduct.

V. CONCLUSION

The Army Rules improve the professional responsibility standards applicable to Army attorneys. The Rules' greatest accomplishment is to restate ethical standards in a far more organized and intelligible way. By deleting statements that were merely aspirational, the drafters have eliminated the mystery over what conduct is mandatory, what conduct is discretionary, and what conduct is prohibited. All Army attorneys now have one clear, comprehensive source setting forth minimal levels of acceptable conduct.

Another substantial accomplishment made by the Rules is to respond to the unique problems facing attorneys working in nonlitigational settings. The Army Rules contain standards tailored specifically for the attorney who serves as an advisor or as a mediator and thus appropriately respond to modern developments in the delivery of legal services.

Another positive advance is that the new Rules address unique circumstances relevant to the practice of law in the military. Standards that were impractical in the military setting, such as the imputed disqualification rule, have been appropriately modified or eliminated.

The Army Rules can and should be improved in several critical areas. The new Rules do, however, stand as a marked improvement to the Code. They address with greater clarity and insight the Army attorney's obligations to the organization, to the judiciary, and to the individual client. The standards set forth in the Rules are more realistic and relevant to governing and improving the quality of legal services provided by today's Army lawyers.

Formulating ethical rules is never an easy proposition because no one set of rules will be acceptable to everyone. Resolving controversial areas, such as a lawyer's duty of candor to the court and confidentiality to a client, present difficult choices between two significant competing interests. Although many lawyers will view the Rules as imperfect for one reason or another, the basic underlying philosophy and general substance of the Rules comport with most of the military legal community's actual conception of what is right and wrong. This is, according to Justice Oliver Wendell Holmes, the first requirement of a sound body of law.[390]

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[390]O.W. Holmes, The Common Law 36 (1881).

ADVERSE IMPACT OF THE FEDERAL BANKRUPTCY LAW ON THE GOVERNMENT'S RIGHTS IN RELATION TO THE CONTRACTOR IN DEFAULT

by Major Scott E. Ransick*

I. INTRODUCTION

When "two inclusive, exclusive, sweeping schemes"[1] such as bankruptcy and federal procurement overlap, procedural and substantive discord occurs unless careful legislative coordination has taken place in the drafting of each. Even a cursory analysis of the legislative histories of the Bankruptcy Code[2] and the federal statutes underpinning the procurement system reveals only haphazard coordination between the two. A comparison of the major provisions of the two systems clearly indicates that conflict must occur when a contractor doing business with the government files a petition in bankruptcy. Conflicting provisions and ambiguities, real or imagined, are guaranteed to provoke needless litigation involving the government, the contractor [hereinafter also referred to as the debtor], the trustee, and other creditors of the debtor. Under the present bankruptcy system, there are few preventative measures the government can take to prevent the disruption it suffers as a creditor in a bankruptcy proceeding. The date of the bankruptcy petition filing is a watershed that drastically changes the relationship between the government and the contractor. An illustration of this change concerns the government's absolute right to "terminate" a contract. If the government terminates an unsatisfactory contract with the debtor one day prior to the petition filing, there is no ongoing contractual relationship for the bankruptcy trustee or court to exercise power over. Once discharged from continuing performance under the previous contract, the government is

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[1] *In re* Gary Aircraft Corp. 698 F.2d 775 (5th Cir.), *cert. denied*, 464 U.S. 820 (1983).

[2] The Bankruptcy Reform Act of 1978, Pub. L. No.95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11 and 28 U.S.C.).

free to contract for that need elsewhere. In contrast, once the petition is filed, the bankruptcy system, not the government, controls the existence or termination of rights under the contract.

Even if the government terminates the contract prior to the petition, any ongoing contract litigation against property or funds of the debtor's estate is automatically stayed by the pending bankruptcy action. Despite governmental vigilance and prompt action at the first sign of impending bankruptcy, the contractor can always file the bankruptcy petition and obtain protection from further contractual claims for money and property.

However, the government should still act whenever possible to preserve its contractual rights. When dealing with a contractor on the brink of bankruptcy, the contracting officer should aggressively assert the government's rights until prevented by the bankruptcy court. For example, the contracting officer could obtain physical possession of property the government has title to under the progress payments clause. Once accomplished, the bankruptcy courts will usually allow the government to keep the property and defend instead against a monetary claim for the value of the property. In this limited way, the government may be able to facilitate re-procurement of the required product, despite the continuing bankruptcy litigation to recover funds from the bankrupt contractor.

An understanding of the policy supporting these two complex, self-contained legal systems is a prerequisite to any attempt to identify which problems are solvable and which are not. Some statutory or regulatory relief for the government appears possible in the relatively narrow areas of progress payment property title and jurisdiction over claims liquidation. Realistically, from the government's perspective, there are no satisfactory solutions to its loss of control over the contract and the funding obligated to it. With no sweeping statutory or regulatory change probable, the government must continue to identify the most feasible litigation strategies in order to more fully protect its interests.

First, in order to acquaint the reader unfamiliar with the arcane field of bankruptcy, part II provides a brief survey of some of the relevant history, statutes, and regulations. Critical provisions covered include the nature of the debtor's estate and the powers of the trustee to preserve the estate.

Part III identifies and analyzes the conflicts between bankruptcy and government contract law. Issues covered include: bankruptcy limitations on the government's power to terminate a contract and

pursue other contractual remedies against the debtor; methods whereby the government may obtain relief from bankruptcy's automatic stay provisions; bankruptcy jurisdiction over liquidation of contract claims; and ownership, possession and title to property under the contract and bankruptcy law.

Finally, conclusions are presented in part IV.

II. SURVEY OF THE BANKRUPTCY CODE

A. BANKRUPTCY POLICY

"Bankruptcy serves a role in corporate life eerily similar to that of the doctrine of reincarnation in some eastern religions."[3] Just as reincarnation promises a new life, bankruptcy is designed to legally resurrect the financially deceased. Historically, one of the main purposes of the bankruptcy code has been to relieve a debtor "from the weight of oppressive indebtedness and permit him to start afresh from the obligations and responsibilities consequent upon business misfortunes."[4] Congress has spoken of bankruptcy law as a fundamental protection that "gives the debtor a breathing spell from his creditors . . . to attempt a repayment plan, or reorganization plan or simply to be relieved of the financial pressures that drove him into bankruptcy."[5] As a compliment to the policies favoring rehabilitation of the debtor, Congress promotes bankruptcy to protect individual creditors through establishment of "an orderly liquidation procedure under which all creditors are treated equally."[6] Numerous economic arguments for bankruptcy relief are also based on protecting creditors and the economy as a whole.[7] This rationale also supports protecting the government when it acts as a contractual creditor in procurement.

A major body of bankruptcy law has developed from these policy roots. In searching for the genesis of bankruptcy, the starting point must be the United States Constitution.

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[3]*Gary Aircraft*, 698 F.2d at 779.

[4]Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554-555 (1915). *See also* Local Loan v. Hunt, 292 U.S. 234, 244 (1934).

[5]H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977) [hereinafter H.R. Rep. No. 95-595], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6296-97.

[6]*Id.* at 340, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6297.

[7]Baird & Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests*, 51 U. Chi. L. Rev. 97 (1984).

B. BANKRUPTCY'S CONSTITUTIONAL, STATUTORY, AND REGULATORY STRUCTURE

Under the United States Constitution, Congress has long had the power to enact bankruptcy law.[8] Although Congress could have exercised this constitutional grant of authority to create a sweeping, exclusive body of law to cover all aspects of bankruptcy, the present system has not excluded all application of state law.[9] The Bankruptcy Code is designed to use pre-existing state law as a starting point from which the bankruptcy court proceeds in exercising its federally based statutory and equitable powers.[10] An excellent example of this interaction is the Code's definition of creditors and claims in sections 101(9) and 101(4).[11] A creditor is an entity (to include the government),[12] with a right to payment or some equitable relief against the debtor. Because no all-encompassing system of federal common law exists,[13] state law determines whether a claim, and thus a creditor, exists.

While the Bankruptcy Code has certain basic rules of claim priority,[14] these priorities apply only to unsecured claims. As a general rule, state law dictates that secured interests are satisfied before any distribution to unsecured claimants.[15] Applying these state laws to the government procurement area causes disagreement over the meaning of progress payment title vesting provisions found in part 32 of the Federal Acquisition Regulation (FAR).[16] A discussion of the difficulties encountered in determining which law is applicable, i.e. federal or state, is contained in part III.

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[8]U.S. Const., art. I, § 8.

[9]*See* Jaffke v. Dunham, 352 U.S. 280 (1957); Security Mortgage Co. v. Powers, 278 U.S. 149 (1956); *In Re* Madeline Marie Nursing Homes, 694 F.2d 433 (6th Cir. 1982); *see generally* Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv. L. Rev. 730 (1982).

[10]*Id.*

[11]11 U.S.C. § 101(4), (9) (1982).

[12]*Id.* § 101(14).

[13]Erie R.R. v. Thompkins, 304 U.S. 64 (1938).

[14]11 U.S.C. § 507 (1982).

[15]D. Cowans, Bankruptcy Law and Practice § 12.32 (3rd ed. 1986).

[16]*See* First National Bank of Geneva v. United States, 13 Cl. Ct. 385, 387 n.3 (1987); *In re* American Pouch Foods, Inc., 769 F.2d 1190 (7th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

C. CRITICAL BANKRUPTCY PROVISIONS

1. Chapter 7 Liquidation and Chapter 11 Reorganization

Title 11 is divided into eight major chapters, with three general administrative chapters[17] and five operative chapters.[18] Most provisions of the three general chapters apply to the operative chapters.[19] By far the largest number of cases dealing with a government contractor come under the provisions of two of the operative chapters, chapter 7 or chapter 11.[20] Further discussion of bankruptcy will be limited to cases filed under one of these two chapters unless otherwise stated.

Chapter 7 deals with the complete liquidation of the debtor's estate.[21] In contrast, chapter 11 provides for resolving claims while allowing the debtor to reorganize for eventual re-emergence from bankruptcy as a surviving business concern.[22] The twin options of liquidation and reorganization are generally available to both business entities and individual debtors. While chapter 11 was created primarily to deal with corporations, partnerships, and other business entities, it is available to individuals.[23] In contrast, only individuals may be discharged from liability under chapter 7.[24]

Choosing between liquidation and reorganization is the initial

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[17]These are chapter 1 (General Provisions), chapter 3 (Case Administration), and chapter 5 (Creditors, Debtors, and the Estate). The Bankruptcy Code is presently divided into eight chapters, using odd numbers with the exception of chapter 12.

[18]These are chapter 7 (Liquidation), chapter 9 (Adjustment of Debts of a Municipality), chapter 11 (Reorganization), chapter 12 (Adjustment of Debts of a Family Farmer with Regular Annual Income), and chapter 13 (Adjustment of Debts of an Individual with Regular Income). Chapter 12 was added by P.L. 99-534, October 27, 1986.

[19]H.R. Rep. No. 95-595, *supra* note 5, at 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5967.

[20]While certain contracting may be done with an individual debtor who files under chapter 13, the vast majority of cases involving a continuing business come under chapter 11. Focus will accordingly be made on the reorganization provisions of chapter 11.

[21]11 U.S.C. § 726 (1982) (Distribution of Property of the Estate); *id.* § 727 (provides for discharge of claims against an individual debtor and debts against the estate). Certain exceptions exist with regard to some types of both property and claims.

[22]*Id.* §§ 1102-1146.

[23]S. Rep. No. 95-989, 95th Cong. 2d Sess. 16 (1978) [hereinafter S. Rep. No. 95-989], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5788, 5789.

[24]11 U.S.C. § 727(a)(1) (1982); S.Rep. No. 95-989, *supra* note 23, at 7, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5793 ("A change from current law will prevent corporations from being discharged in liquidation cases. Corporations are not in the same situation as individual debtors, and the discharge of a corporation promotes trafficking in corporate shells, a form of bankruptcy fraud.").

question that governs the entire bankruptcy proceeding.[25] If a debtor selects liquidation under chapter 7, there is no question of carrying on the business for other than a very short time span.[26] The trustee will see to the liquidation of assets[27] and terminate many of the debtor's executory contracts.[28] Focus of the proceedings shifts from concern about continuation of the business to evaluating claims made against the estate.

Reorganization under chapter 11 combines a form of controlled liquidation with a plan to restore the debtor's fiscal health. Either the debtor, who may remain in possession of the estate, or a trustee will continue to operate the business while creditors' claims are resolved.[29] A higher percentage of executory contracts can be expected to be assumed by the trustee or debtor in possession during reorganization than under a chapter 7 liquidation.

By their nature, chapter 11 cases, containing both the elements of liquidation and continuation of the business, pose a more difficult long-term problem to the government than the more straightforward termination under chapter 7. One concern is the apparent reluctance bankruptcy judges have in providing creditor relief against a debtor's estate when reorganization is involved.[30] This is discussed is greater detail in part III.

2. The Trustee and the Estate

The bankruptcy court appoints the trustee to perform the numerous duties required to liquidate an estate or to promote a reorganization. Although a trustee will always be appointed under chapter 7,[31] under chapter 11 the debtor may remain in possession of the estate.[32] While the trustee and the debtor in possession are considered to be legally different entities from the "original" debtor,[33] they stand in the debtor's shoes with all attendant legal rights.[34] Because the

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[25]Filing under one chapter may be converted, however, under 11 U.S.C. § 348 (1982).
[26]*Id.* § 721.
[27]*Id.* § 704(1).
[28]*Id.* § 365(a).
[29]*Id.* §§ 1107, 1108.
[30]Telephone interview with LTC Billy Smith, Jr., Trial Attorney, Contract Law Division, Office of the Judge Advocate General, U.S. Air Force (November 5, 1987).
[31]11 U.S.C. §§ 701-703 (1982).
[32]*Id.* § 1107 (appointment of a trustee in a chapter 11 reorganization is required only if special factors such as fraud are present or if the appointment is otherwise in the best interests of the creditors despite the extra costs involved.).
[33]*See In re* Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983); *In re* Pennsylvania Peer Review Org'n, Inc., 50 Bankr. 640 (Bankr. M.D. Pa. 1985).
[34]11 U.S.C. § 323 (1982).

trustee and debtor in possession have the same basic legal characteristics, any further discussion concerning a trustee will also apply to the debtor in possession unless otherwise stated.

The estate is a vital concept because bankruptcy controls only the assets included within it. The estate is created by the filing of a petition in bankruptcy and is basically composed of all property in which the debtor has some legal or equitable interest.[35] Other entities, including the government, holding the debtor's property are prohibited from taking any action other than preserving the property and turning it over to the trustee.[36] Of particular interest to the government is the inclusion of executory contracts[37] and causes of action[38] in the estate. Executory contracts are contracts with some performance remaining by both parties and contracts where no performance has commenced.[39] Under the Bankruptcy Code, the trustee decides whether to assume or reject an executory contract on behalf of the debtor's estate. Rejection provides the other party to the contract with a separate claim against the estate for breach damages.[40]

3. Preservation of the Estate

Certainly the most critical features of the bankruptcy system are the provisions for collecting the estate property and protecting it from creditors. Under the Bankruptcy Code, an automatic stay provision acts immediately to halt most judicial and administrative proceedings against the debtor or estate.[41] The trustee is also able to void certain transfers of the debtor's property.[42] Governmental refusal to

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[35]*Id.* § 541.

[36]*Id.* § 543.

[37]*In re* Corporacion de Servicios Medicos Hospital, 805 F.2d 440, 444 n.3 (1st Cir. 1986).

[38]H.R. No. 95-595, *supra* note 5, at 367, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6323.

[39]*See* H.R. rep. No. 95-595, *supra* note 5, at 347, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6303-04 ("Though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides. A note is not usually an executory contract if the only performance that remains is repayment. Performance on one side of the contract would have been completed and the contract is no longer executory."); *see generally In re* Alexander, 670 F.2d 885 (9th Cir. 1982); Countryman, *Executory Contracts in Bankruptcy*, Part I, 57 Minn. L. Rev. 439, 460 (1973) ("a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other"); Weintraub and Resnick, *What is an Executory Contract? A Challenge to the Countryman Test*, 15 U.C.C.L.J. 273 (1983).

[40]11 U.S.C. § 365(g) (1982).

[41]*Id.* § 362(a).

[42]*Id.* § 544.

grant or renew a franchise, license, or permit or even refusal to contract with the debtor because of the bankruptcy is considered discrimination and is prohibited.[43] All of these protection devices are given a broad interpretation to foster bankruptcy's stated goals of allowing the debtor a respite and a chance to start again with a relatively clean slate.[44]

The automatic stay provision in subsection 362(a) and the anti-discrimination rule in subsection 525(a) in particular have very serious consequences for the government. Although there is no exception if the anti-discrimination provision is applicable to an action, the government may obtain relief from the automatic stay when exercising police or regulatory power under subsection 362(b)(4) in certain actions against a debtor.[45] Even these exceptions, however, are narrowly construed[46] and usually do not result in diminution of the estate.[47] Of more practical use to the government is the relief from stay based on the general "good cause" provisions of subsection 362(d)(1).[48]

III. COLLISION BETWEEN BANKRUPTCY AND THE FEDERAL PROCUREMENT SYSTEM

A. GENERAL

The contractor considering the protection of bankruptcy will probably be experiencing difficulties in performing its government con-

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[43]*Id.* § 525(a). *See In re* Exquisito Services, Inc., 823 F.2d 151 (5th Cir. 1987).

[44]*See* H.R. Rep. No. 95-595, *supra* note 5, at 340, 366, 367, 370, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6296, 6297 (discussion of § 525(a) anti-discrimination provisions); *In re* Rees, 61 Bankr. 114, 120, 121 (Bankr. D. Utah 1986) (collecting cases); *In re* The A.C. Williams Company, 51 Bankr. 496, 500 (Bankr. N.D. Ohio 1985) (collecting cases). *But see In re* Exquisito Services, Inc., 823 F.2d 151, 153 (5th Cir. 1987) (discussion of § 362 automatic stay provisions). *See also In re* Elsinore Shore Associates, 66 Bankr. 723 (Bankr. D.N.J. 1986).

[45]11 U.S.C. § 362(b)(4), (5) (1982).

[46]*See In re* Wellham, 53 Bankr. 195, 197 (Bankr. M.D. Tenn. 1985); *In re* Continental Airlines, 40 Bankr. 299 (Bankr. S.D. Tex. 1984); *In re* I.D.H. Realty, Inc., 16 Bankr. 55 (Bankr. E.D.N.Y. 1981); Heckler Land Development v. Montgomery, 15 Bankr. 856 (Bankr. E.D. Pa. 1981); *In re* King Memorial Hospital, Inc., 4 Bankr. 704 (Bankr. S.D. Fla. 1981). *Contra* Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267, 273 (3d Cir. 1984) (§ 362(b)(4) should be construed as broadly as possible to allow states as much power as feasible under bankruptcy due to the general rule that federal preemption is not favored).

[47]For cases interpreting § 365(b)(5), see N.L.R.B. v. Edward Cooper Painting, Inc., 804 F.2d 934, 943 (6th Cir. 1986); Penn Terra Limited v. Department of Environmental Resources, 733 F.2d 267, 275 (3d Cir. 1984); *In re* Mansfield Tire & Rubber Co., 660 F.2d 1108, 1114, 1115 (6th Cir. 1981); *In re* Tauscher, 7 Bankr. 918 (Bankr. E.D. Wis. 1981).

[48]11 U.S.C. § 362(d)(1) (1982).

tract. Unrealistic delivery estimates, unanticipated costs, or any of a myriad of problems may have beset the contractor. Whether the government is to blame for the situation is immaterial to the immediate financial problems a termination for default would cause the contractor. *Bankruptcy thus becomes the contractor's refuge from the government's powerful remedies under the contract and applicable regulations.*

Upon the filing of the bankruptcy petition, the contractor is transformed into a debtor, protected by the automatic stay provisions,[49] and the government becomes merely one of numerous creditors.[50] From the contracting officer's or program manager's point of view this loss of special status is nothing less than a catastrophic degradation of their ability to carry out the procurement mission. Lengthy delays, funding problems, and protracted litigation in a strange forum are but a few of the possible difficulties to be faced. Nonetheless, the protection the debtor and other competing creditors receive in bankruptcy is in accordance with congressional bankruptcy policy.[51] The government must accept the fates that have brought it to the bankruptcy court and attempt to make full use of its remaining specialized legal remedies as well as those rights afforded to any creditor. From the government viewpoint, this may seem meager in comparison to how it usually stands against the contractor. Without the ability to terminate the contract, immediately recover inventory and property, or enforce numerous claims under the contract, the government must vigorously pursue its remaining remedies or be left out in the cold by creditors and lenders more experienced in security interests and the pitfalls of bankruptcy.

Further discussion will focus on three main problem areas: ter-

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[49]*Id.* § 362(a).

[50]Historically, the government has had some form of statutory priority when collecting a non-tax based debt, whether in bankruptcy or some other collective insolvency proceeding. Rev. Stat. § 3466 (1875); 31 U.S.C. § 191 (1964), *amended by* 31 U.S.C. § 3466. However, under section 507 of the present Bankruptcy Code, the government's unsecured non-tax claims have no priority, and are considered to be general unsecured claims. "The Government's *general priority for non-tax claims, currently the fifth* priority in section 64 of the Bankruptcy Act [of 1898], is abolished." S.Rep. No. 95-989, *supra* note 23, at 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5792. "The time has past when the sovereign can do no wrong and is entitled to the first of every insolvent estate." H.R. Rep. No. 95-595, *supra* note 5, at 194, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6154. *See generally* Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 3 (1971); Plumb, *Federal Liens and Priorities-Agenda for the Next Decade*, 77 Yale L.J. 228 (1967); Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905 (1954).

[51]*Id.*

mination of the contract; recovery of property from the debtor; and liquidation of claims. While each is a separate issue, not necessarily related to the resolution of the others, the author will analyze each against the common backdrop of the automatic stay.

B. BANKRUPTCY IMPACT ON THE CONTRACT

1. Bankruptcy Limitations on the Government's Ability to Terminate the Contract and To Pursue Other Remedies Against the Contractor

One of the government's first concerns when a contractor goes into bankruptcy is the status of the contract itself. The continued existence of the contract critically affects the fiscal obligation of funds to that particular contract and the government's ability to re-procure.[52] As previously indicated in part II, the automatic stay provision prohibits the government from exercising its administrative and contractual rights under the FAR to take any action against estate property, whether it is inventory, funds, supplies, or the contract itself.[53] Instead, the continued existence of the contract depends upon factors such as which bankruptcy chapter the debtor petitions under, the trustee's decision of whether the contract is needed for a reorganization, whether it is an executory contract under 11 U.S.C. § 365, and other limitations on the trustee's ability to assume the contract.[54]

This shift in power to the trustee negates both the government's power to terminate a contract for default and to terminate it for convenience. Practically, each type of termination makes a contract nonexecutory and thus exempt from the trustee's assumption powers. It is this common result that causes the bankruptcy system to treat these two quite different government remedies alike. While the termination for convenience is the less harsh of the two remedies from

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[52]Once federal funds are formally obligated to pay for the goods and services of the contract, any attempt to withdraw those funds without first terminating the government's liability to perform under the contract will result in a violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1349(a), 1350 (1982). Also, the government's ability to recover excess re-procurement costs and certain liquidated damages is predicated upon a termination of the contract for default. Fed. Acquisition Reg. 12.202, 52-212.4, 52.249-8 (1 Apr. 1984) [hereinafter FAR].

[53]Harris Products, Inc., ASBCA No. 30426, 87-2 BCA ¶ 19,807.

[54]One example is the trustee must cure or provide certain guarantees if the contract was in default at the time of the bankruptcy petition. *See generally* 11 U.S.C. § 365(b)-(m) (1982).

the debtor's perspective, the basic result is the same: the loss of a contract that may be necessary to the debtor's reorganization. The weight of bankruptcy policy on this point leaves little doubt that no general exception will be made for the "kinder" termination for convenience.

As a practical matter, the government is faced with continuing an unwanted contract that the trustee has decided is necessary for an effective reorganization under chapter 11. In contrast, under chapter 7 the contract may be continued for a brief period of time,[55] but relatively quick termination is usually in order.[56]

In the usual chapter 11 bankruptcy situation, because the contractor has not completed performance, and the government has not paid the full contract price, the contract is still executory and can be assumed as part of the estate.[57] If the contract is executory, the trustee, not the government, decides pursuant to the Code's assumption provisions in section 365 whether the contract is rejected or assumed. Should the trustee reject the government contract, a breach occurs and the court allows the government to file a damages claim as if the contract had been terminated for default before the bankruptcy petition filing.[58] In contrast, if the contract is no longer executory due to a completion of performance, such as payment by the government, the assumption provisions no longer apply. The trustee may not assume the debtor's uncompleted portion of the contract and the government is left to file a claim for breach.[59]

One limitation on the trustee's ability to assume the contract arises if the contract was in default at the time of the bankruptcy petition. In this situation the trustee must promptly cure the default and provide appropriate guarantees of future performance before assuming

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[55]11 U.S.C. § 721 (1982).

[56]Unlike other contracts that the trustee may assume and then assign for the benefit of the estate, under 41 U.S.C. § 15 (1982) government contracts may not be assigned to third parties over the government's objection. When the trustee or debtor in possession is assuming the contract in order to continue performance, the application of the statute's prohibition has been contested. However, assumption under chapter 7 solely to assign the contract further should be prohibited. For further discussion, see part III(A)(3) below.

[57]*See supra* note 39.

[58]11 U.S.C. § 365(g) (1982). The government should still formally terminate the contract in addition to the action of the trustee. *See In re* Invader, 71 Bankr. 564 (Bankr. W.D. Tex. 1987).

[59]*See In re* Record, 8 Bankr. 57 (Bankr. S.D. Ind. 1980). This view is in accord with the legislative history, which uses the example of a note not being an executory contract because no further performance is due by one party. H.R. Rep. No. 95-595, *supra* note 5, at 347, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6303, 6304.

the contract.[60] Practically, this restriction reduces the chances that the trustee will force the government to continue the contract with an unreliable contractor. Such a "mini-responsibility" determination and guarantee of satisfactory performance somewhat offsets the government's loss of its termination remedy. However, because the trustee makes the determination, subject to review by the court, the contracting officer's original responsibility determination made pursuant to FAR 9.103[61] is effectively superceded. The Bankruptcy Code shifts the decision to a trustee or a court without regard to the absence of the requisite expertise in government contract responsibility determinations. Under this system, the decision is made based on the Code's bias toward the rehabilitation of the debtor rather than the responsibility factors laid out in the FAR.[62] A better approach includes an individual with government contracts experience, such as the contracting officer, in this new de facto responsibility decision in order to bring the result more in line with the FAR.

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[60]11 U.S.C. § 365(b)(1) (1982). The duty to promptly cure has been interpreted as a higher standard than simply "within a reasonable time." General Motors Acceptance Corp. v. Lawrence, 11 Bankr. 44 (Bankr. N.D. Ga. 1981). What constitutes adequate assurance of cure and performance is once again left undefined by the Code despite the examples given in 11 U.S.C. § 361 (1982). The determination is made on a case-by-case basis, loosely patterned after the language in Uniform Commercial Code § 2-609(1) ("When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return."). *See In re* Sapolin Paints, Inc., 5 Bankr. 412 (Bankr. E.D.N.Y. 1980).

[61]FAR 9.103 reads in part: "(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility."

[62]FAR 9.104-1, General Standards, reads in part:

> To be determined responsible, a prospective contractor must—
> (a) Have adequate financial resources to perform the contract, or the ability to obtain them . . .;
> (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
> (c) Have a satisfactory performance record . . .;
> (d) Have a satisfactory record of integrity and business ethics;
> (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the prospective contractor . . .);
> (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them . . .; and
> (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

2. Automatic Stay Relief for the Government Under the Police and Regulatory Powers Exception, 11 U.S.C. § 362(b)(4)

Whether the regulatory and police power exception to the automatic stay [hereinafter the police power exception] is available depends upon what the government's motive is for seeking relief, what kind of relief is sought, and how the estate is affected. The relief provided by the police power exception in subsection 362(b)(4) consists of allowing another proceeding against the debtor to continue until resolved. Although the government obviously desires to remove the debtor from the more protective bankruptcy court to a more favorable forum, this relief from stay does not ordinarily translate into the freedom to terminate the contract or recover funds and property. Indeed, while this exception may be used to enforce policies promoting the public interest in many ways, the police power provisions usually do not provide the government with relief in the procurement area for the following reasons.

Under subsection 362(b)(4), the automatic stay does not affect "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."[63] The critical question is what type of action falls within the exception. The legislative history clearly indicates that the provision is designed to allow the government to take action to "prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws."[64] In narrowly interpreting this provision[65] the courts focus on the enforcement of general regulatory laws affecting the public health and safety[66] rather than on governmental attempts to enforce specific contractual rights.[67] Attempts to vindicate contractual rights are judicially rejected as "actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."[68] Thus, the two generally recognized tests[69] of when the police power exception applies focus on whether the government's ac-

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[63]11 U.S.C. § 362(b)(4) (1982).

[64]H.R. Rep. No. 95-595, *supra* note 5, at 343, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6299.

[65]*Supra* note 46 and accompanying text.

[66]*See* State of Missouri v. U.S. Bankruptcy Court, 647 F.2d 768, 776 (8th Cir.), *cert. denied*, 454 U.S. 1162 (1981) (court stated that 362(b)(4) did not encompass exercise of "regulatory laws that directly conflict with the control of the *res* by the bankruptcy court").

[67]*See In re* Corporacion de Servicios Medicos Hospital, 805 F.2d 440, (1st Cir. 1986).

[68]*In re* Lawson Burich Associates, 31 Bankr. 604 (S.D.N.Y. 1986).

[69]*See* N.L.R.B. v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th Cir. 1986) (collecting cases); *In re* Wellham, 53 Bankr. 195, 197 (Bankr. M.D. Tenn. 1985) (collecting cases); *In re* Herr, 28 Bankr. 465, 468 (Bankr. D. Me. 1983) (collecting cases).

tion is primarily based on a pecuniary interest[70] or on the promotion of public policy.[71] Examples of valid exercises of the police power under subsection 362(b)(4) include unfair labor practice hearings,[72] Equal Employment Opportunity Commission hearings on sexual and racial discrimination,[73] and Environmental Protection Agency actions.[74]

There is no specific exception, however, for national defense needs under the police power doctrine, and the government must meet the pecuniary and public policy tests noted above. This is a formidable task because the government's remedies in the procurement field are primarily pecuniary in nature and focus on the private rights of the parties involved rather than the public in general. Any government action that affects funds and other property properly included in the estate must clearly articulate a valid public policy reason to fit within the police power exception.

The potential difficulty in meeting this burden is demonstrated by one court's holding that the government failed to meet either test

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[70]*See In re* Charter First Mortgage, Inc., 42 Bankr. 380, 382 (Bankr. D. Or. 1984). In *Charter* the court stated:

> In reviewing the cases, it is clear to this court that in applying the pecuniary purpose test, it must first look to what specific acts the government wishes to carry out and determine if such advantage would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate.

Id. See also, Swan v. Devros, 37 Bankr. 731, 734 (Bankr. N.D. Ill. 1984); *In re* Thomassen, 15 Bankr. 907, 909 (9th Cir. 1981) ("[S]tate and local government units cannot, by the exercise of their policy or regulatory powers, subvert the relief afforded by the federal bankruptcy laws. When they seek to do so for a pecuniary purpose, they are automatically stayed.").

[71]*See In re* Herr, 28 Bankr. 465, 468 (Bankr. D. Me. 1983). "This test distinguishes between proceedings that effectuate public policy and those that adjudicate private rights: only the former are excepted from the automatic stay." *Id.* at 468; *In re* Wellham, 53 Bankr. 195, 197 (Bankr. M.D. Tenn. 1985). The court said the question was whether the government was "engaging in an action which affects the immediate parties to the action or whether it concerns a wider group subject to the authority of the government unit." *Id.* at 197.

[72]*See* N.L.R.B. v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986); Ahrens Aircraft, Inc., 703 F.2d 23 (1st Cir. 1983); N.L.R.B. v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981).

[73]*See, e.g.*, E.E.O.C. v. Hall's Motor Transport Co., 789 F.2d 1011 (3d Cir. 1986) (employment discrimination hearing allowed to proceed); *In re* Valley Kitchens, Inc., 68 Bankr. 373 (Bankr. S.D. Ohio 1986)(sexual discrimination hearing allowed to proceed); *In re* Bennett Paper Corp., 63 Bankr. 8 (Bankr. E.D. Mo. 1985) (employment discrimination hearing allowed to proceed).

[74]*See, e.g., In re* Commonwealth Oil Refining Co., 805 F.2d 1175 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 3228 (1987); United States v. Jones & Laughlin Steel Corp., 804 F.2d 348 (6th Cir. 1986).

even where the case involved contractor fraud.[75] The government had filed civil suit against the debtor based on fraudulent delivery of substandard metals to the Department of Defense. Although the suit sought damages under numerous theories, the government argued that the action was brought primarily under the False Claims Act and was also necessary in order to determine if the metals had created a safety hazard to members of the armed services. The court refused to lift the stay against the civil suit, indicating that because only one count of seventeen was under the False Claims Act, and other methods existed to determine if the metals had caused a physical danger, the suit was not primarily based on a non-pecuniary purpose. This ruling is an example of the narrowest interpretation of the police power exception and obviously should not be read to imply that taking action against fraudulent contractors is per se an impermissible exercise of the government's authority. So long as attacking fraud is the primary reason for an action against a debtor, and not a subterfuge to protect the government's pecuniary interest, the police power exception is satisfied.[76] One example of fraud that would obviously be within the exception is the situation where the fraud is ongoing. When a contractor is currently involved in defrauding the government, an action that is focused on stopping the illegal behavior and preventing its reoccurrence should be allowed to continue.

Another regulatory action against fraud which is a valid exercise of police and regulatory power is contractor debarment and suspension[77] under FAR subpart 9.4. Because suspension shares many of the characteristics of debarment, any further discussion of debarment also applies to suspension unless otherwise stated.

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[75]*See In re* Wellham, 53 Bankr. 195 (Bankr. M.D. Tenn. 1985); *see also In re* Ellis, 66 Bankr. 821 (Bankr. N.D. Ill. 1986) (state agency action to recover payments fraudulently obtained was not within the automatic stay exception despite potential to deter future fraud, because the actual fraud had been committed three years earlier).

[76]*Supra* notes 63-71 and accompanying text. *See* Dep't of Housing and Urban Development v. Sutton, 68 Bankr. 89 (Bankr. E.D. Mo. 1986); *In re* Liss, 59 Bankr. 556 (Bankr. N.D. Ill. 1986); *In re* Charter First Mortgage, Inc., 42 Bankr. 380 (Bankr. D. Or. 1984).

[77]*FAR 9.403 reads in part:*

> "Debarment," as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is "debarred."
>
> . . . .
>
> "Suspension," as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is "suspended."

Unlike the previously discussed governmental actions that focus on obtaining monetary relief from the contractor, the stated policy of debarment is to ensure that the government deals only with responsible contractors.[78] Debarment has traditionally been recognized as a proper and necessary tool for effective implementation of a statutory program. Proper implementation includes ensuring that only responsible bidders participate in government contracts.[79] The FAR follows the judicially accepted approach that debarment is a serious sanction used to guard the public interest rather than to punish the individual contractor.[80]

Thus, the stated purpose of debarment satisfactorily complies with the public policy and pecuniary purpose tests under the police power exception. Under the FAR, debarment has a clearly articulated purpose of protecting the public interest by ensuring that only responsible contractors do business with the government. Unlike the government's contractual remedies, debarment is not an adjudication of the rights of the parties under the contract but rather a vindication of the public's interest in a responsible procurement system.[81]

Debarment also meets the pecuniary purpose test because the action ordinarily is not applied to current executory contracts,[82] and the

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[78]FAR 9.402(a).

[79]*See, e.g.*, Janik Paving & Construction, Inc. v. Brock, 828 F.2d 84, 89-92 (2d Cir. 1987) (debarment is a proper means to enforce compliance with labor laws under CWHSSA); Gonzalez v. Freeman, 334 F.2d 570, 576, 577 (D.C. Cir. 1964) (debarment upheld as a necessary method to ensure successful implementation of surplus commodity program by Commodity Credit Corporation); Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961) (debarment authority upheld as necessary to ensure responsible bidding on government contracts under labor laws).

[80]FAR 9.402(b). *See, e.g.*, Gonzalez v. Freeman, 334 F.2d 570, 576, 577 (D.C. Cir. 1964), quoting Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 372 (D.C. Cir. 1961) ("Notwithstanding its severe impact upon a contractor, debarment is not intended to punish but is a necessary 'means for accomplishing the congressional purpose' of Commodity Credit."); Janik Paving & Construction, Inc. v. Brock, 828 F.2d 84, 91 (2d Cir. 1987) ("That . . . debarment may incidentally punish while it deters a statutory violation does not transform it into a purely punitive sanction . . . . [I]f the sanction serves to compel compliance with the statute's substantive goals, then it should not be deemed a 'penalty.' ").

[81]A possible exception to this rule may occur if the debarment is determined to be a means of punishing the contractor regardless of the present responsibility. *See generally* 1 The Nash & Cibinic Report ¶ 90 (1987); 27 The Government Contractor ¶ 79 (1985). Because punishment per se does not comport with the FAR's stated policy reasons, the bankruptcy court may do equity and deny exception to the automatic stay in these circumstances. This should be contrasted with actions under statutes such as the False Claims Act, where at least one court has held that an action to punish a fraudulent contractor was within subsection 362(b)(4). *See In re* Herr, 28 Bankr. 465 (Bankr. D. Me. 1983).

[82]FAR 9.405-1 provides:

> (a) Notwithstanding the debarment or suspension of a contractor, agencies may continue contracts or subcontracts in existence at the time the

government is not otherwise attempting to enforce a monetary claim against the estate. Because the law is well settled that a contractor has no right to do business with the government,[83] no property interest of the estate is involved in the government's refusal to award future contracts upon debarment. However, debarment is a limited action with prospective application that has little effect on the critical issues surrounding disposition of property, funds, and executory contracts.

3. Automatic Stay Relief for the Government Under Other Applicable Law and 11 U.S.C. § 365(c)

As we have seen, the government procurement remedies usually do not satisfy the police power exception to the automatic stay. Also, any relief granted rarely extends to termination of the present contract or actual recovery of funds from the debtor. Unlike the police power exception, the nonassignment provisions of section 365 of the Code do provide the government a more satisfactory approach to terminating an unsatisfactory contract with the debtor.[84]

Under the nonassignment provisions, the trustee may not assume an executory contract if applicable law prohibits assignment of the

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> contractor was debarred or suspended, unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.
>
> (b) Agencies shall not renew current contracts or subcontracts of debarred or suspended contractors, or otherwise extend their duration, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension.

It is doubtful that a bankruptcy court would allow an executory contract otherwise necessary to reorganization to be terminated pursuant to debarment. *Cf. In re* Corporacion de Servicios Medicos Hosp., 805 F.2d 440, 444-47 (1st Cir. 1986) (court refused to allow the government to terminate debtor's contract in part because the contract was the only asset, and to remove it would force the debtor from reorganization to liquidation under chapter 7). In the most serious situations that merit immediate termination of present contracts, the government could argue that the public interest absolutely requires such protection despite the impact on the debtor's estate. Subsection 362(b)(5) does not prevent all governmental action that might have monetary impact on the debtor. *See, e.g., In re* Lenz Oil Service, Inc., 65 Bankr. 292 (Bankr. N.D. Ill. 1986) (in interpreting what is allowed by § 362(b)(5), not every judgment that by its operation forces the debtor to spend money is actually a prohibited monetary judgment); *In re* Wheeling-Pittsburg Steel Corp., 63 Bankr. 641 (Bankr. W.D. Penn. 1986) (a back-to-work order was enforced although the debtor could lose enough by paying wages to endanger the prospective reorganization).

[83] *See* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). While debarment for fraud or other dishonesty raises a constitutional liberty interest, no property interest vests. *See, e.g.*, Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964); ATL Inc. v. United States, 736 F.2d 677 (Fed. Cir. 1984).

[84] 11 U.S.C. § 365 (1982).

contract or otherwise excuses the other party from performing or accepting performance from a party other than the debtor or debtor in possession.[85] An attempt by the trustee to assume such a contract constitutes adequate cause for the other party to obtain relief from the automatic stay and to terminate the contract.[86] Judicial interpretation of this provision has differed considerably on what types of contracts are within the purview of this subsection. Some courts have called for a narrow, restrictive reading of the nonassignment provisions to limit their application to contracts that traditionally involved nondelegable duties such as personal services.[87] In *Taylor Manufacturing*, the court based this interpretation on what it perceived to be a conflict between subsections (c)(1) and (f) of section 365.[88] The better interpretation however, is that no real conflict ex-

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[85]11 U.S.C. § 365(c) (1982) provides in part:

> (c) The trustee may not assume or assign any executory contract . . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties, if—
> (1)(A) applicable law excuses a party, other that the debtor, to such a contract . . . from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties; and
> (B) such party does not consent to such assumption or assignment; or
> (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

[86]*See In re* Adana Mortgage Banker, Inc., 12 Bankr. 977, 987, 988 (Bankr. N.D. Ga. 1980). 11 U.S.C. § 362(d) (1982) provides in part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

[87]*In re* Taylor Manufacturing, 6 Bankr. 371 (Bankr. N.D. Ga. 1980). In *Taylor* the court relied upon the meager legislative history of the drafter's intent, quoting at 372 n.2, "executory contracts requiring the debtor to perform duties nondelegable under applicable nonbankruptcy law should not be subject to assumption against the interest of the nondebtor party." *See* Commission Report, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. 199 (1973). The court also looked to Collier on Bankruptcy (1980), which indicated that § 365(c) should be limited in application to personal services or confidential types of contracts. *See also* Matter of Fulton Air Service, Inc., 34 Bankr. 568 (Bankr. N.D. Ga. 1983); *In re* Haffner's 5 Cent to $1.00 Stores, Inc., 26 Bankr. 948 (Bankr. N.D. Ind. 1983); *In re* Bronx-Westchester Mack Corp., 20 Bankr. 139 (Bankr. S.D.N.Y. 1982); *In re* U. L. Radio Corp., 19 Bankr. 537 (Bankr. S.D.N.Y. 1981); *In re* Boogaart of Fla., Inc., 17 Bankr. 480 (Bankr. S.D. Fla. 1981); *In re* Varisco, 16 Bankr. 634 (Bankr. M.D. Fla. 1981).

[88]*See Taylor*, 6 Bankr. at 371, 372. The court indicated that under the rules of statu-

ists and that subsection 365(c) should be given its plain meaning without any undue limitation in application.[89]

The statute as written does not qualify or otherwise limit the applicable laws that may prohibit assignment of the contract. One court, in rejecting a "radical construction" limiting the section, points out that there is no indication in the legislative history that only personal service contracts were contemplated by the drafters.[90]

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tory construction, subsection (f) was the general rule and subsection (c) was the exception. The trustee could assume an executory contract despite applicable law to the contrary so long as the narrower subsection (c) did not apply. Subsection (c) was limited to prevent assumption of the relatively few traditionally nondelegable contracts in the personal services area. 11 U.S.C. § 365(f) (1982) provides in part:

> (f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract . . . of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract . . ., the trustee may assign such contract or lease under paragraph (2) of this subsection.
>
> (2) The trustee may assign an executory contract . . . of the debtor only if—
>
> (A) the trustee assumes such contract . . . in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract . . . is provided.

In *Fulton* the court expanded upon this argument, saying that construing subsection (c) broadly would render subsection (f) meaningless. Great emphasis was put on the use of different language in subsections (c) and (f) in referring to "applicable law." While subsection (c) refers to laws *excusing* performance, subsection (f) alludes to laws *prohibiting* assignment. The court concluded the drafters must have intended this distinction to mean the two subsections were referring to different types of laws.

[89]*See In re* Pioneer Ford Sales, Inc., 729 F.2d 27 (1st Cir. 1984); *In re* Nitec Paper Corp., 43 Bankr. 492 (D.D.C. 1984). Both cases indicated that no real conflict existed between the provisions of § 365(c)(1) and (f)(1). In *Nitec* the court stated that § 365(f)(1) was designed to allow the trustee to override contractual provisions that attempted to bar assignment of the contract "even if 'applicable law' in the state gives legal force to contractual provisions barring assignment." *Nitec*, 43 Bankr. at 498. *Nitec* rejected any reading of subsection (f)(1) that would let the trustee make an assignment despite specific state or federal statutory prohibitions. This view was reinforced in *Pioneer*, which explained that subsection (c)(1) referred to applicable anti-assignment laws "whether or not" they are mentioned in the contract, while subsection (f)(1) is silent on this language. The court concluded that the exclusion of the "whether or not" language meant that subsection (f)(1) dealt only with laws that enforced anti-assignment provisions in the contract. *Pioneer*, 729 F.2d at 29. Such provisions would be struck down just as the Code does to contractual provisions that purport to allow the termination of a contract if a party files a petition in bankruptcy. The court went on to question *Taylor*'s cognitive leap from the "conflict" to a conclusion that subsection (c)(1) was limited to personal services types of contracts, especially when Congress could have incorporated this into the statute so easily and did not.

[90]*In re* Braniff Airways, Inc., 700 F.2d 935, 943 (5th Cir. 1983). Although the pre-Code rule that disallowed assignment of personal services contracts in bankruptcy may have been a starting point for § 365(c), "the drafters actually codified a much broader principle." *Braniff*, 700 F.2d at 943. The court also pointed out that Congress would not have used such a broad term as "applicable law" if the intent was to limit the rule to

Another court, in rejecting the restrictive approach of *Taylor,* has indicated that trying to determine if any particular contract is for personal services and thus unassignable is an uncalled-for complication of an otherwise simple test under subsection 365(c).[91]

The nonassignment provisions are relevant to government procurement due to the Nonassignment Act [the "Act"], which prohibits the assignment of Federal Government contracts by the contractor.[92] Such an attempt to assign will give the government the option to terminate the contract. The Act protects the government from having to deal with numerous different parties not originally within the contract and also ensures that the government obtains its performance from the original party to the contract.[93] The policy behind the Act is also interpreted as being broader than the common law rule concerning personal performance contracts.[94] Without this protection, the contracting officer's responsibility determination under the FAR would be meaningless, and the government might be faced with accepting performance from a non-responsible contractor.

As "applicable law" under subsection 365(c)(1), the Act has been construed to allow the government to terminate executory contracts for default after a debtor in possession has attempted to assume them.[95] However, the government's right to refuse to allow assump-

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personal service contracts. Under this rule the trustee was not allowed to assume airport leases due to the provisions of The Washington Airport Act, 7 D.C. Code §§ 1101-1107, and 14 C.F.R. § 159.91(a).

[91]*See In re* Pioneer Ford Sales, Inc., 729 F.2d 27, 29 (1st Cir. 1984). The legislative history of § 365(c) encourages a broad interpretation, rather than *Taylor's* restrictive application, of what applicable laws will prohibit assignment.

[92]41 U.S.C. § 15 (1982) provides in part:

> No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of actions, however, for any breach of such contract by the contracting parties, are reserved to the United States.

[93]*See* Hobbs v. McLean, Iowa, 117 U.S. 567 (1886); Thompson v. Commissioner of I.R.S., 205 F.2d 73 (3d Cir. 1953).

[94]*See* Chemical Recovery Co. v. United States, 103 F. Supp. 1012 (Ct. Cl. 1952).

[95]*See In re* West Electronics, Inc., 852 F.2d 79 (3d Cir. 1988). In *West* the Air Force petitioned the Bankruptcy Court to allow it to terminate a contract with West Electronics, a debtor in possession. The Air Force argued that the Nonassignment Act and section 365(c) barred West from assuming the contract over governmental objection. Although the Bankruptcy and District Courts denied the petition, the Third Circuit reversed and ordered the lower court to lift the automatic stay and to allow the Air Force to terminate the contract. In so ruling, the Third Circuit stated that the literal meaning of the Nonassignment Act prevented a third party, such as a debtor in possession, from assuming a defense contract. *See also In re* Adana Mortgage Bankers, Inc., 12 Bankr. 977 (Bankr. N.D. Ga. 1980). The Government National Mortgage Associa-

tion is qualified by some courts.[96] One such qualification prevents termination unless there is a showing that the assignment of the contract might cause the problems the that Act was designed to avoid.[97] At least one federal circuit rejected such a limitation of the plain language of the Nonassignment Act.[98] One other court also indicated that because the Nonassignment Act satisfies the general requirement under subsection 365(c)(1), the Bankruptcy Code itself operates to preclude the contract assumption, whether or not the assumption might be mandated by operation of law outside of a bankruptcy situation.[99] This is the better approach because the bankruptcy court is not required to delve beyond the surface of an anti-assignment statute to determine if the plain requirements of the nonassignment provisions are met.[100]

Government contracts that incorporate certain financing provisions under part 32 of the FAR are also arguably exempt from assumption due to subsection 365(c)(2). The nonassignment provisions in subsection (c)(2) apply whether or not any other applicable law would allow or prohibit assignment.[101] Subsection (c)(2) prohibits assumption of executory contracts that directly or indirectly extend financing to the debtor.[102] Government contracts that incorporate loan guarantees,[103] advance payments,[104] or progress payments[105]

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tion was entitled under the Nonassignment Act and the National Housing Act to refuse to allow the debtor in possession to assume guaranty contracts.

[96]*See In re* Adana Mortgage Bankers, Inc., 12 Bankr. 977, 984 (Bankr. N.D. Ga. 1980).

[97]*See* Thompson v. Commissioner, 205 F.2d 73 (3d Cir. 1953); *see also Adana Mortgage Bankers*, 12 Bankr. at 984, 985. Many of the factors the court enumerates in *Adana* to justify application of the Nonassignment Act to the GNMA contracts are also present in the federal procurement area. These factors include the need for integrity, capability, and financial and managerial stability. The selection of federal contractors also focuses on responsibility as a prerequisite to the award of any procurement contract. Just as the integrity of the GNMA system and ultimately the Federal Government was involved in *Adana*, the integrity of the procurement system depends on the government's ability to select responsible contractors. Due to the enormousness of the system, the government must rely on the contractors' integrity and ability for the continued stability needed for successful accomplishment of the procurement mission.

[98]*See In re* West Electronics, Inc., 852 F.2d 79 (3d Cir. 1988). The court specifically states that there can be no doubt that the literal meaning of the Nonassignment Act was intended by Congress, and that an insolvent debtor is not the same entity as a solvent contractor for the purposes of the Act.

[99]*See In re* Pennsylvania Peer Review Org'n, Inc., 50 Bankr. 640, 645, 646 n.7 (Bankr. M.D. Penn. 1985).

[100]*Id.; cf. In re* Pioneer Ford Sales, Inc., 729 F.2d 27 (1st Cir. 1984).

[101]*Adana Mortgage Bankers*, 12 Bankr. at 986.

[102]*See In re* United Press International, Inc., 55 Bankr. 63 (Bankr. D.D.C. 1985).

[103]FAR 32.3.

[104]FAR 32.4.

[105]FAR 32.5.

do provide financing to the debtor.[106] If the contract involves substantial financing, subsection (c)(2) should be available to block assumption by the trustee.

While the operation of the provisions of subsection 365(c) should enable the government to reject assumption of the contract by the trustee or debtor in possession, some bankruptcy courts will undoubtedly hesitate to follow this strict interpretation due to its harsh results. Operation of such a statute acts to strip the court of its power to control contracts that may be critical to a successful reorganization. Because the bankruptcy court has the equitable power to reject laws perceived as causing an inequitable result, the government's attempts to pursue this remedy will not be universally successful.

4. Impact of Bankruptcy Discrimination Prohibitions under 11 U.S.C. § 525 on the Government Contract

Apart from the Bankruptcy Code's impact on the current contract with the debtor, the government must also be concerned about the Code's protection of the debtor in the future. As previously discussed,[107] the anti-discrimination provisions in section 525(a) prohibit the government from taking certain actions against the debtor if the action is based on the debtor's bankruptcy.[108] These provisions have serious impact on the government in two related areas. First, whether to exercise the option years in a contract is normally a discretionary decision made by the government based solely upon its best interests.[109] Second, great deference is also given to a contracting officer's adverse responsibility determination due to the contractor's financial problems.[110] Bankruptcy, however, restricts the con-

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[106]While the Bankruptcy Code and its legislative history are not clear on what financing includes (*see supra* note 85), clearly government contract provisions that incorporate major financing and loan guarantees must enhance the debtor's financial situation. This forced enhancement of a debtor is at least partially what the section was designed to avoid. H.R. Rep. No. 95-595, *supra* note 5, at 348, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6304.

[107]*See supra* notes 43, 44 and accompanying text.

[108]11 U.S.C. § 525 (1982) reads in part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, . . . deny employment to, terminate employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title.

[109]FAR 17.201 reads in part: " 'Option' means a unilateral right in a contract by which, for a specified time, the Government may elect . . . to extend the term of the contract."

[110]*See, e.g.*, American Bank Note Company, Comp. Gen. Dec. B-222589 (18 Sept. 1986), 86-2 CPD ¶ 316; Brunswick Corporation, Comp. Gen. Dec. B- 223577 (16 Sept.

tracting officer's discretion in these matters, and provides pitfalls for the unwary.

The degree to which the anti-discrimination provisions will affect the government's actions depends upon whether the particular bankruptcy court follows a restrictive or expansive interpretation of what discrimination is prohibited. A restrictive interpretation basically limits application to discrimination that results *solely* from the debtor's status, or in one court's words, "only differentiation between debtor and non-debtor is precluded by the statute."[111] A broad interpretation prohibits any discrimination that might thwart bankruptcy's general fresh start policy.[112] While the majority of bankruptcy courts favor the broad approach, the appellate courts generally follow the more conservative narrow interpretation.[113] However, the government should not assume that it will ultimately prevail at the appellate level. Rigid compliance to the rule will avoid yet another intrusion of the bankruptcy court into the procurement process.

Strict adherence to the spirit and letter of the anti-discrimination provisions is difficult when the contracting officer is faced with the prospect of awarding new business to the debtor who may or may not be in default on other contracts. Under FAR 9.103 the contracting officer is required to make an affirmative finding that the contractor meets certain responsibility standards before a contract can be awarded.[114] Because a lack of adequate financial resources and problems in having the resources needed to meet a delivery schedule are normal in a bankruptcy situation, the contracting officer may be tempted to make a nonresponsibility determination based solely upon the contractor's bankruptcy status. Such a decision is exactly what the anti-discrimination provisions prohibit.[115] Although the precise

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1986), 86-2 CPD ¶ 308; Industrial Maintenance Services, Inc., Comp. Gen. Dec. B-223300 (24 June 1986), 86-1 CPD ¶ 588 (all three cases holding that absent a real showing of fraud, bad faith, or complete ignorance of the responsibility criteria, the contracting officer's determination of nonresponsibility will not be questioned).

[111]*In re* Exquisito Services, Inc., 823 F.2d 151, 153 (5th Cir. 1987) (collecting cases); *see also, e.g., In re* Goldrich, 771 F.2d 28 (2d Cir. 1985); Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984).

[112]*See In re* Exquisito Services, Inc., 823 F.2d 151, 153 (5th Cir. 1987).

[113]*See, e.g., In re* Rees, 61 Bankr. 114, 122 (Bankr. D. Utah 1986).

[114]*Supra* notes 61, 62.

[115]*See, e.g., In re* Coleman Am. Moving Services, Inc., 8 Bankr. 379 (Bankr. D. Kan. 1980) (Air Force contracting officer's nonresponsibility determination was in violation of subsection 525(a) because the decision focused upon the debtor's status under chapter 11); *In re* Son-Shine Grading, Inc., 27 Bankr. 693 (Bankr. E.D.N.C. 1983) (state transportation department decision to remove debtor from a pre-qualified bidders list due to chapter 11 reorganization violated subsection 525(a)); *In re* Marine Electric Railway Products Div., Inc., 17 Bankr. 845 (Bankr. E.D.N.Y. 1982) (N.Y. City transit authority rejection of bid solely because of debtor in possession status under chapter 11 prohibited by § 525).

language of subsection 525(a) refers to discriminatory hiring and employment practices, the courts have consistently interpreted this to include contracting as well.[116]

While difficult, the task of complying with both the directives of subsection 525(a) and the FAR is not insurmountable. Some guidance for what the contracting officer can properly consider may be found in the pertinent legislative history. Permissible factors include "future financial responsibility or ability,"[117] "the factors surrounding the bankruptcy, . . . [and present] managerial ability."[118] A proper responsibility determination must be founded on a realistic evaluation of the ability to perform the contract, without regard to debtor's bankruptcy status. While this may seem an artificial distinction, one should remember that in the bankruptcy arena the contracting officer's nonresponsibility determination will be closely scrutinized by a forum that is operating under its own set of rules and guided by differing policies.

As previously mentioned, a second example of the anti-discrimination provisions' impact on the government's contracting discretion concerns the exercise of option years in existing contracts. At least one court has held that the government's refusal to exercise its option to extend a contract an additional year with a debtor undergoing chapter 11 reorganization is prohibited discrimination.[119] In *Exquisito* the government refused to exercise the option years in a food services contract that was awarded to the debtor under the auspices of the Small Business Association's 8(a) program. The court compared the 8(a) program to a franchise where the government contracted with the S.B.A., which in turn granted the exclusive performance rights to the debtor. After finding that the government failed to renew the "franchise" solely because of the debtor's chapter 11 petition, the court stated that the government violated subsection 525(a). As a result, the court ordered the government to renew the contract with the debtor. Despite the court's professed intent to narrowly interpret the anti-discrimination provisions, calling a government contract a renewable franchise is more in accord with a broad interpretation of the statute. The better view, as the dissent in *Exquisito* points out,[120]

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[116]*See, e.g., In re* Marine Electric Railway Products Div., Inc., 17 Bankr. 845, 851-53 (Bankr. E.D.N.Y. 1982); *In re* Coleman Am. Moving Services, Inc., 8 Bankr. 379, 383 (Bankr. D. Kan. 1980).

[117]S. Rep. No. 95-989, *supra* note 23, at 81, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5867.

[118]H.R. Rep. No. 95-595, *supra* note 5, at 165, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6126.

[119]*In re* Exquisito Services, Inc., 823 F.2d 151, 154 (5th Cir. 1987).

[120]*Id.* at 155.

is that a government contract, whether awarded through the auspices of the S.B.A. or not, should not be considered a grant of privilege or franchise because no one has the right to do business with the government. It should also be noted that because the franchise analogy depends upon the intervention of the S.B.A., the court's rationale cannot be extended to contracts an agency directly awards to a contractor. As a result, under *Exquisito* subsection 525(a) applies only to contracts under the S.B.A.'s 8(a) program. There is no justification under bankruptcy policy for differing treatment of contracts based solely upon whether they are under the auspices of the S.B.A.

Although *Exquisito* should be considered an unjustified expansion of the scope of subsection 525(a), the same result might have been reached had the court decided that the government's refusal to renew the contract was discrimination in the employment sense. Such an interpretation would require a broad application of the statute, but as discussed earlier, numerous courts are willing to do so in the cause of protecting the debtor. Thus, while *Exquisito* should be read as being limited to its facts, the government must ensure that contracting officers are educated on the impropriety of taking adverse action solely because a contractor is in bankruptcy. The remedy granted in *Exquisito* would be a much harsher lesson indeed.

C. BANKRUPTCY JURISDICTION AND LIQUIDATION OF CLAIMS

Unlike the methods previously suggested that may allow the government to terminate a contract, no automatic stay relief exists for expeditious recovery on monetary contractual claims. The government's right to recover unliquidated progress or advance payments, excess re-procurement costs, and other breach damages is reduced to a low priority claim against the estate. In addition to the government's claims, the debtor or trustee also normally raise counterclaims under the contract against the government. These claims may be for equitable adjustments under the contract, a termination for convenience settlement, and damages for a wrongful termination for default, to name but a few possibilities.

Adjudicating these claims is often a difficult and lengthy process that ordinarily is accomplished pursuant to the Contract Disputes Act of 1978. However, in bankruptcy "[t]he bankruptcy court normally supervises the liquidation of claims," whether or not another forum exists to resolve the claim.[121] Whether the bankruptcy court should

[121]Nathanson v. National Labor Relations Board, 344 U.S. 25 (1952). *See also* Gardner v. New Jersey, 329 U.S. 565 (1947); Zimmerman v. Continental Air Lines, Inc., 712

defer to the ASBCA for resolution of a government contract claim involves applying some form of the doctrine of primary jurisdiction.[122] Arguably, one government goal is to remove the debtor from the bankruptcy forum, which is biased toward rehabilitating the debtor, to the ASBCA or Claims Court, which are more experienced in government contracts and unconcerned with saving the debtor from financial distress. This approach presumes that as a general rule, the more knowledgeable the forum the less likely the debtor is to prevail in the liquidation of the parties' contract claims.

The majority of courts that address this issue defer liquidation of government contract claims to the more specialized forum. In the typical case the government either challenges the bankruptcy court's jurisdiction as being inconsistent with the Contract Disputes Act or moves to have the court defer the matter for resolution by the ASBCA. The practical effect of such a deferral is that the contract claims are processed de novo pursuant to the Contract Disputes Act, and the resulting liquidated monetary judgment is then filed in the bankruptcy court as a claim for or against the estate. Whichever party is making the claim bears the responsibility for initiating the claim, which still includes presenting the claim to the contracting officer as required by the Contract Disputes Act. Only then can the contested claim go to the ASBCA or Claims Court for final decision on issues of entitlement and quantum of recovery.

In *Gary Aircraft*, a leading pre-Contract Disputes Act case, the Fifth Circuit thoroughly analyzed the provisions, policies, and histo-

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F.2d 55, 56 (3d. Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984); *In re* Continental Airlines Corp., 64 Bankr. 882, 886 (Bankr. S.D. Tex. 1986). The liquidation of claims is a "core" proceeding under 28 U.S.C. § 157(b) (1982), to which the bankruptcy court has exclusive jurisdiction. Although the court may defer to an administrative forum for liquidation of contingent claims, this should not be confused with the court's ability to abstain from hearing a case based on comity with a state court. See 28 U.S.C. § 1334(c)(1) (1982). Deferment for liquidation is not a similar relinquishment of jurisdiction.

[122] Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956). For an excellent discussion of the doctrine of primary jurisdiction and its effect on aspects of the jurisdiction of the Armed Forces Board of Contract Appeals, see Ditton, *The Doctrine of Primary Jurisdiction and Federal Procurement Fraud: The Role of the Boards of Contract Appeals*, 119 Mil. L. Rev. 99 (1988).

ries of the Bankruptcy Act of 1898 and of federal procurement statutes and regulations in order to resolve the conflict between them.[123] In deciding to defer to the ASBCA, the court considered the bankruptcy court's discretion to defer to another forum for claims liquidation, the exclusive jurisdiction of the Court of Claims to resolve claim against the government, the lack of undue delay in deferring to the Board of Contract Appeals, the esoteric nature of government procurement law, and the expertise of the ASBCA in this area of law.[124] In promulgating its rule of deferment, the Fifth Circuit declined to rule on the issue of whether the bankruptcy court had jurisdiction over the claim.[125]

Although deferment to other administrative bodies is not universally accepted in bankruptcy,[126] the cases that have since dealt with liquidation of claims in government contracts follow *Gary Aircraft*.[127]

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[123]*In re Gary Aircraft, Corp., 698 F.2d 775 (5th Cir.), cert. denied*, 464 U.S. 820 (1983). Prior to the Contract Disputes Act, a contractor's claims were governed by the disputes clause, which required the claims to pass through the contracting officer and the agency's board of contract appeals prior to suit in the Court of Claims. This exclusive scheme was contrasted with the Bankruptcy Act, which provided exclusive jurisdiction over cases in bankruptcy. Two previous cases that had accepted deferral to the ASBCA were United States v. Digital Products, Corp., 624 F.2d 690 (5th Cir. 1980) (resolution of claims based on termination for default should go to ASBCA) and *In re* Verco Industries, 27 Bankr. 615 (Bankr. 9th Cir. 1982) (lower court had deferred issues arising from the termination for default to the ASBCA).

[124]*Gary Aircraft*, 698 F.2d at 783, 784.

[125]*Id.* at 784 n.6.

[126]*See, e.g.*, Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3d Cir. 1983), *cert denied*, 464 U.S. 1038 (1984) (in balancing two federal schemes, because bankruptcy can vindicate the purpose of the Arbitration Act, mandatory arbitration proceedings will be stayed); *In re* McLean Industries, Inc., 76 Bankr. 852 (Bankr. S.D.N.Y. 1987) (because the issue involved was not esoteric, and within the province of the bankruptcy court, no lifting of stay for admiralty proceeding); *In re* Amalgamated Foods, Inc., 41 Bankr. 616 (Bankr. C.D. Cal. 1984) (arbitration procedures under ERISA rejected because bankruptcy was an adequate if not better method to accomplish the statute's purposes because no specialized knowledge was required; *Gary Aircraft* inapplicable); *In re* Compton Corp., 40 Bankr. 880 (Bankr. N.D. Tex. 1984) (DOE proceeding to recover overcharges stayed because not so specialized that bankruptcy proceeding could not properly resolve the claim amounts).

[127]*See, e.g., In re* Invader Corp., 71 Bankr. 564 (Bankr. W.D. Tex. 1987) (liquidation of costs surrounding termination for default of Navy contractor would be deferred to the ASBCA); *In re* Meisner Industries, Inc., 54 Bankr. 89 (Bankr. M.D. Fla. 1985) (contractor's claim for progress payment deferred to ASBCA); *In re* Economy Cab and Tool Co., Inc., 47 Bankr. 708 (Bankr. D. Minn. 1985) (contractor's claim for unpaid progress payment deferred to the administrative appeal process); *In re* American Pouch Foods, Inc., 30 Bankr. 1015 (D. Ill. 1983), *aff'd*, 769 F.2d 1190 (7th Cir. 1985); *In re* Vogue Instruments, Corp., 31 Bankr. 87 (Bankr. E.D.N.Y. 1983) (debtor's action in bankruptcy court contesting termination for default stayed until resolution by ASBCA).

This deference to the ASBCA in matters clearly within the scope of the Contract Disputes Act should be contrasted with questionable issues, such as contractor fraud. *See* United States v. General Dynamics Corp., 644 F. Supp. 1497 (C.D. Cal. 1986),

Because the Claims Court is of like stature with the boards of contract appeals under the Contract Disputes Act, there is no reason for limiting deferment to the ASBCA.[128] Deferment continues to be a matter of discretion in the bankruptcy court, subject to the needs of each particular case. Government attempts to argue that the Contract Disputes Act and its exclusive jurisdictional scheme[129] divest the bankruptcy courts of jurisdiction over government contract claims are rejected.[130] While the bankruptcy court arguably needs such discretion and flexibility to best settle the estate, it should be the rare case where the court should not defer to the statutorily mandated contract disputes resolution system. The bankruptcy interest is adequately vindicated by the expeditious liquidation and return of the claim to the bankruptcy court, because as a rule, collection of a monetary judgment cannot otherwise be made against the debtor.[131]

D. OWNERSHIP, TITLE, AND POSSESSION OF THE ESTATE

1. Ownership of Funds and Material

One of the most bitterly disputed issues involving government procurement and bankruptcy concerns the status of funds and inventory

rev'd, 828 F.2d 1356 (9th Cir. 1987) (Ninth Circuit reversed the district court decision to defer to the ASBCA, under a primary jurisdiction theory, issues from a federal criminal fraud case). While this decision casts doubt on whether the boards of contract appeals even qualify as administrative agencies to which primary jurisdiction can apply, this position is contrary to the majority of bankruptcy cases, which accept deferring traditional contract claims to the boards.

[128]Previous cases such as *Gary Aircraft* restricted the deferment to the Board of Contract Appeals because prior to the Contract Disputes Act, exhaustion of the board appeal was required before appeal was allowed to the Court of Claims.

[129]41 U.S.C. §§ 602, 605, 607 (1982).

[130]28 U.S.C. §§ 1334(a)-(b), 157(a)-(b) (1982). *See, e.g., In re* Invader Corp., 71 Bankr. 564, 567 (Bankr. W.D. Tex. 1987); *In re* Vogue Instruments, Corp., 31 Bankr. 87, 90 (Bankr. E.D.N.Y. 1983). Although other courts do not specifically discuss jurisdiction, the existence of jurisdiction must be assumed or there would be no discretion to exercise in deferring to the ASBCA. Also, other courts, including *Gary Aircraft*, may discuss deferment as required by law in this area, but this rule is always qualified by the statement that there be no countervailing considerations or that the deferment may not cause undue delay. In such cases the court could proceed under 11 U.S.C. § 503(c) (1982) without deferment to the ASBCA. *See, e.g., Gary Aircraft*, 698 F.2d at 784 n.7; *In re* Meisner Industries, Inc., 54 Bankr. 89 (Bankr. M.D. Fla. 1985). While it is arguable that the enactment of the exclusive jurisdictional provisions of the Bankruptcy Code and the Contract Disputes Act during the same year indicated an intent that each should not interfere with the other's special area, the present bankruptcy courts apparently disagree. Bankruptcy courts must bear in mind, however, the requirement to exercise sound discretion in deferring to another administrative system established by Congress. *See, e.g.*, Nathanson v. N.L.R.B., 344 U.S. 25 (1952) (bankruptcy court should defer to the N.L.R.B. for liquidation of unfair labor practice claims); Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) (bankruptcy court should defer to Railway Labor Adjustment Board on union dispute in railway reorganization).

[131]11 U.S.C. § 365(b)(5) (1982). *See In re* Sam Daily Realty, Inc., 57 Bankr. 83 (Bankr D. Haw. 1985).

held by the contractor in bankruptcy. A basic tenant of the Bankruptcy Code is that all property, tangible and intangible, in which the debtor has a legal or equitable interest will be included in the estate when the bankruptcy petition is filed.[132] Such property is protected by the automatic stay provisions and will be subject to use and distribution by the trustee according to applicable bankruptcy law. If the debtor possesses property but has no accompanying ownership interest in it, the true owner is entitled to immediate relief from the automatic stay under subsection 362(d)(1) and to recovery of the property.[133] If the creditor merely holds a lien or security interest in the property rather than complete title, however, then the property remains in the estate with usually no prospect of immediate relief from the bankruptcy court.[134]

Under the financing methods in part 32 of the FAR[135] the government protects itself financially by using contractual clauses to reserve title to property and create paramount liens on unliquidated funds. These provisions are found in the progress payments clause, and paramount lien provisions also exist in the advance payments clause. The clauses defend the government's interests not against the bankrupt contractor but against the contractor's other creditors, who are competing for the same remaining assets. The progress payments clause, however, is of greater concern in bankruptcy than the advance payments provisions. Under the progress payments clause, the government receives title to all inventory, work-in-progress, materials, and any other property that is properly allocable to the contract, as of the date of the contract or when the property should have been allocated to the contract.[136] If these title vesting provisions are

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[132]11 U.S.C. § 541(a) (1982).

[133]*See, e.g., In re* American Pouch Foods, Inc., 769 F.2d 1190 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

[134]11 U.S.C. § 544(a) (1982) gives the trustee the rights of a hypothetical creditor with a judicial lien against the debtor's property as of the filing of the bankruptcy petition. The trustee will utilize this superior lien position to prevent the lien creditor from taking immediate possession of the property.

[135]FAR 32.3, 32.4, 32.5.

[136]The progress payments clause, FAR 52.232-16, provides in part:

> (d)(1) Title to the property described in this paragraph (d) shall vest in the Government. Vestiture shall be immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.
> (2) "Property," as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable to this contract under sound and generally accepted accounting principles and practices.
> (i) Parts, materials, inventories, and work in progress;

given their plain meaning, the government is entitled to prompt recovery of the property from the estate, which in turn promotes speedy and efficient re-procurement. If the progress payment clause reserves title and not just a security interest, the government is also not required to file a financing statement or otherwise perfect its interest under any other federal or state law.

2. Title vs. Lien Theory

Some recent courts and commentators interpret the progress payment clause as providing only a lien that must be dealt with just as any other security interest on property in the estate.[137] The arguments advanced to support the newer interpretation are based on the historical development of government financing and policy arguments decrying any favored treatment of the government in the procurement arena. However, the better interpretation continues to give literal meaning to the title vesting provisions of the progress payments clause. A careful review of both the historical background of this issue and the competing policies involved supports this proposition.

At the heart of the dispute lies a traditional statutory prohibition against advancement of funds on contracts in excess of performance already received by the government. From 1823 to the present, some form of this prohibition against advance payments has existed.[138] This flat prohibition obviously required the contractor to obtain financing from other sources, which was bound to negatively affect

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(ii) Special tooling and special test equipment to which the Government is to acquire title under any other clause of this contract;

(iii) Nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds patterns, taps gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (ii) above; and

(iv) Drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to the Government by other clauses of this contract.

See also 41 U.S.C. § 255 (1982). The above provision should be compared to the construction progress payment clause, FAR 52.232-5, which reads in part: "(d) All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government" (emphasis added). One commentator has pointed out that although this interest is less than provided by FAR 52.232-16(d)(1), the end result is usually the same because liens may not attach to materials incorporated into and work done on government real property. This negates the importance of whether payment has been made. *See* 2 The Nash & Cibinic Report ¶ 5 (1988).

[137]*See, e.g.*, Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1037 (1983).

[138]*See In re* American Pouch Foods, Inc., 769 F.2d 1190, 1193 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

procurement in certain circumstances. Because of the potential for serious adverse effects on the procurement mission, a doctrine evolved whereby the government made partial or progress payments to contractors in exchange for a proportional vesting of title in the government to the unfinished work.[139] In time, statutes were enacted to allow advance, but not progress, payments in certain types of procurement contracts.[140] Statutory authority for progress payments was finally provided in the 1958 amendment of the Armed Services Procurement Act.[141]

Although legislative recognition of the progress payment-title vesting doctrine was late in coming, the U.S. Supreme Court previously recognized the concept's validity in *Ansonia Brass*.[142] The court was faced with the interpretation of a progress payments type clause that vested title in the government to a dredge under construction as installment payments were made to the contractor. In finding that the contract provisions were clearly sufficient to pass title to the government and defeat the liens of the contractor's materialmen, the court stated:

> But it is equally well settled that if the contract is such as to clearly express the intention of the parties that the builder will sell and the purchaser shall buy the ship before its completion, and at the different stages of its progress, and this purpose is expressed in the words of the contract, it is binding and effectual in law to pass the title.[143]

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[139]*Id.* at 1193; Marine Midland Bank v. United States, 687 F.2d 395, 401 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1037 (1983) (to escape statutory limitations, the title vesting provisions had to be strictly construed to transfer title to the government).

[140]Armed Services Procurement Act of 1947, Pub. L. 80-65, 62 Stat. 21 (advance payments were authorized for negotiated military procurement contracts); Federal Property and Administrative Services Act of 1949, Pub. L. 81-288, 63 Stat. 377 (advance payments were authorized for nonmilitary negotiated procurements).

[141]Pub. L. No. 85-800 § 9, 72 Stat. 967 (1958) (codified as 10 U.S.C. § 2307 (1982)). 10 U.S.C. 2307(a)(1) and (c) read in part:

> (a) The head of any agency may—
> (1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; . . .
> (c) Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens.

See also 41 U.S.C. § 255 (1982).

[142]United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910).

[143]*Id.* at 466, 467.

The U.S. Supreme Court later expanded on the nature of the government's claim to property acquired under a progress payment type clause in *Allegheny County*.[144] The court stated:

> The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the title or liens which they create or permit, all present questions of federal law not controlled by the law of any state. . . . Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. . . . We hold that title to the property in question is in the United States . . . .[145]

The ability of the contractual language to pass title prior to the 1958 legislation is thus judicially accepted.[146] Regulatory guidance also incorporated title vesting as security for contractor financing. Under the Defense Contract Financing Regulations, promulgated a few years prior to the 1958 amendments, title granting provisions were used to secure progress payments and related property.[147]

The 1958 amendment, codified in part as 10 U.S.C. § 2307(c), did not explicitly provide for the reservation of title as security for progress payments. However, subsection 2307(c) refers only to using paramount liens to secure advance payments without any mention of progress payments at all.[148] While the legislative history is sparse on this issue, a letter from the Comptroller General to the Senate Committee on Government Operations indicated that progress payments should not be allowed unless some security device such as title reservation or a paramount lien on progress payment property was authorized.[149] In a recent well reasoned treatment of this issue, the court in *American Pouch Foods* concluded that Congress had intended to validate the traditional practice, already established in regulation and judicially recognized, of reserving title over progress pay-

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[144]United States v. Allegheny County, 322 U.S. 174 (1944).

[145]*Id.* at 183.

[146]*E.g.*, City of Detroit v. Murray, 355 U.S. 489 (1958) (while the issue was the validity of a local tax on government property, the title vesting clause was sufficient to vest title in the government). However, title vesting provisions did not go without criticism. *E.g.*, McClelland, *The Illegality of Progress Payments as a Means of Financing Government Contractors*, 33 Notre Dame L. Rev. 380 (1958).

[147]32 C.F.R. part 82, subpart E (1957).

[148]*Supra* note 141.

[149]1958 U.S. Code Cong. & Admin News 4031.

ment property.[150] The validity and literal interpretation of progress payment title vesting provisions continue to be accepted by a majority of the courts.[151]

In 1982, however, the Court of Claims in *Marine Midland* broke with the majority and held that the progress payment clause gave the government a lien rather than title to property covered by the payments.[152] While the Claims Court consistently follows this position,[153] *Marine Midland* is criticized and is not followed by other jurisdictions.[154] The issue is alive and well, however, with at least one bankruptcy court writing in sympathy with *Marine Midland,*[155] and conversely, the Claims Court indicating that they would rather return to the majority title position.[156]

Marine Midland began with a finding that the title vesting clause had simply been a legal mechanism to avoid the statutory advance funding prohibitions in effect before 1958. Once the need for the legal fiction of progress payment title was gone, the clauses existed only to provide a security interest or lien in the contractor's inventory in exchange for government financing.[157] The court stressed that the nature of the progress payment clause was consistent with the lien theory and inconsistent with the normal vestiges of ownership.[158]

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[150]*In re* American Pouch Foods, Inc., 769 F.2d 1190, 1194, 1195 (7th Cir. 1985), *cert. denied,* 475 U.S. 1082 (1986).

[151]*See, e.g., In re* Wincom Corp., 76 Bankr. 1, 2 (Bankr. D. Mass. 1987); *In re* Economy Cab and Tool Co., Inc., 47 Bankr. 708, 711 (Bankr. D. Minn. 1985).

[152]Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982), *cert. denied,* 460 U.S. 1037 (1983).

[153]*See* Welco Industries, Inc. v. United States, 8 Cl. Ct. 303 (1985), *aff'd.*, 790 F.2d. 90 (Fed. Cir. 1986); First National Bank of Geneva v. United States, 13 Cl. Ct. 385 (1987).

[154]*See, e.g., In re* American Pouch Foods, Inc., 769 F.2d 1190 (7th Cir. 1985), *cert. denied,* 475 U.S. 1082 (1986); *In re* Reynolds Manufacturing Co., 68 Bankr. 219 (Bankr. W.D. Penn. 1986); *In re* Economy Cab & Tool Co., 47 Bankr. 708 (Bankr. D. Minn. 1985).

[155]*See In re* Wincom, 76 Bankr. 1, 3, 4 (Bankr. D. Mass. 1987).

[156]*See* First National Bank of Geneva v. United States, 13 Cl. Ct. 385 (1987).

> As a court with nationwide jurisdiction, it is in the interest of public policy that the law be applied consistently. The court is uneasy with the thought that two plaintiffs will be treated differently under the law merely because one litigates in the bankruptcy courts and one litigates in the United States Claims Court. This court would be inclined to adopt the reasoning of the title theory, but is not in a position to do so.

Id. at 387 n.3.

[157]*See* Marine Midland Bank v. United States, 687 F.2d 395, 401 (Ct. Cl. 1982), *cert. denied,* 460 U.S. 1037 (1983). *But see In re* American Pouch Foods, Inc., 769 F.2d 1190, 1196 (7th Cir. 1985), *cert. denied,* 475 U.S. 1082 (1986).

[158]*Marine Midland,* 687 F.2d at 399 ("[T]he government takes an interest in the contractor's inventory but does not want, and does not take, any of the responsibilities that go with ownership.").

The court went on to indicate that this interpretation of the progress payments clause also provides a superior lien creditor with a claim for the value of the property in question and not the actual property which could not be withheld from the government.[159] This approach enabled the court to distinguish *Ansonia Brass* and its progeny. Once having decided that the government held only a security interest or lien, the court went on to create a federal common law rule giving the government lien priority only over general creditors.[160] However, the Court of Claims's approach in *Marine Midland* is suspect for several reasons.

The Court of Claims interpreted 10 U.S.C. § 2307(c) to mean that Congress rejected the accepted practice of title vesting in progress payment property. Despite the court's general statement that the lien theory is not inconsistent with cases apparently accepting literal title vesting, the plain language of a majority of the applicable cases cannot be that easily reconciled with a lien approach.[161]

In *Marine Midland* the court attempted to finesse the issue by arguing that most of these cases litigated only the right to possession of the property and not the potential follow-up claim by a superior lien creditor or the trustee for the value of the property taken by the government. The Court of Claims relied in part upon *Armstrong*, in which the U.S. Supreme Court held that when the government with a paramount lien took title to property already subject to a creditor's lien, the latter's lien was destroyed and an action to recover the value was allowed.[162] However, this is only logical due to the nature of a paramount lien that would leave title in the contractor where competing liens could validly attach.

In contrast, under a literal interpretation of the progress payment clause, title vests in the government at the contract date or as soon as the property is or should have been allocated to the contract. Because a creditor's security interest cannot be created until the contractor acquires rights to the collateral,[163] the vesting of title in progress

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[159]*Id.* at 397, 398; *see also* Armstrong v. United States, 364 U.S. 40 (1960).

[160]*Marine Midland*, 687 F.2d at 404.

[161]*See, e.g., In re* Double H. Products, 462 F.2d 52, 55 (3d Cir. 1972) (in a case prior to *Marine Midland*, the court held that the title vesting provisions in the contract transferred actual title, not a lien, despite the creditor bank's specific argument that the title should only be considered a security device); *In re* American Pouch Foods, Inc., 769 F.2d 1190, 1196 (7th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (post *Marine Midland* decision).

[162]Armstrong v. United States, 364 U.S. 40 (1940).

[163]The Uniform Commercial Code states in part:

> [A] security device is not enforceable . . . with respect to the collateral and does not attach unless:

payment property at the time of allocation should prevent attachment of the security interests under the rationale of *Ansonia Brass*.[164] Once the court has ruled that the government has full title to the property through operation of the progress payment clause, there usually would not be any further need to litigate the existence or validity of a claim because other liens or security interests should not have attached to the property.

The *Armstrong* scenario, where the government takes title well after competing liens have attached, should be the exception rather than the rule in the progress payments area. Thus, the courts' literal application of title vesting is the reason why the cases apparently focus on the possessory aspect of ownership rather than a follow-up claim for the value of the extinguished lien. This result undercuts the Court of Claims's argument for a narrow interpretation of the majority's literal title approach.[165]

The Court of Claims distinguished at least one other literal title case by simply indicating it was decided prior to acceptance of the Uniform Commercial Code, and reservation of title was a legal fiction designed to protect what would now be characterized as a purchase money lender.[166] However, the court in *Double H* specifically rejected a lender's attempt to characterize the government's title under the progress payments clause as a "paper title" security device.[167] Such a direct rejection is difficult to reconcile with the Court of Claims's dismissal of the case as one in which a literal interpretation of title vesting was necessary simply to uphold the use of an archaic security device.

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement . . .;
(b) value has been given; *and*
(c) *the debtor has rights in the collateral.*

U.C.C. § 9-203(1) (emphasis added).

[164]This issue can best be framed by considering supplies, equipment, and inventory obtained after the government contract is formed. Because even a security interest previously created to apply to after acquired inventory will not attach until the debtor obtains rights to the property, if the property is allocable to the contract at that point in time the government's title will vest, preventing the competing lender's security interest from attaching.

[165]Other than the Claims Court, only one reported federal decision does not treat the government's interest as actual title. In United States v. Lennox Metal Manufacturing, 225 F.2d 302, 317 (2d Cir. 1955), the court ruled that because the government had in bad faith terminated a contract for default, it was barred by the "unclean hands" doctrine from enforcing the "equitable title lien." The court's desire to do equity resulted in this incorrect characterization of the government's title in the contract property.

[166]*Marine Midland*, 687 F.2d at 402 (citing *In re* Double H. Products, Corp., 462 F.2d 52 (3d Cir. 1972)).

[167]*In re* Double H. Products, Corp., 462 F.2d 52, 55 (3d Cir. 1972).

Marine Midland and its progeny in the Claims Court should be seen not as a belated recognition that the lien theory is correct law but rather as a policy-based attempt to bring title vesting in government contracts into line with commonly accepted commercial practice under the U.C.C. This desire to modernize what the Court of Claims regarded as an old-fashioned form of security device is readily apparent in the following passage from *Marine Midland:*

> The rule of decision we choose for this case is to make the government's security interest under its title vesting procedures paramount to the liens of general creditors. We believe that this merely follows the modern practice of giving priority to purchase money interests, as we consider purchase money to be closely analogous to the government's progress payments . . . .[168]

3. Priorities Under the Lien Theory

Even if *Marine Midland* was assumed to be correct in stating that the title vesting provisions provided only a lien, the court's characterization of the lien as superior only to those of general creditors is also suspect. Under a lien theory, the government's interest should still be paramount to all other liens. This would at least provide the same protection to progress payments as the paramount lien provided for advance payments under 10 U.S.C. § 2307.[169] Apart from the statutory paramount lien language, analysis of applicable law demonstrates the absolute priority lien is still the better rule.

Substantial guidelines have been laid down on how to determine the appropriate law governing the priorities of federal liens. In *Clearfield Trust* the U.S. Supreme Court ruled that federal law, not state law, controls any determination of the government's rights under nationwide federal programs.[170] The Court stated that if Congress did not provide the rule, then the federal courts would fashion the appropriate law.[171] One year later the Supreme Court specifically ruled that federal law governed questions about liens created by the government's procurement contracts.[172]

In the absence of a federal statute, the question remains whether a uniform federal common law should be created, or applicable state

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[168]*Marine Midland*, 687 F.2d at 404.

[169]*See In re* American Pouch Foods, Inc., 769 F.2d 1190 (7th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

[170]Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[171]*Id.* at 367.

[172]*Supra* note 144 and accompanying text.

laws adopted as federal law, or a combination of the two. In *Kimbell Foods* the Supreme Court considered this issue and held that state law would be incorporated to control lien priorities under the federal loan programs conducted by the Small Business Administration and the Federal Housing Authority.[173] In making its determination the Court focused on several factors: whether the federal program required a uniform body of law; whether the use of state law would thwart the program's purposes; and also to what degree the adoption of a federal law would disrupt the states' commercial systems.[174] Because the federal agencies were already applying state law with no apparent hardship, the Court declined to adopt a uniform federal rule. *Kimbell Foods* indicated, however, that uniform federal rules might be necessary to govern federal lien priority in order to "vindicate important national interests."[175]

The few courts that have followed the lien theory have split on the issue of whether the procurement area requires a uniform law or whether state law should be incorporated. *Murdoch Machine* used one state's version of article 2 of the U.C.C. to determine the relative priorities between the government and a seller with the right to withhold possession from an insolvent buyer.[176] The government claimed that it had title to certain steel the contractor had ordered from a supplier prior to becoming insolvent. Under applicable state article 2 sales law the supplier argued that it had a right to withhold the steel from the insolvent contractor-buyer, and that the government's title interest could not attach prior to actual shipment of the property. In comparing the government to any other large company involved in interstate transactions, the court found that compliance with applicable state law would not cause hardship to the government and would eliminate the danger of secret liens to suppliers who were unaware of the government contract.[177]

In contrast, rather than adopting state law as federal law, the Court of Claims decided upon a uniform federal rule in *Marine Midland*.[178] In deciding upon a uniform rule, the court distinguished *Murdoch Machine* on its facts[179] and relied instead upon established federal practice and the existence of congressional policy favoring a

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[173]United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).
[174]*Id.* at 728, 729.
[175]*Id.* at 740.
[176]*In re* Murdoch Machine & Eng. Co. of Utah, 620 F.2d 767 (10th Cir. 1980).
[177]*Id.* at 772.
[178]*See* Marine Midland Bank v. United States, 687 F.2d 395, 404 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1037 (1983).
[179]*Id.* at 403 n.8.

uniform approach.[180] The rule provided that the progress payment clause gave the government a lien that was superior to the rights of a general creditor. Although a uniform rule was enunciated, the court did make an analogy to purchase money security interests under article 9 of the Uniform Commercial Code.

Recent Claims Court decisions following *Marine Midland* demonstrate the consistency problems with developing the federal rule using a case-by-case analogy to commercial law. In *Welco* the court resolved the respective priority problem in favor of the government by further comparing its interest to a purchase money security interest under article 9. The court went on to state: "It should be understood that the foregoing analysis is not intended to signal the court's adoption of state rules of priority as the basis for a federal standard. It may well be that the proper rule is one that calls for absolute federal priority."[181] Conversely, the court in *First National Bank of Geneva* decided that the government's interest in certain special tools under a progress payments clause was not like the purchase money interest because the funds were not sufficiently related to the tools.[182]

Although *Marine Midland* correctly articulated some of the reasons why a uniform federal common law should be applied to govern federal procurement lien priorities, the rule adopted was complex and confusing. Also, limiting the government's interest to a status less than a purchase money interest ignores the general nature of progress payment and advance funds. To avoid uncertainty, and more closely parallel the advance payment lien, the rule of absolute federal priority speculated upon in *Welco* is preferable to the Claims Court's present approach. The question should only be relevant to the government when litigating in Claims Court and possibly the Tenth Circuit, however, because the lien approach is not otherwise accepted.

4. Policy Conflict Between Lien and Title Theory

While the merits of the policies behind literal title-vesting as opposed to lien theory are open to debate, the current state of the law still requires literal interpretation of the progress payments clause. Whether the government should receive this favored treatment in the world of secured transactions is a more hotly contested issue than the

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[180]1958 U.S. Code Cong. & Admin. News 4021, 4027 ("improve . . . procurement through the promotion of greater uniformity and simplicity"); *id.* at 4027 ("It is contemplated that uniform government-wide regulations will be developed.").

[181]Welco Industries, Inc. v. United States, 8 Cl. Ct. 303 (1985), *aff'd*, 790 F.2d 90 (Fed. Cir. 1986).

[182]First National Bank of Geneva v. United States, 13 Cl. Ct. 385 (1987).

actual state of the law. Certain commentators have caustically condemned the effect of the government's title vesting provisions upon secured creditors and lenders.[183] Of considerable concern is the perceived inequity of allowing the government to prevail over secured creditors without having to file a financing statement or otherwise perfect what the U.C.C. would regard as just another security interest.[184] One recent commentator noted that the government's rights under the progress payments clause had been characterized as secret liens and that "[s]ecret liens are nasty little creatures."[185] One court stated that literal enforcement of the title vesting provisions was like dealing "wild cards to businessmen at random," and would result in injustice.[186] These critics usually call for a requirement that the government's interest be reduced to a security interest that must be perfected by filing in accordance with article 9. This approach, however, is not without flaws.[187]

In answer to this criticism, several factors must be addressed. First, it is true that progress payments are a form of financing device and that a security interest would appear at first glance to be an adequate method to protect the government's interest in the unliquidated progress payments. Also, characterizing the government's interest as a security interest would simplify treatment of the property under other FAR provisions covering inventory control and plant clearance and would also reduce the liability exposure due to injury or damage

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[183]*See* White, *Dancing on the Edge of Article 9*, 91 Comm. L.J. 385 (1986). White states that the U.S. Supreme Court in *Kimbell Foods* has settled the question in favor of incorporating state law as the applicable federal law governing lien and security interest priorities. He goes on to heavily criticize the holding in *American Pouch* and questions why the courts continue to protect the "country's largest and nastiest creditor." *Id.* at 394. However, White does not answer the specific bases relied on by *American Pouch* and *Marine Midland* for not adopting state law, and he ignores the consistent judicial interpretation of the title vesting provisions.

[184]U.C.C. § 9-102(1)(a); *see also* U.C.C. Official Comment 1.

[185]2 The Nash and Cibinic Report ¶ 5 (1988) (quoting Clark & Clark, Secured Lending Alert, Dec. 1987).

[186]*In re* Murdoch Machine & Eng. Co. of Utah, 620 F.2d 767, 772 (10th Cir. 1980).

[187]*See generally* 2 The Nash & Cibinic Report ¶ 5 (1988). Despite certain commentators' statements that because the government complies with recording laws as a lender in the S.B.A. and F.H.A. loan programs it should comply as a buyer, this approach ignores the nature of procurement and the practical results of compliance. Unlike the government's lending programs, which mesh with the complementary state laws, government procurement is an international multi-billion dollar system that is geared to one uniform federal approach. The magnitude of this task alone sets government acquisition apart from most commercial transactions. Due to the impact of literally thousands of sometimes conflicting statutes, the procurement system is already too complex for real commercial efficiency, and the addition of yet another layer of contract administration would only result in additional cost and confusion.

caused by the progress payment property. It must be recognized, however, that the government's interests, and accordingly the public interest, goes beyond the monetary concern. Critical defense procurements simply cannot be considered just another purchase by a major corporation, however attractive the proposition may be to the competing business world. The public interest demands that material, systems, and other property necessary to the national defense not be unreasonably encumbered or withheld from the government.[188] While obviously not applicable to every contract or inventory, this factor must be considered in an evaluation of the government's position in respect to other creditors.

With this in mind, even a cursory attempt to bring progress payments security in line with the U.C.C. reveals a structural problem that prevents the government from adequately protecting either of the above mentioned interests. Ordinarily, the government is competing with the contractor's other suppliers and lenders who previously created security interests in the inventory. Under U.C.C. § 9-203, these interests attach as soon as the contractor gains rights to the newly acquired collateral, such as supplies and inventory. However, under the progress payments system, the contractor must first incur the cost of obtaining the new collateral and then request liquidation of the appropriate amount from the progress payment fund before the requirements for attachment are satisfied.[189] It is readily apparent that the government's security interest would attach much too late to prevail against these other creditors.

The same problem occurs when the government perfects its security interest. Perfection is of course critical to establishing priorities among competing security interests and has special application in bankruptcy, where perfected interests have priority over almost all other claims against the collateral in the estate. Because the progress payment property remains in the possession of the debtor, the government would normally perfect its interest by filing a financing statement in accordance with the applicable state recording act.[190] The date the security interest is considered to be perfected is the later of the date the interest attached to the collateral and the date the financing statement was filed.[191] Because most lenders file the financ-

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[188] *See, e.g., In re* Double H Products Corp., 462 F.2d 52, 55 n.4 (3d Cir. 1972). *Cf.* 50 U.S.C. App. § 2071(a) (1976); 15 C.F.R. §§ 350.3 to 350.13, Industrial Mobilization Regulations and the Defense Priorities and Allocations System.

[189] *See generally* FAR 32.5.

[190] *See* U.C.C. §§ 9-302, 9-305.

[191] *See* U.C.C. § 9-303.

ing statement on the contractor's inventory before advancing funding, as soon as the contractor obtains any right to the inventory the security interest is perfected. Thus, the government will be faced with a previously perfected security interest before the progress payment security interest can even attach, let alone be perfected.

As a result, the government will not be able to obtain a security interest superior to creditors and financial institutions with previously perfected security interests in inventory and materials. Under these circumstances, the government is left without adequate security for both its financial interest as well as sensitive defense procurements should the contractor become insolvent. Armed with only a lien or security interest, the government faces a trying situation under the Bankruptcy Code.

In addition to the above mentioned difficulties in obtaining a superior perfected security interest under state law, even this interest might not be sufficient to ensure eventual government possession of the progress payment property in bankruptcy. In a chapter 11 reorganization, the government must face potentially lengthy delay and in the worst case may also be required to accept some alternate collateral of the trustee's choosing in satisfaction of its progress payment security interest.[192] Under section 1129, the "cram down" provisions of the Bankruptcy Code, even a protesting secured creditor may eventually lose the specific collateral to which the security interest had attached. If the trustee also rejects the executory contract with the attendant duty to deliver the property, the government as a secured creditor may lose all control over the originally contracted-for property.[193]

While this appears in direct conflict with the rule that the government is entitled to receive what it contracts for,[194] the policy behind the "cram down" provisions may bring about a contrary result. As

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[192]11 U.S.C. § 1129(b) (1982).

[193]At least when the government is faced with a situation where property it has some interest in is taken pursuant to state law, a remedy is available under 40 U.S.C. § 308 (1982) to recover the property pending resolution of a claim against the government for its value. The government is not allowed to use this provision against a federal proceeding, however. *See, e.g.*, The Revenue Cutter, 20 F. Cas. 560 (N.D. Ohio 1860) (No. 11,713) (case in admiralty was not a proceeding under state law, so the government was not entitled to possession).

[194]*See, e.g.*, Marine Midland Bank v. United States, 687 F.2d 395, 397, 398 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1037 (1983).

previously noted,[195] congressional policy has already demonstrated the intent to slowly reduce the government to the status of the ordinary creditor. Also, the rule is one of sovereignty and focuses upon state law, not federal law, which interferes with the government's possession. Because of the congressional bankruptcy policy and the limited application of the government's possession rule, differing judicial treatments of this issue are bound to occur. Because the Bankruptcy Code does not address the presently accepted title vesting provisions, further limitation of the government's status should come from Congress, not from the courts. As previously indicated, unless numerous changes are effected in how progress payments are made, only title will continue to adequately secure the government's interest against competing creditors.

III. CONCLUSIONS AND RECOMMENDATIONS

A. GENERAL OBSERVATIONS

A pragmatic review of the present relationship between bankruptcy and federal procurement disputes resolution indicates that there are many problems and few possible solutions. Any expectation that Congress will reverse its present policy trend in bankruptcy toward reducing the government's previously favored status is unrealistic. However, countervailing policy based on the public interest in efficient, effective, and responsible public procurement can co-exist with bankruptcy's egalitarian nature. The basic need at this time is for statutory and regulatory clarifications that promote responsibility and efficiency, with less emphasis on pecuniary interests. The following conclusions are based on the general observation that there is a valid government interest requiring such protection.

Before proposing legislative or regulatory relief, one must consider the hoary adage, "if it ain't broke don't fix it." From the government's perspective, bankruptcy has indeed "broken" its ability to terminate unsatisfactory contracts with the debtor; to recover progress payment property, unliquidated progress, and advance payments; and to obtain consistent treatment of claims under the provisions of the Contract Disputes Act. Some of these issues can be resolved to the government's satisfaction by legislative or regulatory change, but the government must accept the basic fact that bankruptcy imposes some inescapable limitations.

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[195] *Supra* note 50 and accompanying text.

B. REGULATORY VS. LEGISLATIVE APPROACHES

As discussed, the government can presently litigate and argue for the recovery of progress payment property under the title vesting theory, termination of unsatisfactory contracts under the Nonassignment Act, and claims valuation by the ASBCA under the Contract Disputes Act. Of the three, only the nonassignability argument is not yet widely accepted. However, efficient procurement management and equal treatment of contractors in bankruptcy requires consistency, a quality lacking in this area. Absent an unequivocal pronouncement from the U.S. Supreme Court, which is unlikely in the foreseeable future, consistency can only be accomplished through statutory or regulatory clarification. Possible candidates for reform are the title vesting provisions, the Contract Disputes Act jurisdictional sections, the scope of the Nonassignment Act, and the respective provisions of the Bankruptcy Code.

Modifying the Bankruptcy Code is not a practical or feasible solution to the above problems. Because Congress declined to provide the government priority in non-tax monetary claims, there is little chance that it will expand the automatic stay provisions in subsections 362(b)(4) and (5) to include national defense as a basis for exception.

Bankruptcy is a framework that incorporates numerous other laws and regulations, however, and it is in these other areas that changes should be made. For example, the Code does not attempt to spell out the details of each exception to the automatic stay or what may be excluded from the estate. Rather, the Code relies on other statutes and regulations to determine whether the bankruptcy laws will apply to the subject property or interest. Thus, without touching the Bankruptcy Code, the government can still protect its rights by modifying or clarifying non-bankruptcy law. As a practical matter, clarifying peripheral statutes or regulations will meet with less resistance than a frontal assault on the Bankruptcy Code.

For example, rather than excepting progress payment property from the Code's general definition of the estate, the government should clarify the FAR to clearly vest full title to the property in itself. As a practical matter, while a change in the FAR is important for anyone dealing with government procurement, it would not have any impact on the vast majority of bankruptcy cases. In contrast, any attempt to specifically create additional exceptions in the Bankruptcy Code could be broadly interpreted as opening the floodgates for other special interests to carve out their own exceptions. The realities of

congressional resistance to further proliferation of narrow exceptions in the Code and the definite trend against favoring the government make this approach highly unlikely.

C. PROPOSALS AND PROBLEMS

1. Termination of the Contract

As previously discussed, unless the government can terminate an unsatisfactory contract with the debtor, funds necessary for re-procurement will remain obligated under the contract and the government will bear the excess costs of such a re-procurement. The government must presently rely on the incorporation of the Nonassignment Act by 11 U.S.C. § 365(c)(1) to prevent assumption of the contract and allow termination. Clarification of the relationship between 11 U.S.C. § 365(c)(1) and the Nonassignment Act would certainly serve to eliminate the inconsistent treatment the courts give these provisions. However, this is a problem that very possibly should not be taken back to Congress for a solution. While the better interpretation of these two provisions should except government contracts from being currently assumed in bankruptcy, any attempt to clarify this position by amending the Nonassignment Act to specifically apply to the trustee and debtor in possession may bring about an unpredictable and undesirable result.

2. Title to Progress Payment Property

The government's ability to speedily recover progress payment property is an important factor in ensuring timely and efficient re-procurement. Any interpretation of the title vesting clause that gives less than actual title to the government is insufficient to satisfy this requirement. In order to avoid the confusion raised by *Marine Midland* and the lien interpretation of the title vesting provision, 10 U.S.C. § 2307 and 41 U.S.C. § 255 should be amended to specifically recognize title vesting as a means to protect the government's interest in progress payment property. While this would clear away any doubt about the government's title, there is congressional reluctance to deal legislatively with a title issue that can be dealt with by regulation. Recently, in the 1988 Defense Authorization Act, the Senate-House Conference Committee considered title to special tooling and test equipment. The Committee stated that doubts about government title in the property should be resolved by regulation rather than by statute.[196] Obviously, this indirect guidance indicates that clarifica-

[196] *See* 30 The Government Contractor ¶ 3 (1988).

tion of title vesting in progress payment property must come in the provisions of the FAR.

Under this approach the government should modify FAR 32.503-14 and the Progress Payments Clause at FAR 52.232-16 to state that the title transferred to the government is absolute and not just a lien or security interest. As modified, the contractual clause would vest full title[197] and allow the government to seek relief from the bankruptcy stay in order to retrieve the property. This approach offers an expedited and effective solution in this area.

3. Forum Referral for Liquidation of Claims

Presently, both the Bankruptcy Code and the Contract Disputes Act provide the "exclusive" means to liquidate claims against a government contractor in bankruptcy. The government's claims are better protected by the statutory system specifically designed to provide consistent and efficient treatment of this specialized area of the law. Although liquidated claims are ultimately the province of the bankruptcy courts, contested unliquidated contractual claims should be the responsibility of the forums provided under the Contract Disputes Act. Congress should clarify the Contract Disputes Act to specifically address resolution of claims by or against a contractor in bankruptcy. This modification follows the present judicial majority policy of deferral to the boards. By reserving federal procurement issues to the system with the greatest expertise in procurement law, the bankruptcy court is freed from unnecessary work. This ensures expeditious processing of the bankruptcy action, to the benefit of the government and other creditors.

In conclusion, the current conflicts in enforcement of bankruptcy law and federal procurement remedies indicate that the system is indeed "broken." However, it is uncertain whether any of the specific problems discussed above will be resolved. A valid governmental concern is that any congressional interest might result in a "solution" worse than the present problem. Accordingly, we should consider each proposal separately, weigh the risks, and test the prevailing political winds before we request legislative reform. The best approach may be to litigate and accept inconsistency rather than obtain an unfavorable statutory amendment.

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[197]Despite occasionally harsh results, the government may contract as it wishes. Such a specific contractual provision purporting to pass actual title would be valid and enforceable. *See, e.g., In re* American Boiler Works, 220 F.2d 319 (3d Cir. 1955) (in the absence of constitutional limitation, the government can contract as it desires, despite harsh results in application).

The government should, however, take those actions immediately available to protect its interests. These actions include more emphasis on aggressive measures by the contracting officer prior to the bankruptcy petition. Additionally, the FAR provisions covering title vesting in progress payment property should be modified to reflect the current judicial majority position in progress payment title vesting.

FROM CONFISCATION TO CONTINGENCY CONTRACTING: PROPERTY ACQUISITION ON OR NEAR THE BATTLEFIELD

by Elyce K.D. Santerre*

I. INTRODUCTION

While the mechanics of acquiring logistical support on or near the battlefield have received considerable attention lately,[1] much work remains to be done. Doctrine on contingency contracting is still in the early stages of development.[2] The vast majority of contracting officers are civilians, not soldiers who will be deploying with the force they support.[3] Contracting mechanisms to pay for seizures and requisitions do not exist, except as ratifications of "unauthorized commitments."[4] The contracting system "worked" in Grenada primarily because the duration of the armed conflict was limited. This enabled contracting and Corps of Engineers personnel to arrive in country after the shooting had stopped, but still only a short time after a number of informal obligations had been made.[5]

This article will examine the current state of the law relating to contingency contracting. Contingency contracting, as used in this article, refers to contracting in the early stages of a combat deployment.[6] Recent developments in doctrine will be considered in

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[1]*See, e.g.*, Little & Chambers, *Creative Logistics in Costa Rica*, Army Logistician, Jan.-Feb. 1988, at 8; Powell & Toner, *Contracting During a Foreign Exercise*, Army Logistician, Jan.-Feb. 1988, at 14.

[2]*See* Dep't of Army, Concepts and Studies Division, Directorate of Combat Developments, U.S. Army Quartermaster School, Interim Operational Concept: Contracting for the Army in the Field, (Coordinating Draft, 17 November 1987) [hereinafter Draft FM]; and P. Gilliatt, Contingency Contracting Smart Book (1987) (containing a recommended Department of the Army Pamphlet).

[3]C. Lowe & P. Gilliatt, Army Contingency Contracting 71 (1985).

[4]*See infra* text accompanying notes 271-80.

[5]*See* Braswell, *The Big Bucks of Operation Urgent Fury*, Soldier Support Journal, July/August 1984, at 5.

[6]*See* P. Gilliatt, *supra* note 2, at 14. This article will concentrate on acquisition in areas outside the established logistical bases in Europe and Korea.

making recommendations to commanders and their legal advisors on how best to use contingency contracting under current law. Recommendations for change form the final section of this article.

II. LAW OF WAR LIMITS ON COMBAT ACQUISITION

A review of the current law would not be complete without a review of the international law applicable to acquisition of property on the battlefield or in occupied territory. Although, as will be discussed later, compliance with international law is only a first step—a bare minimum of legally acceptable behavior—it is a necessary first step. A violation of contracting regulations and statutes may result in a commander becoming personally liable for payment of a contract or answerable for a domestic "white collar crime." A violation of international law in this area could result in a commander being charged with a violation of the law of war.[7]

A. DEFINITION OF TERMS

Definition of three apparently very similar terms—confiscation, seizure, and requisition—is required before proceeding. "Confiscation" refers to permanent appropriation of enemy property without payment of compensation.[8] "Seizure" is similar to confiscation in that it refers to a taking of property without immediate payment of compensation; however, items "seized" must be returned, or compensation paid for them, at the end of the armed conflict.[9] "Seizure" is used by some writers to refer to any uncompensated appropriation, without distinguishing confiscation;[10] however, in this article it will be used in its narrower sense. "Requisition" refers to appropriation of private property in occupied areas for the needs of an army of occupation. Compensation must be paid for requisitioned property as soon as possible.[11]

The circumstances for use, and limitations on the use, of each of these three methods of property acquisition depends on the location and the nature of the property acquired.

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[7]2 L. Oppenheim, International Law § 143 (7th ed. 1952).

[8]Generally, this applies only to enemy public movable property. *See infra* text accompanying notes 12-16 & 65-70; *see also* Dep't of Army, Pamphlet No. 27-161-2, International Law, Vol. II, at 175 (23 October 1962) [hereinafter DA Pam 27-161-2].

[9]DA Pam 27-161-2 at 176.

[10]*See, e.g., infra* text accompanying note 16.

[11]DA Pam 27-161-2 at 181.

B. PROPERTY CAPTURED/FOUND ON BATTLEFIELDS

Rules governing property captured or found on the battlefield turn on whether the property is public or private, with additional rules pertaining to certain specific classes of protected property.

1. Enemy Public Property

(a) *In General*

Enemy public property found on the battlefield presents few law of war problems. In general, it may be confiscated or destroyed if "military necessity" requires such confiscation or destruction.[12] An action is justified by military necessity if it is "indispensable for securing the complete submission of the enemy as soon as possible" and not forbidden by international law.[13] A duty to pay compensation for enemy public property arises only if the law of war is violated.[14] The commander does not have free rein completely, however, in determining what constitutes military necessity. One commentator suggests a "reasonably prudent commander" rule—that confiscation or destruction is legally justified if a "reasonable prudent commander acting in compliance with the laws of war"[15] would "have authorized such destruction or seizure under similar circumstances."[16]

(b) *Protected Targets*

Specific types of enemy public property are accorded additional protection. The major categories of such property are the traditionally protected targets: religious and medical buildings; historic monuments; and buildings used for art, science, or charitable purposes. When properly marked and not used for military purposes, they not only are forbidden as targets for destruction,[17] but also enjoy certain immunities against seizure or confiscation.

Medical establishments, if captured, must be permitted to continue operating as such, at least until other treatment is secured for the

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[12]Regulations annexed to Hague Convention IV, 1907, art. 23(g), 36 Stat. 2277, T.S. No. 539 [hereinafter HR].

[13]Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 3(a) (18 July 1956) [hereinafter FM 27-10].

[14]*See* HR, *supra* note 12, art. 3.

[15]M. Greenspan, The Modern Law of Land Warfare 279 (1959). That last preceding phrase does, however, make the definition a bit tautological.

[16]*Id. See* text accompanying note 10.

[17]HR, *supra* note 12, art. 27.

patients found there.[18] Medical transport equipment may not be confiscated except in the case of forced landings due to bad weather, mechanical breakdowns, or similar situations. In such cases, the personnel aboard may be taken prisoner (or retained, depending on their status) and the aircraft or other medical vehicle may be confiscated.[19] Again, this is subject to the requirement that the capturing forces ensure proper care for the patients.[20] In any case in which medical transport equipment is used for non-medical purposes, any protective markings must, of course, be removed.[21] All other medical equipment may be confiscated, but only after ensuring that the wounded and sick receive proper care. Under no circumstances may captured medical supplies be deliberately destroyed.[22] If medical supplies, equipment, or buildings are the property of a relief society recognized under the Geneva Conventions, they may be requisitioned, but not confiscated or seized, for urgent medical needs.[23] "Fair" compensation must be paid for "requisitioned" property.[24] Use, not strict legal title, is the key to whether items are the property of a relief society.[25]

"Cultural property" is also to be afforded special protection. It is treated as private property, even if publicly owned.[26] Buildings dedicated to art, science, etc., may be used for quartering of troops, storage of supplies, and similar uses if necessary, but any damage must be avoided to the fullest extent possible.[27] Religious buildings, as a matter of U.S. policy, are to be used only for medical needs, and only when urgently needed.[28] Moveable cultural property may enjoy an additional form of protection, which extends to the truck, train, or other vehicle carrying it. When cultural property is being transported to a place of safety, as provided for in Articles 12 or 13 of the 1954 Hague Convention on Cultural Property, it may not be confiscated or seized, and "the means of transport exclusively engaged in the trans-

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[18]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, [hereinafter GWS] art. 19, 6 U.S.T. 3114, T.I.A.S. No. 3362.

[19]International Committee of the Red Cross, Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 293 (J. Pictet ed. 1958) [hereinafter Pictet, vol. I].

[20]GWS, *supra* note 18, art. 35.

[21]*Id.* art. 44.

[22]*Id.* art. 33.

[23]*Id.* art. 34.

[24]Pictet, vol. I, *supra* note 19, at 279.

[25]*Id.* at 278-79.

[26]HR, *supra* note 12, art. 56.

[27]FM 27-10, para. 405(b).

[28]*Id.* para. 405(c).

fer of such cultural property" is also immune from confiscation or seizure.[29]

Protected cultural property can be identified by its required distinctive markings: three blue and white shields in a triangular formation (one shield below). The individual shields consist of "a royal blue square, one of the angles of which forms the point of the shield, and of a royal blue triangle above the square, the space on either side being taken up by a white triangle."[30]

2. Private Property Found on the Battlefield

Private property found on the battlefield poses additional issues that must be considered by the combat commander. The main distinction is that a taking of private property, even when lawful, generally gives rise to an obligation to pay for it.[31]

The rules governing most private property, regardless of whether it is found on the battlefield or in occupied territory, are the same;[32] thus, private property will not be discussed in detail in this section. One problem worth noting, however, is the potential difficulty of distinguishing between private and public property. The Hague Regulations were written when it was easier to distinguish between public and private property.[33] The intervening years have seen not only the rise of socialism and the nationalization of industries, but also the privatization of some previously government-operated "commercial activities."[34] In many parts of the world an oil derrick may well be public property. In the United States the lawn mower used to cut the military parade field may be private property.

(a) *Distinguishing Public Property from Private Property*

The primary criterion for distinguishing between public and private property is that of beneficial ownership, rather than title. For example, private funds remain private property even when deposited in a government bank.[35] When ownership is mixed, part public and

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[29]Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, art. 14, 249 U.N.T.S. 240 [hereinafter Hague Convention on Cultural Property, 1954]. There are approximately 70 parties to the convention. The U.S. signed the Final Act of the Conference, but never ratified the Convention. 2 H. Levie, The Code of International Armed Conflict 1040 (1986).

[30]Hague Convention on Cultural Property, 1954, *supra* note 29, art. 16.

[31]*See, e.g.*, HR, *supra* note 12, arts. 52, 53.

[32]*See, e.g.*, FM 27-10, para. 59(b).

[33]DA Pam 27-161-2 at 184.

[34]*See* Office of Management and Budget, Circular A-76 (Revised Aug. 4, 1983).

[35]M. Greenspan, *supra* note 15, at 291; FM 27-10, para. 394(a).

part private, compensation to the private owners may be required in proportion to their ownership interest in the property.[36] United States policy is to treat property of unknown ownership as public property until its true ownership can be determined.[37]

Some clearly "private" property, in the usual sense of this term, is treated as if it were public property. Even if privately owned, individual "arms, horses, military equipment and military documents" may be confiscated.[38] Pictet's Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War gives a broad reading to these categories. "Arms" includes ammunition and accessories. "Horses" should be read as including any "individual means of transport," such as motorcycles, skis, or bicycles. "Military equipment" means articles "solely for military use, such as optical or precision instruments, portable radio sets, component parts of weapons, pioneer tools, etc." "Military documents" means documents other than identity papers, such as "maps, regulations, written orders, plans, individual military records, etc."[39]

(b) *Property of Prisoners of War (POW's)*

Certain items of property in the possession of a POW are protected, even if owned by the state. Personal effects, clothing, protective articles, eating implements, and small sums of money possessed by POW's may not be confiscated. "Articles of value" may be taken for safekeeping only, and the prisoner is entitled to a receipt.[40] Retained personnel (medical personnel and chaplains) are entitled to retain their personal belongings and to take these belongings with them when repatriated.[41]

Enforcement of the protection of a POW's property has not always been entirely successful.[42] Major General Robert M. Littlejohn, chief of the U.S. Army's quartermaster services in the World War II European Theatre of Operations, complained at one point: "I have no defense for [requisitions to support] POW's turned over to me practical-

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[36]*See* Kaufman v. Societe Internationale, 343 U.S. 156 (1952); *see also* FM 27-10, para. 394(b).

[37]FM 27-10, para. 394(c).

[38]Geneva Convention relative to the Treatment of Prisoners of War, August 12, 1949, art. 18, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter GPW].

[39]International Committee of the Red Cross, Commentary, III Geneva Convention relative to the Treatment of Prisoners of War 167 n.2, para. B (J. Pictet ed. 1958) [hereinafter Pictet, vol. III].

[40]GPW, *supra* note 38, art. 18.

[41]*Id.* art. 33; GWS, *supra* note 18, art. 30.

[42]Pictet, vol. III, *supra* note 39, at 166-67.

ly naked. What happens to their mess gear? and their blankets? They must have had something, somewhere."[43]

(c) *Private Property Used or Damaged During Military Operations*

An exception to the general rule requiring compensation for private property is the absence of any requirement to pay for such property used or damaged during actual military operations. For example, fields of fire may be cleared through a wheat field without paying the farmer for the loss of the crops. Buildings may be used for shelter of troops or the sick and wounded, and no rent needs to be paid.[44]

To summarize, public property on the battlefield (with the exceptions noted above for medical and cultural property) may be taken without compensation whenever required by military necessity. Private property may be used temporarily in the course of operations without an obligation to pay for it, but otherwise is subject to the same requirements for compensation as property seized or requisitioned in occupied territory.

C. PROPERTY IN OCCUPIED AREAS

Property rules grow more complex in the realm of military occupation. A first complexity is in determining at what point in time "occupation" begins. This is a factual determination, based on when control of the territory shifts from the prior government to the invading army.[45] Article 42 of the Hague Regulations provides that occupation exists when territory "is actually placed under the authority of the hostile army."[46] Oppenheim, in his treatise on international law, quite correctly describes that definition as "not at all precise, but it is as precise as a legal definition of a fact such as occupation can be."[47] The fact of occupation is frequently evidenced by the invading

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[43]Quoted in W. Ross & C. Romanus, The Quartermaster Corps: Operations in the War against Germany 730 (United States Army in WWII: The Technical Services, 1965).

[44]M. Greenspan, *supra* note 15, at 283; *see also* Seery v. United States, 127 F. Supp. 601, 605 (Ct. Cl. 1955).

[45]FM 27-10, para. 355.

[46]Note that the rules of occupation apply to occupation of hostile territory. This distinction is important because it eliminates the applicability of seizure and requisition to most low-intensity conflicts (LIC). The expected LIC scenario for U.S. forces will be that of a presence in a friendly foreign country in support of the legitimate government. This distinction also limited the applicability of seizure and requisition in Grenada to the combat phase of the operation. Inapplicability of seizure and requisition to most LIC is discussed in more detail later in this article. *See infra* notes 259-66 and accompanying text.

[47]2 L. Oppenheim, *supra* note 7, § 167.

army issuing a proclamation declaring a state of occupation,[48] and this is the practice of U.S. forces.[49] As long as the date of declared occupation is at least a reasonably close approximation of actual occupation, it is unlikely to be challenged in the absence of substantial subsequent resistance.[50]

1. General Rules Applicable to Property in Occupied Areas

Property in occupied territory can be divided into several categories. Public property can be real property, including public works, cultural property, military property, and other moveable property not included in the other categories. Private property can be categorized as real property, property susceptible to direct military use, and other private property.

Regardless of the type of property involved, an overriding requirement is that the needs of the civil population must be provided, particularly regarding food and medical supplies.[51] This requirement can severely limit the items that can be legally seized or requisitioned, and it may even require that the occupation forces import goods for the civil populace rather than requisitioning goods from them.[52] For example, more than 2,500,000 tons of supplies of all kinds, including 1,000,000 tons of wheat and flour, were imported by the Allies into occupied Italy in the spring of 1945.[53] A wide variety of supplies may be required. In February of 1945 nipples for baby bottles were in such short supply in Belgium that the lack of them was considered "prejudicial to military operations."[54]

A corollary to this is that property in occupied areas may not be destroyed unless absolutely necessary for military operations.[55] De-

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[48]M. Greenspan, *supra* note 15, at 219.

[49]FM 27-10, para. 357.

[50]*See* M. Greenspan, *supra* note 15, at 219; *see also* 2 L. Oppenheim, *supra* note 7, § 167, n.4.

[51]*See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 55, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter GC]; *see also* HR, *supra* note 12, art. 52.

[52]GC, *supra* note 51, art. 55.

[53]G. Benson & M. Neufeld, *American Military Government in Italy*, in American Experiences in Military Government in World War II 136 (C. Friedrich & Assoc. eds. 1948).

[54]SHAEF Msg. No. 12558 to War Department, 13 Feb. 1945, reprinted in H. Coles & A. Weinberg, Civil Affairs: Soldiers Become Governors 887 (Dep't of Army, Chief of Military History, United States Army in World War II, Special Studies 1964) (the prejudice to military operations was the danger of disease caused by the use of unsanitary substitutes).

[55]GC, *supra* note 51, art. 53; M. Greenspan, *supra* note 15, at 287.

struction, if any, must be limited, to the extent possible, to facilities with a direct military use, such as railroads, airfields, and military barracks.[56]

2. Ownership of Confiscated, Seized or Requisitioned Property

Still another important point to be considered, regardless of the type of property concerned, is that any property confiscated, seized, or requisitioned becomes the property of the capturing state, not that of individual soldiers.[57] U.S. policy expressly forbids individual soldiers to profit from their position in an invading or occupying force, even from business dealings that would otherwise be legal.[58] Although not technically in an "occupied area," the initial house-to-house search in Grenada provides an instructive example. When complaints were received that U.S. soldiers were taking private property, the commanding general issued strong guidance and began nonjudicial punishment proceedings. He made it clear that theft remains theft, and the problem abated.[59]

3. Public Real Property and Cultural Property

An occupying army may take control of public real property, but does not and cannot become its owner, only its "administrator and usufructuary."[60] Thus, the property cannot be sold and must be preserved from wasteful or negligent damage to its value. Despite these restrictions, the occupying army may exercise many rights commonly associated with ownership, including leasing out the property (the lease should not extend beyond the length of the occupation), harvesting crops, cutting timber (in reasonable amounts), and generally receiving the "fruits" of the public land.[61]

Some important exceptions should be noted. Property belonging to local governments or to religious, educational, or cultural institutions is treated as private property and is therefore subject to the restrictions on seizure or requisition of private property discussed

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[56]FM 27-10, para. 401.

[57]Pictet, vol. III, *supra* note 39, at 167. The U.S. practice of allowing certain confiscated items to be retained by individuals as "war trophies" does not change the general rule. As the owner of the items, the government may dispose of them by giving them to individuals without offending international law. M. Greenspan, *supra* note 15, at 282. In this regard, note that war trophies are specifically excluded from the provisions for compensating U.S. Army soldiers for damage to their private property incident to their military service. Dep't of Army, Regulation No. 27-20, Claims, para. 11-5(g) (10 Aug. 1987) [hereinafter AR 27-20].

[58]FM 27-10, para. 398.

[59]DAJA-IA 1986/8019, 28 May 1986, at 2.

[60]HR, *supra* note 12, art. 55.

[61]*See, e.g.*, M. Greenspan, *supra* note 15, at 288.

below.[62] Cultural property, both real and personal, including religious, historical, scientific, and artistic property, is specially protected.[63] Even if such property contains raw materials of military value (e.g., the metals in a statue), it may not be confiscated, seized or requisitioned.[64]

4. Public Military Property

Public moveable property that is useful for military operations may be confiscated, and no compensation needs to be paid for it.[65] This category is generally interpreted broadly, and includes such items as cash, realizable securities, communications and transportation equipment, and the contents of arms depots.[66] Even wine vats have been included in this category.[67]

As broad as this category of public property susceptible to military use is, it is not unlimited. The primary exceptions are cultural property[68] and property that is privately owned, though held by the government.[69] Historically, violations of this aspect of the law have not been found in questions of fine judgment as to whether or not such property is militarily useful. Rather, violations have been found when there has been wholesale, indiscriminate plunder of public property, particularly works of art, without regard to its usefulness to military operations.[70] Consequently, a commander appropriating public moveable property for any reasonable military use (which probably does not include paintings to decorate an officers club) is likely to be operating well within permissible behavior under the law of war.

5. Private Real Property

Private real property may not be confiscated or seized. Unlike public real property, such property may not be leased out, and the occupier is not entitled to its fruits.[71] The army of occupation may, however, requisition this property for its use.[72] There is scholarly authority

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[62]HR, *supra* note 12, art. 56.

[63]Hague Convention on Cultural Property, 1954, *supra* note 29.

[64]2 L. Oppenheim, *supra* note 7, § 142.

[65]HR, *supra* note 12, art. 53.

[66]2 L. Oppenheim, *supra* note 7, § 137; M. Greenspan, *supra* note 15, at 290-91.

[67]2 L. Oppenheim, *supra* note 7, § 137 n.2 (citing a 1948 decision of the Court of Appeal of Orleans holding that a German seizure of French government wine vats conformed to Article 53 of the Hague Regulations).

[68]*See supra* text accompanying notes 26-30 and 62-64.

[69]*See supra* text accompanying notes 35-37.

[70]*See* 2 L. Oppenheim, *supra* note 7, § 138(a), (b); *see also* M. Greenspan, *supra* note 15, at 291 n.62.

[71]HR, *supra* note 12, art. 46; FM 27-10, para. 407.

[72]HR, *supra* note 12, art. 52.

for the position that temporary use of this property for billets, hospitals, and similar purposes does not require compensation;[73] U.S. commanders cannot rely on this, however, because this proposition is contrary to express U.S. policy.[74] U.S. commanders may requisition private real property in occupied areas, but they must be prepared to pay fair compensation for its use.

6. Private Property Capable of Direct Military Use

Private property that may be fairly characterized as "war material" may be seized. Seizure of private property differs from requisition of private property in important ways. The property can be seized for use outside the occupied area, not just for the needs of the occupying army.[75] Compensation need not be paid until the end of the war, and the provisions of the peace treaty determine the party responsible for paying this compensation. It does not necessarily have to be the occupier.[76]

Examples of war material include ammunition, arms, and means of transportation or communications.[77] The issue of appropriate treatment of raw materials is a difficult one. Although many raw materials are valuable, even essential, in modern warfare, they are often equally adapted to civilian use. This has resulted in opinions as to what constitutes "war material" that cannot easily be reconciled. Oppenheim, in his influential treatise, included cloth (for uniforms) and leather (for boots) as examples of war materials.[78] On the other hand, the Singapore Court of Appeal has held that oil in the ground seized by Japanese forces was not "munitions de guerre" within the meaning of article 53 of the Hague Regulations.[79] Thus, a commander should not rely on "seizure" in order to obtain raw materials. This would include the seizure of any items not capable of immediate military use, absent substantial modification.[80]

7. Other Private Property

All other forms of private property may be requisitioned if such property is required for the needs of the occupation army or adminis-

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[73]2 L. Oppenheim, *supra* note 7, § 140.

[74]FM 27-10, paras. 407, 412.

[75]Lauterpacht, *The Hague Regulations and the Seizure of Munitions de Guerre*, 1955 Brit. Y.B. Int'l L. 219, 221.

[76]*See* 2 L. Oppenheim, *supra* note 7, § 141.

[77]HR, *supra* note 12, art. 53.

[78]2 L. Oppenheim, *supra* note 7, § 141.

[79]N.V. De Bataafsche Petroleum Maatschappli & Ors. v. The War Damage Commission, 22 Malayan Law Journal 155 (1956), *reproduced in* 51 Am. J. Int'l L. 802 (1957) (the Singapore Oil Stocks case).

[80]Lauterpacht, *supra* note 75, at 242.

trative personnel.[81] Only the needs of the local occupying force, not the general requirements of the occupying state's army, may be supplied by requisition, however.[82] Export of requisitioned material constitutes "economic plunder" and was the basis of several war crimes convictions following World War II.[83]

Requisition must be made under the authority of the local commander of the occupation forces and not individual soldiers.[84] The preferred method is systematic collection in bulk through local authorities.[85] This method has the advantage of apportioning the burden more fairly among the local inhabitants and limiting possibly acrimonious direct contact between the inhabitants and armed soldiers.[86] Coercive measures, if any, must be limited to those absolutely necessary to enforce the requisition.[87] Fair value must be paid for the property as soon as possible.[88] If prices cannot be agreed upon, they may be set by military authority.[89]

Funds to pay for requisitions may be obtained by "contribution," a special type of requisition for money. Only a commander-in-chief, not a local commander, may order a contribution by the civilian community, and it must be used only to meet the needs of the occupying force.[90] To the extent possible, contributions should be collected in the same manner as are (or were) local taxes, and receipts must be provided.[91] An advantage of contribution is that it allows the burden of occupation to be apportioned among the local population as a whole, rather than among just those individuals who own materials required by the occupier. For example, the residents of urban neighborhoods, as well as those of rural areas, will share the economic burden of providing foodstuffs needed by an occupying force.[92]

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[81]HR, *supra* note 12, art. 52; GC, *supra* note 51, art. 55.

[82]*See* 2 L. Oppenheim, *supra* note 7, § 147 (noting violations of the principle by the German army in WWI); *see also* M. Greenspan, *supra* note 15, at 301 (noting effect on title of violations of this principle in WWII).

[83]*See* 2 L. Oppenheim, *supra* note 7, § 143.

[84]HR, *supra* note 12, art. 52.

[85]FM 27-10, para. 415.

[86]DA Pam. 27-161-2 at 182.

[87]FM 27-10, para. 417.

[88]GC, *supra* note 51, art. 55; HR, *supra* note 12, art. 52.

[89]FM 27-10, para. 416; M. Greenspan, *supra* note 15, at 303 (citing British practice); 2 L. Oppenheim, *supra* note 7, § 147 (commenting, in regard to those prices, "it is expected that they shall be fair").

[90]HR, *supra* note 12, arts. 49, 51.

[91]*Id.* art. 51.

[92]M. Greenspan, *supra* note 15, at 304.

III. LAW OF WAR COMPLIANCE IS NOT ENOUGH: DOMESTIC LAW LIMITS ON COMBAT ACQUISITION

An initially legal requisition may become illegal through failure to make payment within a reasonable time.[93] This need for reasonably prompt payment raises the issue of the mechanisms that exist to pay property owners for requisition, especially if contribution is not used (or, as will be discussed later,[94] cannot be used). Under U.S. domestic law payment from government funds for goods and services is controlled by contract law and fiscal law.[95] Both subjects merit a general review as well as a more detailed discussion of their application to contingency contracting.

A. REQUIREMENTS OF A VALID CONTRACT

The basic requirements of a valid contract are an agreement, or "meeting of the minds," based on legally sufficient consideration between parties who have the legal capacity to form a contract.[96] Each of these basic requirements has particular problems in the contingency contracting environment.

1. Meeting of the Minds

A "meeting of the minds" can be difficult to achieve in contingency contracting, primarily due to differences in language and business practice. Interpreters can be difficult to locate. Procurement sections are seldom staffed with a translator, even at Corps level.[97] Even if a translator is available, one must be aware of subtle differences in the meaning attached to seemingly ordinary business terms. For example, American lumber "2-by-4's" are not really two inches deep and four inches wide, but one and one-half inches by three and one-half inches. Thus, if a contracting officer orders "2-by-4's" in Honduras, he

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[93]2 L. Oppenheim, *supra* note 7, § 147, n.4 and cases cited therein.

[94]*See infra* text accompanying notes 140-41.

[95]10 U.S.C.A. § 2303 (West Supp. 1988) states that U.S. contract law, specifically the Armed Services Procurement Act, applies to "procurement [by DOD, its departments, and NASA] . . . for which payment is to be made from appropriated funds." U.S. Const. art. I, § 9, cl. 7, requires a valid appropriation by Congress before any funds are taken from the U.S. treasury.

[96]As with most contracting rules, there are exceptions. Due to space limitations, this article will not deal with every exception and permutation to every rule noted herein. Unless the particular exception is relevant to the issue of combat contracting, only the basic rules will be examined.

[97]Powell & Toner, *supra* note 1, at 15.

will very likely receive precisely what he asked for—two-inch by four-inch lumber—and not what he actually wanted.[98]

2. Consideration—Benefit to Both Sides

Sufficient consideration—that each party derive some benefit from the bargain—is not likely to be a particular problem in forming contingency contracts, as compared to other forms of government contracts. Most[99] contingency contracts will probably be relatively straightforward exchanges of money for goods or services. The only readily-apparent potential consideration problem is likely to arise in the area of contract administration, specifically extensions of delivery time.

Other legal systems place far less emphasis on timely performance or delivery than does the U.S. system. On Grenada, Major Andrew Johnson, one of two contracting officers deployed to the island, developed a rule of thumb concerning delivery dates in the Caribbean: "Monday" really means "Wednesday."[100] Add to these cultural differences the disruptions of war, and delivery dates are likely to be missed. Under American government contracting rules, this is grounds to terminate the contract for default.[101] In allowing a contractor to extend the delivery date a contracting officer is supposed to require consideration, such as a reduction in price or an increase in quantity or quality of goods delivered. In practice, however, contracting officers have some discretion in this area. If the delay is "excusable," that is, not the fault of the contractor, the contractor has a right to an extension of the delivery date. The extension granted, however, is to be only for that period of elapsed time directly related to the valid excuse. As this is a factual determination, the contracting officer does possess some flexibility in allowing additional time without requiring additional consideration.

In his decision, the contracting officer should consider whether it is in the government's best interest to continue with the same contractor. This is usually a matter of whether the government can get the goods in issue more quickly by continuing to do business with the first contractor or by initiating a new contract with another vendor. When the delay is simply the result of a cultural difference in the way busi-

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[98]*Id.* at 16.

[99]That is, "most" contracts from a numerical standpoint, rather than one of total dollar value.

[100]Telephone interview with Major Andrew Johnson (Feb. 18, 1988).

[101]For readers unfamiliar with contracting, "termination for default" means that the contractor's goods will not be accepted, or paid for, and the contractor may be held liable to pay for any amount over the original contract's price that the U.S. must pay to obtain replacements.

ness is done, flexibility on the part of the contracting officer is probably the best course of action.

3. Authority to Bind the Government

(a) *In General*

The final basic contracting requirement, capacity to make a contract, is strictly limited in government contracting. The capacity to bind the government encompasses much more than the common law requirements of sanity, sobriety, and attainment of legal age. The government cannot be held to a contract unless the person making it possesses the actual authority to act for the government in the specific area of contract formulation.[102]

"Actual authority" is a term of art that distinguishes such authority from "apparent authority." Under the common law, a principal may be bound to an unauthorized agreement made by its agent with a third party if the principal gave that third party reason to believe the agent had contracting authority. The contracting authority of the agent in such cases is called "apparent authority" because the agent "appears" to have authority he does not actually possess. Apparent authority is legally insufficient to bind the government to a contract.[103]

Command authority, as broad as it is, does not necessarily include the authority to enter into contracts on behalf of the government. In fact, it rarely does include such authority. Contracting authority is vested in the heads of government agencies with contracting power, such as the Department of Defense and the Department of the Army.[104] This power may be delegated by creating subordinate "contracting activities." The person in charge of a contracting activity is called the "Head of Contracting Activity" (HCA). Contracting activities have been established in DOD; examples include U.S. Army Materiel Command activities and major commands (MACOM's).[105] MACOM commanders, as HCA's, are at the lowest level where a commander has contracting authority by virtue of holding a command position. Commanders at MACOM or higher levels typically do not exercise their contracting authority personally, but through a Principal Assistant Responsible for Contracting, or PARC.[106]

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[102]*See* Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

[103]Dep't of Army, Pam. No. 27-153, Legal Services—Contract Law, para. 1-3 n.25 (25 Sep. 1986).

[104]Federal Acquisition Reg. Subpart 2.1 (1 Apr. 1984) [hereinafter FAR].

[105]Defense Federal Acquisition Reg. Suppl. Subpart 202.1 (1 Apr. 1984) [hereinafter DFARS].

[106]*See* J. Cibinic & R. Nash, Formation of Government Contracts 66 (2d ed. 1986).

Contracting authority is delegated directly to individual contracting officers in subordinate commands, not to commanders. The instrument used to delegate such authority is called a "Certificate of Appointment," or a "warrant." A warrant is issued by the PARC,[107] and it establishes the limits of a contracting officer's authority to enter into contracts. The contracting officer's authority may be limited by the dollar value of individual contracts, the type of contract, or by any other limitations specifically indicated on the warrant.[108]

If a contracting officer exceeds the limits of his warrant, the action he has taken is invalid, unless ratified by a contracting officer with sufficient authority to do so. This limitation of contracting authority solely to duly appointed contracting officers is not a recent development resulting from concerns over extraordinarily expensive hammers and toilet seats. The Supreme Court has held that the U.S. is not bound by unauthorized contractual actions since 1868,[109] when it refused to require payment of a commercial draft that had been guaranteed by the Secretary of War.

This limitation on contracting authority is not limited to the armed forces. The principal case concerning "actual" as opposed to "apparent" contracting authority involved the Federal Crop Insurance Corporation.[110] Other unauthorized contractual actions have been attempted, without success, by officials ranging from the Deputy Assistant Secretary of Labor for Labor Relations[111] to the chief administrator of the National Capital Sesquicentennial Commission.[112] The important thing to remember is that, absent a warrant, no authority exists to enter into a contract, and, without a contract, no authority exists to expend U.S. funds for goods and services.

(b) *Unauthorized Commitments—Ratification or Personal Liability*

When a contract is made, or an attempt is made to contract, without actual contracting authority, the government may choose to be bound by the contract. This is done by "ratification." The essence of ratification is the approval, by an individual with the requisite authority to do so, of a contract that is invalid solely because the person who made it lacked the authority to contract on behalf of the government.[113]

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[107]Other individuals with the authority to appoint contracting officers are listed in FAR § 1.603-1 and Army FAR Suppl. § 1.603-2 (1 Dec. 1984) [hereinafter AFARS].

[108]FAR § 1.603-3.

[109]The Floyd Acceptances, 74 U.S. 666 (1868).

[110]Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

[111]Jascourt v. United States, 207 Ct. Cl. 955, *cert. denied*, 423 U.S. 1032 (1975).

[112]Byrne Organization, Inc. v. United States, 152 Ct. Cl. 578, 287 F.2d 582 (1961).

[113]FAR § 1.602-3(a).

The military rules for ratification of "unauthorized commitments" are set forth in the Defense Federal Acquisition Regulation Supplement (DFARS) section 1.602-3. The prerequisites for ratification are: 1) that some benefit to the government must have resulted from the unauthorized commitment (goods or services must have actually been accepted by the government); 2) that the ratifying official has the authority to approve such contracts and had the authority to do so at the time the commitment was made; 3) that the contract would otherwise have been proper, if it had been made by someone with the authority to make it; 4) that a contracting officer determines that the price is fair and reasonable, and recommends payment; 5) that legal counsel agrees with the contracting officer's recommendation to pay for the commitment; 6) that funds were available at the time of the commitment and are still available; and 7) that any additional regulations or procedures for ratification that are required by subordinate agencies (i.e., Army, Navy, etc.) are also followed.[114]

If the government, acting through the contracting officer, legal counsel and ratifying official, decides not to ratify the commitment in issue, the individual who made the contract may be personally liable for payment of the obligation incurred.[115] This principle dates to 1855, when the U.S. Attorney General opined that an individual who, without the authority to do so, attempts to obligate the government to a contract may be personally responsible for any obligation incurred.[116] Although unauthorized commitments made in good faith are usually ratified, personal liability is a real possibility. The contracting officers on Grenada did refuse to ratify some commitments (primarily contracts for souvenir T-shirts allegedly purchased as PT uniforms).[117]

B. FISCAL LAW LIMITS ON GOVERNMENT CONTRACTING

Although a contracting officer may possess the authority to enter into a contract, a contract may not be made unless government funds

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[114]*Id.* The additional agency requirements are found at section 1.602-3 of that agency's Federal Acquisition Regulation (FAR) supplement (e.g., AFARS § 1.602-3 contains the requirements that are specific to the Department of the Army).

[115]A provision also affords contractors the opportunity to apply to the General Accounting Office (GAO) for payment under theories of quantum meruit or quantum valebant, but this is an illusory alternative to ratification, as the Comptroller General usually requires ratification before making payment under these theories. *See, e.g.*, Comp. Gen. Dec. B-182584 (1974), 74-2 CPD ¶ 310.

[116]7 Op. Atty. Gen. 88 (1855).

[117]Interview with MAJ Johnson, *supra* note 100.

are available to pay for it. These funds must be appropriated by Congress. As the Constitution states: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[118]

1. The "Anti-Deficiency Act"

It is a criminal act to enter into or authorize government contracts in the absence of government funds to pay for such contracts. Known informally as a violation of the "anti-deficiency act," a knowing and willful violation of 31 U.S.C. § 1341(a) (or of 31 U.S.C. §§ 1342 or 1517(a)) is punishable by a fine of up to $5000, two years in prison, or both.[119]

An exception worth noting at this point may be relevant to contingency contracting. The Army, Navy, and Air Force may spend money not yet appropriated to purchase needed clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies.[120] This exception is used primarily to sustain the armed forces during funding gaps occurring at the end of the fiscal year. It must not be construed as blanket authority to disregard funding limits when purchasing listed items.[121]

2. The Purpose Statute

It is not legally sufficient that DOD, or the Army, or an individual command has government funds available. The "right kind of money" must be available to purchase the desired goods and services. The source of this requirement is the "purpose statute,"[122] which states: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

How may a commander or contracting officer determine whether suitable funds are available? At times this is a relatively easy process. If an item or project is specifically mentioned in an appropriations bill, it is clearly permissible to spend the funds so appropriated for such an item or project. A purpose for which certain funds were

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[118]U.S. Const. art. I, § 9, cl. 7.

[119]31 U.S.C.A. §§ 1350, 1519 (West 1983). 31 U.S.C.A. § 1341(a) (West 1983) prohibits obligating or spending money before it is appropriated, or in amounts greater than the amount appropriated. 31 U.S.C.A. § 1342 (West 1983) prohibits accepting "voluntary" personal services for which payment may have to be made, except in emergencies involving protection of human life or property. 31 U.S.C.A. § 1517(a) (West 1983) prohibits spending or obligating more than the amount in a formal subdivision of an appropriation.

[120]41 U.S.C.A. § 11 (West 1987).

[121]*See also* Dep't of Defense, Logistics Systems Analysis Office, Acquisition Policies During Mobilization 3 [hereinafter DOB Mobilization study] (draft, March 1987) "Food and Forage Act" also does not waive procurement regulations).

[122]31 U.S.C.A. § 1301(a) (West 1983).

appropriated may also be specifically mentioned in the legislative history.

Those situations, however, will rarely arise in contingency contracting. Items purchased on the local economy in the early stages of a deployment will rarely, if ever, appear as line items in an appropriations bill or be referenced in congressional hearings.[123] An exception of limited applicability, however, is that expenses of occupation administration are permanently authorized to be paid from Department of Defense appropriations.[124]

The General Accounting Office (GAO) has developed rules to judge the propriety of expenditures for items not specifically mentioned in appropriations. The item must be reasonably needed to accomplish an authorized purpose,[125] its purpose must not otherwise prohibited by law,[126] and its purchase must not be provided for in another, more specific appropriation.[127]

Agencies have some discretion to determine those items reasonably necessary to accomplish their assigned and funded missions. For example, the Comptroller General approved the purchase of calendars with funds appropriated for chaplains' activities because those calendars were overprinted with chapel schedules.[128] Discretion is broadest when new duties are assigned after appropriations were made.[129]

This discretion is limited, however, by other provisions of law. Outright prohibitions or restrictions on spending money for particular items are obvious limitations. Some of these restrictions are general and permanent in nature. An example is the "bona fide needs statute,"[130] which requires spending a fiscal year's money only for a fiscal year's needs. Other restrictions are quite specific and are often contained in annual appropriations bills. Examples range from the prohibition of the use of Department of Defense funds for the Nicaraguan Contra rebels[131] to the requirement that beer and wine for Department of Defense nonappropriated fund activities be purchased within the state where the installation is located.[132]

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[123]*See infra* text accompanying notes 286-88.

[124]Act of Dec. 19, 1985, Pub. L. No. 99-190, § 101(b), 99 Stat. 1202.

[125]62 Comp. Gen. 566 (1984).

[126]*See infra* notes 130-132 and accompanying text.

[127]*See infra* notes 134-135 and accompanying text.

[128]62 Comp. Gen. 566 (1984).

[129]63 Comp. Gen. 422 (1984) (funding SDI ("Star Wars") from RDTE funds prior to a specific appropriation).

[130]31 U.S.C.A. § 1502(a) (West 1983).

[131]Act of Nov. 14, 1986, Pub. L. No. 99-661, § 1351, 100 Stat. 3995.

[132]Acts of Oct. 18, 1986, Pub. L. No. 99-500, and Oct. 30, 1986, Pub. L. No. 99-591, § 101(c), 100 Stat. 3341-116.

Unfortunately, short of deploying with a copy of the U.S. Code and a copy of the latest appropriations act, a commander or contracting officer can do little to be confident of avoiding all funding prohibitions. This is particularly true of officers who hold procurement as an alternate specialty who are not in a procurement position and who may be deployed on very short notice.[133]

That requirement of the "purpose test" that prohibits expending funds for items provided for in a more specific appropriation may also prove troublesome to unwary contracting officers.[134] Even if funds appropriated specifically for certain items are exhausted, the use of a more general appropriation otherwise available for the purchase of such items is prohibited.[135]

There are no criminal penalties for violating the "purpose statute;" however, violations of the purpose statute may lead to violations of other fiscal laws that do carry criminal penalties.[136] The remedy for a violation of the purpose statute is the "deobligation" (return) of the funds that should not have been obligated and the obligation and expenditure of the funds that should have been used originally. By the time the error is corrected, however, sufficient money may not be available in the proper fund. If this is the case, a correction of the violation of the purpose statute will result in a violation of the anti-deficiency act.

3. Prohibition Against Augmentation

A corollary to the purpose statute's prohibition against obtaining funds from other appropriations is the prohibition, found in 31 U.S.C. § 3302, against obtaining funds from outside sources. The relevant portion is subparagraph (b): "Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government *from any source* shall deposit the money in the Treasury as soon as practicable *without deduction for any charge or claim.*"[137]

Certain statutory exceptions to this augmentation prohibition are relevant to contingency contracting. According to 10 U.S.C. § 2211 any reimbursements received from members of the United Nations

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[133]LTC Frank L. Powell, *see supra* note 1, was a brigade executive officer in an infantry division when he was given five days notice prior to deploying as the contracting officer for the AHUAS TARA exercise in Honduras.

[134]*See, e.g.*, 63 Comp. Gen. 422 (1984); 1 Comp. Gen. 126 (1894).

[135]36 Comp. Gen. 386 (1956).

[136]Comp. Gen. Dec. B-208697 (Sept. 28, 1983), 82-2 CPD ¶ 2.

[137]Emphasis added. 31 U.S.C.A. § 3718(b) (West Supp. 1988) allows debt collection fees to be deducted from the amount recovered.

for certain expenses of joint exercises may be credited to DOD instead of being deposited in the Treasury. Further, 22 U.S.C. § 1754 provides that proceeds of certain sales under the Mutual Security Act of 1951 may be used for enumerated purposes. Two of these purposes are the "purchase of goods or services in friendly nations"[138] and the "purchasing [of] materials for United States stockpiles."[139] The procedural aspects of using such funds are beyond the scope of this article. A determination as to the availability of such funds must be made in coordination with the servicing comptroller.

Perhaps the most significant consequence, for purposes of this article, of the prohibition on augmentation is that it eliminates the availability of "contribution" under the law of war as a source of funding for occupation expenses.[140] Any contribution collected would become the property of the United States, not of the Army or the command occupying the territory. In the absence of any specific statutory authority to retain the funds for local use, 31 U.S.C. § 3302 requires the immediate deposit of such funds in the Treasury. Permanent authority exists to pay for "expenses in connection with administration of occupied areas;" however, such expenses must be met out of Department of Defense appropriations, not from general Treasury funds.[141] Thus, although contribution can be collected only for the use of the occupying force, such money, once collected, must be deposited immediately in the Treasury, thus depriving the occupying force of the use of the funds.

4. Prohibition Against Advanced Payments

A funding restriction that can cause particular difficulty for contingency contracting is contained in 31 U.S.C. § 3324. This provision forbids payment in excess of the value of goods already delivered or services already performed. In other words, no advance payments may be made.

This concept runs counter to normal business practice in many parts of the world where contingency contracting is likely to occur.[142] There are some exceptions that may prove to be invaluable, however.

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[138]22 U.S.C.A. § 1754(a)(2) (West 1979).

[139]22 U.S.C.A. § 1754(a)(6) (West 1979).

[140]For a brief discussion of contribution under the law of war, see *supra* text accompanying notes 90-92.

[141]Act of Dec. 19, 1985, Pub. L. No. 99-190, § 101(b), 99 Stat. 1202. *See also* 31 U.S.C.A. § 1306 (West 1983), which states that "[f]oreign credits owed to or owned by the Treasury are not available for expenditure by agencies except as provided annually in general appropriation laws."

[142]*See* Powell & Toner, *supra* note 1.

For example, 10 U.S.C. § 2396 allows advance payments to be made to comply with foreign laws or regulations and advance payments of rent to be paid for a period dictated by "local custom." Where advance payments for items other than rent are dictated only by custom, however, the problem remains.

5. "Doing Good" is No Defense

Commanders and contracting officers involved in contingency contracting should be aware that good intentions, and even good results, are not defenses to violations of fiscal law. During a recent exercise in Honduras funds appropriated for the day-to-day operation of the Army (OMA funds) were used, among other things, to provide medical and veterinary services to civilians. This was not "a bad thing to do," as it surely contributed to local acceptance of the Army presence in the area. Nevertheless, the Comptroller General determined that such services should have been provided from Agency for International Development funds, not from Army funds. The GAO decision directed that accounting corrections be made and that if these corrections resulted in a violation of the anti-deficiency act, the Army must file the required report of an anti-deficiency act violation with Congress.[143]

Such stringent application of fiscal law is not novel. In 1868 the Secretary of War purported to guarantee the credit of a contractor in order to get much-needed supplies to starving soldiers in Utah. The U.S. Supreme Court found that the Secretary had exceeded his authority and invalidated the instruments of that transaction.[144]

6. Prospects for Change

In the current political climate, any wholesale relaxation of fiscal law restrictions on the Department of Defense is unlikely. The memories of outrageously expensive toilet seats and stool caps do not engender a great amount of trust in the military contracting system. Additionally, a recent *Newsweek* poll reported that forty-three per cent of those polled favored "major cuts in defense spending" as the principal approach toward reducing the federal budget deficit.[145] Even in the event of declared war statutory and regulatory relief has not always been prompt. In World War II restrictions were substan-

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[143]63 Comp. Gen. 422 (1984).

[144]The Floyd Acceptances, 74 U.S. 666 (1868). *See also* Bausch & Lamb Optical Co. v. United States, 78 Ct. Cl. 584 (1934) (denying payment for extra security measures, taken by a contractor during WWI, that were directed by officers who erroneously believed that they were acting for the Secretary of the Navy).

[145]Newsweek, Nov. 23, 1987, at 19.

tially relaxed for overseas commanders, but not until 1944, literally years after the U.S. declaration of a state of war.[146]

On the other hand, Congress has been willing to grant relief in specific, limited problem areas. One of the most notable examples is congressional reaction to the GAO opinion regarding spending in Honduras noted earlier.[147] Less than four months after the Comptroller General determined that the Department of Defense required specific statutory authority to provide humanitarian aid and civic assistance in the context of overseas operations, Congress provided such statutory authority. The Stevens Amendment to the 1985 Department of Defense Appropriations Act authorized DOD to use Operation and Maintenance funds to pay for "incidental" humanitarian assistance and civic action undertaken in the context of Joint Chiefs of Staff-coordinated or -directed exercises.[148] The Fiscal Year 1987 Department of Defense Authorization Act added a new chapter, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations, to Title 10 of the United States Code. This authorizes DOD to provide humanitarian and civic assistance during authorized overseas operations and to fund such assistance from funds specifically appropriated for that purpose.[149] This chapter also provides to DOD the authority to spend Operation and Maintenance funds for "minimal" humanitarian and civic assistance undertaken during overseas operations.[150]

Another example of congressional willingness to correct specific fiscal law problems is the grant of authority to DOD to reallocate funds to avoid anti-deficiency act violations caused solely by currency fluctuations.[151]

It is clear that commanders and contracting officers involved in overseas deployments must comply with all normal fiscal law rules.

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[146]*See* HQ, Army Service Forces, Procurement Regulations Revision No. 52, para. 108.6 (11 Oct. 1945) (citing a 1944 War Dep't circular) (available in Procurement Regulations: History Set Vol. 9, Oct. 11, 1945-June 1, 1946, in the library of The Judge Advocate General's School, U.S. Army).

[147]*See supra* text accompanying note 143.

[148]Department of Defense Appropriations Act, 1985, 8103, Pub. L. No. 98-473, § 101(h), 98 Stat. 1837, 1942 (1984). For a discussion of what constitutes "incidental" humanitarian aid, see Ms. Comp. Gen. B-213137 (30 Jan. 1986) at pp. 32-34 of the enclosure to that decision. *See also* HQDA Msg. 271326Z Jul 88, subject: U.S. Army Engineer Exercise Troop Construction OCONUS.

[149]10 U.S.C.A. § 403(a) (West Supp. 1988).

[150]10 U.S.C.A. § 403(b) (West Supp. 1988).

[151]Further Continuing Appropriations, 1983, Pub. L. No. 97-377, Title VII, Sec. 791, of Title I, § 101(c) (Dec. 21, 1982).

When specific problem areas are identified, however, these issues should be surfaced and corrective legislative action should be taken.

C. ADDITIONAL RESTRICTIONS ON SPECIFIC TYPES OF ACQUISITION

In addition to those restrictions pertaining to all contract actions, numerous restrictions apply to specific types of contracts. It is beyond the scope of this article to focus in detail on real estate acquisition or the intricacies of the Federal Acquisition Regulation (FAR). Sufficient information will be provided, however, to point out the problems involved and to identify sources that will provide guidance and further information.

1. Real Estate

Responsibility for real estate transactions rests with the Corps of Engineers (COE).[152] This issue may not initially appear to be related to contingency contracting. Rarely, if ever, will armed forces buy real estate or establish long-term leases in the early stages of a combat deployment. Short-term contracts for hotels and furnished rooms are considered service contracts, and therefore may be handled by non-COE contracting officers.

Only COE may negotiate retroactive leases, however.[153] Thus, if soldiers are sheltered in homes, hovels, or hotels without a formal contract, owners of these facilities may not be paid rent until a COE team arrives on the scene.[154] In Grenada, while the contracting officers arrived in the early days of November,[155] the District Engineer Contracting Office team from Mobile, Alabama, was not on site until November 21, 1983.[156] Between November 21st and 28th the team negotiated and executed twenty-four leases, and it ratified a number of "leases" made by purchasing agents. It needed a second trip to Grenada on December 12, 1983, to clear up thirteen additional leases.[157]

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[152]*See* Army Reg. 405-10, Real Estate—Acquisition of Real Property and Interests Therein (25 May 1970).

[153]Army Reg. 405-15, Real Estate—Real Estate Claims Founded Upon Contract (1 Feb. 1960).

[154]*See* Braswell, *supra* note 5, at 11.

[155]Johnson, *supra* note 100.

[156]Braswell, *supra* note 5, at 8.

[157]Letter from CPT Warren, Administrative Law Officer, to the SJA, XVIII Airborne Corps & Ft. Bragg, subject: Claims Operations in Grenada—After Action Report/Lessons Learned, 9 March 1984, para. 19 [hereinafter Claims AAR].

2. Purchases Over $25,000

The requirements of the Federal Acquisition Regulation (FAR), Defense FAR Supplement (DFARS), and Army FAR Supplement (AFARS) are not suspended for contingency contracting.[158] These regulations are lengthy and filled with complex and time-consuming requirements, particularly with respect to purchases over $25,000.[159]

(a) *Competition in Contracting Act*

Much of the complexity of these regulations flows from the competition requirements of the Competition in Contracting Act of 1984 (CICA).[160] The purpose of competition is more than ensuring that the government "gets a good deal." The "full and open competition" required by CICA mandates also that all responsible[161] contractors must be given a fair chance to compete for a contract.[162] The minimum requirements of full and open competition are to have specifications that are not unduly restrictive,[163] to provide adequate notice of the proposed contract,[164] to allow a minimum of thirty days for potential contractors to prepare their offers, and to evaluate those offers fairly.[165]

This full and open competition is to be achieved through contracting using competitive procedures, the most important of which are sealed bidding[166] and competitive proposals.[167]

(b) *Choice of Sealed Bidding or Other Competitive Procedures*

Sealed bidding must be used if four criteria are present, and it may not be used if any of these criteria are absent: 1) sufficient time must be available to complete the sealed bidding process (as will be discussed, the time required can be substantial); 2) price will be the determining factor in selecting a contractor; 3) discussions with the bidders are not needed; and 4) the contracting officer reasonably expects to receive more than one bid.[168] If a contracting officer chooses

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[158]P. Gilliatt, *supra* note 2, at 14; *see also* Powell & Toner, *supra* note 1.

[159]That is, anything other than "small purchases," which will be discussed later in this article.

[160]Pub. L. 98-369 §§ 2701-2753, 98 Stat. 1175 (July 18, 1984).

[161]"Responsible" is a term of art that denotes those contractors capable of performing the contract. *See* FAR Subpart 9.1.

[162]*See* J. Cibinic & R. Nash, *supra* note 106, at 288.

[163]*See infra* text accompanying notes 181 & 186; *see generally* FAR Part 6.

[164]*See infra* text accompanying notes 171-74; *see generally* FAR Part 5.

[165]*See* FAR § 6.003.

[166]10 U.S.C.A. § 2304(a)(2)(A) (West Supp. 1988).

[167]10 U.S.C.A. § 2304(a)(2)(B) (West Supp. 1988).

[168]10 U.S.C.A. § 2304(a)(2) (West Supp. 1988).

not to use sealed bidding, he or she must document the reasons as to why this process is not appropriate.[169]

(c) *Sealed Bidding*

The solicitation for offers from potential contractors under sealed bidding procedures is called an Invitation for Bids (IFB). The rules for this method of procurement are contained in part 14 of the FAR.[170]

At least fifteen days prior to issuing an IFB the proposed procurement must be publicized in the Commerce Business Daily (CBD).[171] Individuals interested in contracting to provide the government particular goods or services may inspect the appropriate classification in the CBD to determine which government agencies are currently looking for that particular product or service. A notice must also be placed on the public bulletin board of a contracting office planning to contract for goods or services to advise local contractors of business opportunities.[172] IFBs must be sent to those who request them (for example, after seeing the CBD notice)[173] and to bidders on a "bidder's list" comprised of prior bidders for similar items and others who have asked to be included on the list.[174]

The IFB contains specifications for the desired item and applicable contract and solicitation clauses. Even a relatively simple IFB can consist of thirty to forty pages, even though many or most required clauses are incorporated by reference to the FAR or one of its supplements. The bid schedule lists the items desired, with a space or spaces for the bidder to fill in the price at which it will sell the item. The bidder then returns the completed bid schedule and a completed copy of the "representations" portion of the IFB. This is a multi-page section in which the bidder provides information, for example, as to whether it is a corporation or sole proprietor. The bidder must state that it is not prohibited from contracting with the government (not "debarred" or suspended), that it is or is not a small business, that it is or is not on the Environmental Protection Agency's list of polluters, and must provide various other items of information that the govern-

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[169]FAR § 6.401.

[170]Defense and Army rules are contained in parts 2 and 14 of their respective supplements. For an explanation of the new numbering system of the DFARS, see DFARS § 201.104-2.

[171]AFARS § 5.203.

[172]*See generally* FAR Part 5, "Publicizing Contract Actions."

[173]It is not unusual for contractors to send in a copy of the synopsis from the CBD, with a note that they want a copy of the IFB for that procurement.

[174]FAR § 14.205-1(b).

ment may use to foster socioeconomic policies through government contracting.

The IFB will specify a date and time for the opening of bids, and any bid not received on time may not be considered.[175] When the specified time arrives, the contracting officer opens the bids and determines which one offers the lowest price. The bidder submitting this bid is the "apparent low bidder;" however, prior to awarding the contract, the contracting officer must make additional determinations. The apparent low bidder will become the contractor only if it is "responsible" and its bid is "responsive."

Responsibility, in a potential contractor, is a question of the contractor's ability to perform the contract. Does it have enough financial backing? Does it have any experience in the area? Does it have the facilities and equipment? Before awarding the contract, the contracting officer must decide that the potential contractor is responsible.[176] Responsiveness must also be considered. To be accepted bids must not attempt to modify the IFB in regard to price, quantity, quality, or delivery.[177] Any bid modifying these items, or ambiguous as to whether the bidder actually agrees to meet the government's requirements, is nonresponsive. A nonresponsive bid may not be accepted, even if it would be to the government's advantage to do so.[178]

The responsive and responsible bidder offering the lowest price will be awarded the contract.

(d) *Competitive Proposals*

The other principal method of competitive procedures is competitive proposals, also known as "negotiation." The rules for this method of procurement are contained in FAR Part 15. Negotiated procurements have the same publicity requirements that are applicable to sealed bidding.[179] Two types of solicitations are used in negotiated contracting, Request for Proposals (RFP) and Request for Quotations (RFQ). Since RFQ's are principally used under small purchase procedures, they will be discussed in a later section.

A request for proposals will contain applicable contract and solic-

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[175]With exceptions not worth noting here. *See* FAR § 14.304 if more details are desired.

[176]FAR § 9.103(b).

[177]FAR § 14.402.

[178]63 Comp. Gen. 529 (1984).

[179]*See* FAR § 15.403 and FAR Part 5.

itation clauses[180] and a description of the product or service desired. This description is not like an IFB specification that bidders must agree to meet exactly, without any variations or ambiguities, or else have their bids rejected as "nonresponsive." Instead, potential contractors, or "offerors," in negotiated procurements will offer detailed proposals indicating the manner in which they will be able to better satisfy the government's requirements. Moreover, unlike the IFB, price is not the deciding factor and might not be the primary consideration. Accordingly, the most important portion of the RFP is the statement of "evaluation criteria." This advises offerors of the manner in which the government will decide between competing proposals. Thus, the evaluation criteria detail not only what factors are important, but also the relative importance of these factors. These criteria may set forth any conditions rationally related to the government's needs, but may not be unduly restrictive.[181] For example, proficiency in Spanish and prior experience as a translator may be more important than price in selecting a Spanish-language interpreter.

The contract is to be awarded to the offeror whose proposal best satisfies the evaluation criteria. At times, it is possible to award the contract on the basis of the initial proposals, if these proposals meet the government's minimum needs and the prices are fair and reasonable.[182] Frequently, however, the contracting officer must conduct discussions with offerors to obtain the desired goods or services. These discussions clarify ambiguities in a proposal, resolve any questions of responsibility, or correct "deficiencies." Deficiencies are differences between the proposal and the government requirement or a price that is out of line with the government's estimate or the other bids. For example, a contract to provide hotel rooms for thirty people may specify fifteen double rooms with baths, located in a single building. One offeror may quote a good price for housing thirty people, but may be ambiguous as to whether that price is for fifteen double rooms or for eight four-person rooms. Another may clearly offer fifteen double rooms, but with shared shower facilities. A third offeror may propose fifteen double rooms with private baths, but located in three different hotels. The contracting officer would hold discussions with the first offeror to clarify the number of rooms offered, with the second to determine whether he has any rooms that do have private showers, and with the third to determine if he could reallocate room assignments to get everyone in one building.

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[180] *See* FAR § 15.406 for required clauses.

[181] FAR § 15.605.

[182] FAR § 15.610(a). The RFP must also advise offerors of this possibility. FAR § 15.610(a)(3)(i).

If discussions are held with any offeror, they must be held with all offerors who have a reasonable chance of being awarded the contract.[183] In the example above, the contracting officer may not call the first offeror to "see if they really meant fifteen rooms" unless he also provides the other offerors with a chance to revise their proposals. If the contracting officer modifies or supplements any of the evaluation criteria (e.g., decides that four people could share a room) he must give notice of that change to all offerors with a reasonable chance of receiving the award.[184] After discussions the contracting officer sets a date for submission of best and final offers (BAFO's). Any late BAFO's may not be considered. The offeror whose timely BAFO best meets the government's needs is to be awarded the contract.[185]

(e) *Specifications May Not be "Unduly Restrictive"*

In all types of competitive procedures, the government's specifications or evaluation criteria must not be unduly restrictive. "IBM-compatible" computers may be required if such compatibility is essential for use with existing equipment. A requirement for IBM computers, however, may not be made by either specifying this brand name or an unneeded feature found only on IBM computers.[186]

(f) *Exceptions to Competition Requirements*

Sealed bidding is unlikely to ever be used in a contingency setting. It simply takes too much time to prepare detailed specifications, publicize the IFB, and provide contractors with time to examine the specifications and to prepare a bid.[187] As the use of competitive proposals is required when time is too short for sealed bidding,[188] contingency contracts will thus almost always be negotiated contracts. Meeting even the requirements of competitive proposals, however, may be impracticable during deployments to areas other than those with an established procurement base, such as Europe or Korea.[189] For an example of the lead time involved, the 193d Infantry Brigade (Panama) contracting office requires four months' lead time prior to an exercise for all requests for commercial contracts over $25,000.[190]

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[183]FAR § 15.610(b).
[184]FAR § 15.610(c).
[185]FAR § 15.611.
[186]FAR § 10.004; Comp. Gen. Dec. B-204364.2 (8 Jan. 1982), 82-1 CPD ¶ 24.
[187]*See infra* discussion of sealed bidding; *see also* P. Gilliatt, *infra* note 2, at 46.
[188]*See supra* notes 171-74 and accompanying text.
[189]*See* Draft FM, *supra* note 2, at 4-5.
[190]193rd Infantry Brigade (Panama) Contracting Instructions for Exercises (CIFE) Sec. III, "Milestones" (undated).

CICA permits exceptions to its competition requirements under strictly limited circumstances listed in the statute and in FAR 6.302. Three of those exceptions are relevant to a discussion of contingency contracting: exception (2) for unusual and compelling urgency; exception (4) for international agreements; and exception (6) for national security.[191]

The first relevant exception is when the "agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals."[192] The "unusual and compelling urgency" provision will be the most used exception in contingency contracting. DFARS allows use of this exception if the purchase request has a very high priority, defined as Uniform Material Movement and Issue Priority System (UMMIPS) categories 01 through 04.[193] To avoid wholesale abuse of the UMMIPS system, however, such purchase requests must be approved prior to submission to the contracting officer.[194] The draft Department of the Army Pamphlet on Contingency Contracting recommends that logistics staff officers (G-4 or S-4) validate these purchase requests.[195]

This exception may not be used if the "urgency" is the result of a failure to plan ahead.[196] For urgent requirements that surface because of a sudden deployment, however, it provides an escape from strict compliance with the normal time-consuming competition requirements. It is also the only exception to the competition requirement that does not require advance justification and approval (J&A).[197] Avoiding the need for a J&A can save significant time, particularly if the contracting officer finds it difficult or impossible to contact the appropriate approval authority.[198]

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[191]10 U.S.C.A. § 2304(c)(2), (4), (6) (West Supp. 1988); FAR § 6.302-2,-4, & -6. Other exceptions may also apply, but no more than to non-contingency situations. For example, when there is only one manufacturer, anywhere, of an item (or very few sources of an item) 10 U.S.C.A. § 2304(c)(1) (West Supp. 1988) permits dealing only with the sole source. The sorts of items to be procured in a deployment are no more likely, and probably less likely, to be made by only one source.

[192]10 U.S.C.A. § 2304(c)(2) (West Supp. 1988).

[193]DFARS § 206.302-2(b)(6).

[194]DFARS § 206.303-1(b)(70).

[195]P. Gilliatt, *supra* note 2, at 15, 47.

[196]10 U.S.C.A. § 2304(f)(5)(A) (West Supp. 1988).

[197]10 U.S.C.A. § 2304(f)(2) (West Supp. 1988).

[198]*See infra* note 251 and accompanying text; text accompanying note 310. *See also* P. Gilliatt, *supra* note 2, at 65.

The second relevant exception is where "the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures."[199] This provision is unlikely to be useful in many contingency situations outside Europe and Korea. Only if a Status of Forces Agreement or treaty exists prior to deployment, and it specifies use of a source that is still available under the contingency conditions, will this be of any benefit.

The third exception is where "the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals."[200] This exception provides for contracting without the normal competition (especially publication) requirements when it is necessary to keep the contracting action confidential (e.g., in preparation for a surprise deployment). The designation of the purchase as "classified," or the purchase of a classified item is not in itself sufficient justification to use this provision.[201]

(g) *Justifications and Approvals (J&A)*

To use any of the competition requirements exceptions, the contracting officer must offer a written justification and have it approved at an appropriate level. J&A's based on exception (2), unusual and compelling urgency, may be submitted after the fact, but they are still required.[202]

The contracting officer's justification must include: 1) a description of the item or service required; 2) identification of the relevant statutory exception (e.g., "10 U.S.C. § 2304(c)(6)"), and the reasons for using it; 3) a determination that the anticipated price will be fair and reasonable (often difficult in a contingency situation);[203] 4) a description of any market survey done (to locate sources or determine prices) or an explanation of why none was conducted; 5) a list of sources, if any, that showed an interest, in writing, in competing for the con-

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[199]10 U.S.C.A. § 2304(c)(4) (West Supp. 1988).
[200]10 U.S.C.A. § 2304(c)(6) (West Supp. 1988).
[201]FAR § 6.302-6(b).
[202]10 U.S.C.A. § 2304(f)(2) (West Supp. 1988).
[203]Powell & Toner, *supra* note 1, at 16, state that determination of whether prices are fair and reasonable "is the most difficult determination the contracting officer must make during initial deployment."

tract; and 6) a statement of how the agency can, if possible, avoid using noncompetitive procedures the next time it needs the same item or service.[204] The process is obviously designed to discourage unnecessary use of exceptions to the competition requirement; however, such a process also makes legitimate use more difficult for the deployed contracting officer.

The amount of the proposed contract is the factor used in determining who may approve the justification for limiting competition. For contracts costing up to and including $100,000 approval may be given "at a level above the contracting officer." For contracts costing over $100,000 but not over one million dollars the Competition Advocate must provide approval. When higher dollar amounts are involved approval must be granted at HCA (e.g., MACOM) level or higher.[205] In the case of deployed contracting officers, even the "level above the contracting officer" may well be in the United States. This may result in all exceptions requiring approvals in advance (everything other than exception (2)) being unworkable if communication proves to be difficult.

(h) *Maximum Practicable Competition*

Even when an exception is approved, a contracting officer must still obtain as much competition as is "practicable in the circumstances."[206] Very little guidance exists as to the meaning of the requirement. Small purchase procedures call for competition to the "maximum extent practicable,"[207] and the FAR indicates that standard is generally satisfied by oral price quotations from three or more vendors.[208] That guidance, however, is much more applicable to the small purchase specialist in CONUS who has available to him a good telephone system and the "yellow pages." The competition required to be obtained by a deployed contracting officer will depend on the facilities and information actually available. At a minimum, however, a contracting officer aware of two equally willing and qualified sources may not arbitrarily exclude one. In other words, even when possessed of a J&A permitting noncompetitive procurement, a contracting officer must still "play fair" with potential contractors.

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[204]10 U.S.C.A. § 2304(f)(3) (West Supp. 1988).

[205]FAR Subpart 6.5; Army Reg. 715-31, Procurement—Army Competition Advocacy Program (23 June 1986).

[206]FAR § 6.301(d).

[207]10 U.S.C.A. § 2304(g)(4) (West Supp. 1988).

[208]FAR § 13.106(b)(3).

(i) *Oral Solicitations*

A solicitation need not be written when a contracting officer is making a small purchase (discussed later), is purchasing perishables, or is acting in an emergency.[209] A high UMMIPS priority[210] does not, standing alone, constitute an emergency.[211] The contracting officer must still document the file in order to show why an oral solicitation was used and must list the sources contacted (including name, date and time, and price quoted).[212] Once a contractor is selected, the oral agreement must be expeditiously reduced to a written contract. Any delay in doing so must be explained in the contract file.[213] Unjustified delay tends to make the original "emergency" suspect.

(j) *Deviations from Acquisition Regulations*

The FAR also contains provisions concerning "deviations" from its rules. These appear in FAR Subpart 1.4. Innovation is encouraged in section 1.402, "Policy," which states that "development and testing of new techniques . . . should not be stifled simply because such action would require a FAR deviation." Despite these encouraging words, however, the actual process is daunting. Even if the deviation affects just one contract, it must be approved by an agency head (e.g., the Secretary of the Army) or his designee.[214] If the deviation is from a rule contained only in the AFARS, and not in the DFARS or FAR, an HCA or PARC is authorized to approve deviations from that rule.[215]

Deviations affecting more than one contract are called "class deviations." Class deviations from the FAR for DOD actions must receive advance approval from the Deputy Undersecretary of Defense, Research and Engineering (Acquisition Management), and a copy must be furnished to the FAR Secretariat.[216] Class deviations from DFARS must be approved in advance by the Assistant Secretary of Defense (Acquisition and Logistics) or by unanimous agreement of the members of the DAR Council.[217] AFARS class deviations require advance approval by the Director of Contracting at Department of the Army level.[218] If an agency expects a class deviation to be required per-

[209]*See* FAR § 6.302-1.

[210]*See supra* text accompanying note 193.

[211]DFARS § 215.402(f).

[212]P. Gilliatt, *supra* note 2, at 47.

[213]DFARS § 215.402(f).

[214]FAR § 1.403; the DOD and Army designees are listed in DFARS § 201.403 and AFARS § 1.403.

[215]AFARS § 1.403(91). HCA's and PARC's are discussed *supra* at text accompanying notes 104-06.

[216]FAR § 1.404(b).

[217]DFARS § 201.404.

[218]AFARS §§ 1.404, 1.290(b)(6). The format for deviation requests is set forth in AFARS § 1.201-90(d).

manently, the agency is expected to propose a FAR revision.[219] Permanent FAR revisions must be approved by the FAR council, and this will very likely require an extended period of time.

This is not to say that deviations will never be a factor in contingency contracting. One exception to the requirement for prior approval that may be applicable to contingency contracting is found in FAR 1.405, which authorizes deviation from the FAR when required to comply with treaties or executive agreements.[220] Decisions regarding any other deviations necessary should be made and deviations should be requested well in advance of actual deployment. Moreover, as class deviations generally expire after two years,[221] deviations obtained well in advance of deployment may expire before they are required. Accordingly, those deviations expected to be required in deployment situations should either be recommended as permanent revisions to the FAR or prepared and held for submission to the appropriate authority when this necessity arises.[222]

3. Small Purchases

Congress has recognized that the complexity involved in complying with the full range of procurement rules would be impractical in the case of small purchases. To lessen the burden for both contracting agencies and contractors, Congress mandated use of simplified procedures for "small purchases" (defined as $25,000 or less) of property or services.[223] To avoid opening an obvious loophole, however, Congress has also specified that purchases may not be artificially split into several smaller purchases to qualify for the simplified procedures.[224]

Competition is still required, but only to "the maximum extent practicable."[225] In practice, this is far less than the "full and open competition" required for large purchases. For example, small purchases need not be synopsized in the Commerce Business Daily.[226]

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[219]FAR § 1.404.

[220]FAR § 1.405 does not authorize deviation from a restriction required by a statute unless a more recent treaty conflicts with such a restriction. For the general rule that more recent statutes nullify the effect of inconsistent treaties—for purposes of U.S. domestic law—see Reid v. Covert, 345 U.S. 1 (1957).

[221]AFARS § 1.491.

[222]For examples of recommended FAR revisions worded to take effect only in the event of mobilization, see DOD Mobilization study, *supra* note 121, Appendix F, Part 2.

[223]10 U.S.C.A. § 2304(g)(1), (2) (West Supp. 1988).

[224]10 U.S.C.A. § 2304(g)(3) (West Supp. 1988).

[225]10 U.S.C.A. § 2304(g)(4) (West Supp. 1988).

[226]FAR § 5.101(a)(1). Small purchases over $10,000 must still be synopsized if the contracting officer does not reasonably expect to receive at least two offers if he does not synopsize. *See also supra* text accompanying notes 171-74.

Notice of purchases between $5000 and $25,000 must be posted in a public place at the contracting office for 10 days, but the purchase need not be delayed to allow for this period of time.[227] Obtaining oral or telephonic price quotes from 3 or more vendors is generally considered sufficient competition for a small purchase.[228]

Purchases under $1000 may be made without obtaining any competitive price quotes, if the contracting officer is able to determine that the price quoted is reasonable.[229] Making a determination concerning "reasonableness" may well be a difficult task for contracting officers deployed to unfamiliar areas. Sources that have helped exercise contracting officers ascertain fair local prices include local Corps of Engineers personnel, the local U.S. Military Assistance Group, or the U.S. Embassy contracting office.[230] One or more of these sources, if available, should prove to be of great assistance during deployment situations.

Price information may be requested from vendors orally or by using DD Form 1155, Order for Supplies or Services/Request for Quotations. Prices quoted are not to be considered "offers." That is, the government may not form a binding contract by making an order at the quoted price. Instead, the government's order to the vendor becomes an offer to buy at that price, which the vendor accepts by so notifying the government or by delivering the items requested.[231] Thus, as the government's order is only an offer, it may be withdrawn or changed unilaterally by the government at any time prior to the contractor accepting the order.[232]

(a) *Procedures for Small Purchases*

There are three principal types of simplified small purchase procedures: blanket purchase agreements; imprest funds; and purchase orders.

A blanket purchase agreement (BPA) is the government-contracting equivalent of a charge account. It is an agreement by the vendor to provide items from a broad class, such as "hardware," at a price at least as low as the price that the vendor provides to its most favored customer for comparable orders. Authorized purchasers, and the dollar limit for each, will be listed in the agreement. The

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[227]FAR § 5.101(a)(2).
[228]FAR § 13.106(b)(5).
[229]FAR § 13.106(a).
[230]Powell & Toner, *supra* note 1, at 16.
[231]FAR § 13.108(a).
[232]FAR § 13.108(c).

authorized purchasers are appointed by the contracting officer.[233]

A BPA may be used to avoid issuing numerous purchase documents for repetitive small purchases from a single supplier. It does not waive the small purchase competition requirements, and purchases should not be made against a BPA without examining competing prices. The BPA is designed for use in those situations in which past experience has shown that a supplier is dependable and has consistently offered a lower price. More than one BPA may be established for a class of items if experience has shown that more than one supplier is dependable and has low prices.[234] The lack of past experience will make BPA's difficult to use in the early stages of a deployment, unless historical data associated with prior deployments to the area is available.[235]

An imprest fund is the government-contracting equivalent of a "petty cash" fund. The rules for imprest funds are set forth in subparts 13.4 of the FAR and its Supplements and in Army Regulation 37-103-1.[236] An "imprest fund cashier," who may be appointed by the local commander, may pay up to $500 for small purchases.[237] Combined with ordering officers[238] appointed under AFARS 1.698 to make such small purchases, this can be a "force multiplier" for contracting officers. Accordingly, items costing under $500 required by isolated units may be ordered and paid for locally without the involvement of the contracting office or the finance office. Detailed instructions for operation of an imprest fund are contained in DFARS 13.405, "Procedures," and in a Contingency Contracting pamphlet currently in draft form.[239]

A significant limitation on the use of imprest funds is that, regardless of the shortage of personnel, the same individual may not serve as both the imprest fund cashier and ordering officer.[240] The opportunity for fraud is simply considered to be too great.

Two forms of purchase orders are available for use. DD Form 1155, Order for Supplies or Services/Request for Quotations, is used within

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[233]FAR Subpart 13.2.

[234]*Id.*

[235]P. Gilliatt, *supra* note 2, at 45.

[236]Army Reg. 37-103-1, Finance Administration—Finance and Accounting for Installation Imprest Funds (29 May 1987).

[237]FAR § 13.404(a).

[238]Ordering officers are discussed in more detail at *infra* notes 247-52 and accompanying text.

[239]P. Gilliatt, *supra* note 2, at 5-99.

[240]AFARS § 13.405(90).

DOD for purchases involving an amount of money within the small purchase limit ($25,000). Standard Form 44, Purchase Order-Invoice-Voucher (SF 44), is limited to use for purchases up to $2500.[241]

The DD Form 1155 provides a convenient means by which to prepare small purchase contracts. The form may be completed by hand,[242] can be used to make the order and record the delivery, and serves as the public voucher to authorize payment.[243] Detailed instructions for completing DD Form 1155 are contained in DFARS Subpart 213.5, and additional instructions specifically tailored to deployment conditions appear in the draft Contingency Contracting pamphlet.[244] DD Forms 1155 were used extensively in Grenada, along with its now-obsolete companion form, DD Form 1155r, Reverse of Order for Supplies or Services/Request for Quotations-Foreign.[245]

The FAR describes the SF 44 as "a pocket-sized purchase order designed primarily for on-the-spot over-the-counter purchases of supplies and nonpersonal services while away from the purchasing office or at isolated activities. It is a multipurpose form that can be used as a purchase order, receiving report, invoice, and public voucher."[246] The SF 44 differs from DD Form 1155 in that it includes instructions concerning its use, rather than incorporating specific contract clauses. It allows ordering officers at isolated locations to make one-time, over-the-counter purchases of goods and services that are immediately available. As the funding limit for use of the SF 44 is five times that amount authorized for imprest fund purchases, use of the SF 44 greatly expands the number of purchases that can be easily made.

(b) *Ordering Officers*

Given the limited number of deployable contracting officers,[247] the ability to use ordering officers is crucial. Ordering officers may be

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[241]Aviation fuel and oil purchases up to $10,000 may be made using SF 44's. DFARS § 213.505-3.

[242]Obviously, it would be more convenient if all required clauses were contained on the form, and this problem has been recognized at DOD level. *See* Dep't of Defense, Logistics Systems Analysis Office, Acquisition Policies During Mobilization, at F-61 (draft, March 1987). For a list of required clauses, see DFARS § 213.507.

[243]DFARS § 213.505-2(S-70)(1)(iv)(A).

[244]P. Gilliatt, *supra* note 2, at 39-44.

[245]Mr. Randall Pennington, a civilian attorney working in the office of the XVIIIth Airborne Corps SJA at the time of Urgent Fury, graciously provided several completed copies of these forms utilized in Grenada. Almost all required clauses were printed on the DD Form 1155r, which simplified preparation of the form.

[246]FAR § 13.505-3(a).

[247]*See infra* text accompanying notes 284-91.

appointed to perform several functions;[248] however, the most useful of these functions in contingency contracting will be that of making purchases using imprest funds or SF 44's. Ordering officers may be appointed by the same officials who appoint contracting officers and by chiefs of contracting offices, if these individuals are delegated such authority by the HCA.[249] Contracting officers in Grenada found ordering officers to be so indispensable that they appointed such officers despite their lack of authority to make such appointments.[250] Given the likelihood of poor communications to CONUS in the early stages of a deployment,[251] the authority to appoint ordering officers should be routinely delegated to deployment contracting officers.[252]

(c) *Staying Within the Small Purchase Limits*

Small purchase procedures are much simpler than "normal" contracting procedures. Accordingly, such procedures should be used to the fullest extent possible in contingency contracting. Simplified procedures both speed up the process and lessen the workload for scarce contracting personnel. Consequently, a contingency contracting officer should be fairly aggressive in seeking to structure transactions to stay within the small purchase dollar limits. Note, however, that this must not include splitting larger transactions into $25,000 increments. Such transaction splitting is specifically prohibited by statute.[253] There are, nevertheless, perfectly legitimate ways to achieve maximum use of small purchase procedures. At the risk of stating the obvious, renting is generally cheaper than buying. Even in Grenada, three commercial rental car companies were available to lease vehicles.[254]

A less obvious use of small purchase procedures is contracting for small amounts during the period it takes to arrange the large purchase. Even when possessed of approved exceptions from normal competition requirements, it still requires time to arrange large purchases. The contractor will necessarily require some time to react to requests and to ship the desired items. In Grenada a contract for pe-

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[248]*See* AFARS § 1.698-1(c).

[249]AFARS § 1.603-2(91). The format for appointing an ordering officer is contained in AFARS § 1.698-2.

[250]Johnson, *supra* note 100. Major Johnson reports that although his immediate headquarters was displeased, the Joint Chiefs of Staff recognized the necessity for his actions.

[251]For example, Army claims personnel in Grenada were at first unable to contact CONUS to determine if they had been granted single-service claims authority. Claims AAR, *supra* note 157, para. 2.

[252]*See* P. Gilliatt, *supra* note 2, at 19.

[253]10 U.S.C.A. § 2304(g)(3) (West Supp. 1988).

[254]Johnson, *supra* note 100.

troleum, oil, and lubricants (POL) was negotiated quickly and awarded to Texaco International, with invoices sent directly to Ft. Bragg. During the time between deployment to Grenada and the beginning of actual deliveries by Texaco, however, POL was purchased from local gas stations through the use of SF 44's.[255]

IV. RECOMMENDATIONS TO COMMANDERS AND THEIR LEGAL ADVISORS

There are planning steps commanders can take to make maximum use of contingency contracting under existing laws and regulations. Before turning to a discussion of those steps, however, a more explicit discussion of the reasons for choosing contracting over seizure or requisition is appropriate.

A. PLAN TO AVOID SEIZURE AND REQUISITION

Commanders should avoid use of seizure and requisition to the fullest extent possible. Use of captured enemy property does not pose a problem; however, forcible acquisition of private property will very likely have a negative impact on the given mission. An issue of the Marine Corps Development and Education Command's *Operational Overview* that was devoted to the Grenada operation states succinctly: "If the civilians in the area are friendly, they may begin to feel differently if you take their car or truck at gunpoint. It doesn't hurt to ask. Of course, any enemy military transport is 'fair game.' "[256] The Marines attribute part of their success in Grenada to civilian assistance, and they view this assistance as resulting, at least in part, from their respect for private property.[257]

Early in American history, George Washington also dealt with the sensitive issue of the requisition of private property and expressed, in his military journal, the disadvantages of using "military impress:"

> Instead of having magazines filled with provisions, we have a scanty pittance scattered here and there in the different States. Instead of having our arsenals well supplied with military stores, they are poorly provided, and the workmen

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[255]Braswell, *supra* note 5, at 8, 12.
[256]USMC, The Marine Corps Development and Education Command, The Operational Overview 30 (Jan.-Mar. 1984) [hereinafter USMC Grenada Overview].
[257]*Id.*

> all leaving them. . . . Instead of having a regular system of transportation upon credit, or funds in the quartermaster's hands to defray the contingent expenses of it, we have neither the one nor the other; and all that business, or a great part of it, being done by military impress, we are daily and hourly oppressing the people—souring their tempers and alienating their affection.[258]

1. Seizure or Requisition is Particularly Unsuited to LIC

The need to avoid "bayonet requisition" is especially important in low-intensity conflict (LIC). It rarely will be legally justified. Seizure and requisition are actions suited to the conventional battlefield and to hostile occupation.[259] In LIC U.S. forces will most likely be functioning in support of a friendly government.[260] Accordingly, there will be no "occupied territory." Further, if the conflict is effectively dealt with in its earliest stages, there will be no conventional "battlefield."

In the LIC environment respect for private property will be a vital part of either revolutionary or counter-revolutionary strategy. A principal reason for French defeat in Vietnam was the Vietminh's respect for private property. The Vietminh general, Giap, asserted, "Our army . . . has always observed a correct attitude in its relations with the people. It has never done injury to their property, not even a needle or a bit of thread."[261] French officers confirmed that this was more than just propaganda, that Vietminh soldiers were actually expected to adhere to this standard.[262] An American Army officer, commenting on the Vietminh code in 1966, stated, "Such actions win rather than alienate the people. They are just as important as the more conventional military operations."[263]

Local contracting has been recognized as a source of good will, encouraging local businesses and aiding the economy.[264] As beneficial as contracting is, it is only one part of what a comprehensive counter-

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[258]First entry in May, 1781, *quoted in* H. Johnston, The Yorktown Campaign and the Surrender of Cornwallis, 1781 at 71-72 (1881).

[259]*See supra* notes 12-92 and accompanying text.

[260]*See, e.g.*, Remarks by Secretary of Defense Caspar Weinberger, Conference on Low-intensity Warfare (Jan. 14, 1986).

[261]General Vo Nguyen Giap, People's War People's Army (1961), *quoted in* J. McCuen, The Art of Counter-Revolutionary War 60 (1966).

[262]McCuen, *supra* note 261, at 61.

[263]*Id.*

[264]*See, e.g.*, Draft FM, *supra* note 2, para. 2(g)(1).

insurgency strategy should be.[265] Used as part of a comprehensive program, however, it is one more way to fulfill the aim of counter-insurgency, "to give the people a vested interest in the existing administration of the state: in Templer's words, to influence their 'hearts and minds.' "[266]

2. Accounting and Accountability Problems of Seizure and Requisition

Seizure and requisition should also be avoided in view of the accounting and accountability problems involved. The claims office on Grenada received over fifty claims for alleged vehicle damage resulting from unauthorized use of private vehicles by U.S. soldiers.[267] The claimants generally had no receipts, and no American records existed documenting seizures or the condition of the vehicles at the time they were seized. As a result, claims personnel were convinced, "claims were undoubtedly paid for damage not done by U.S. soldiers."[268]

The lack of relevant records also contributed to the difficulty encountered in ensuring that all seized civilian vehicles were returned to the impound lot established at Point Salines.[269] Lack of accountability may also have resulted in unnecessary damage being done to the vehicles. Often, this damage was so extensive that many of the vehicle owners did not wish to have their cars returned.[270]

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[265]For a general description of counter-insurgency strategy, with case studies, see Armed Forces & Modern Counter-insurgency (I. Beckett & J. Pimlott eds. 1985). During the American Revolutionary War, a prominent British merchant described the limitations of using contracts, without also providing long-term security, in terms strikingly pertinent to modern low-intensity conflict:

> This American Land War . . . courts Allegiance, but cannot enforce any, either by Contribution of Property, or Penalty of Person. . . . We call upon the Inhabitants then, to give us assurance of their Amity & Submission, by oath or affirmation. They decline it, & won't tell us their reasons. Whether from Principle, as not inclining to our government, or from prudence, not being certain of a permanent protection . . . . [T]he Inhabitants [are] taking our Money, giving us good words, & making the same excuses as they did on the former occasion.

R. Oswald, "General Observations Relative to the Present State of The War, London, August 9, 1779," folios 63-64, Clements Library, Univ. of Mich., Ann Arbor, *quoted in* J. Sands, Yorktown's Captive Fleet 5 (1983).

[266]Pimlott, *The British Army: The Dhofar Campaign, 1970-1975*, in Armed Forces & Modern Counter-insurgency, *supra* note 265, at 22.

[267]Claims AAR, *supra* note 157, at 10.

[268]*Id.*

[269]*Id.* at 5.

[270]Johnson, *supra* note 100.

3. Paying the Owner of Seized or Requisitioned Property

The law of war requires that fair compensation be paid to the owners of private property seized or requisitioned.[271] No mechanism, however, exists under U.S. domestic law to pay for seizures and requisitions as such, and any payment from U.S. funds, for any reason, must be authorized by law.[272] Claims procedures do not provide a means to pay for seizures and requisitions.[273] In Grenada several claims were submitted for goods or services provided to U.S. forces.[274] All such claims were directed to the Comptroller, who had assumed control of contracting functions,[275] as they were not payable from claims funds.[276]

The only means by which the U.S. may pay for the seizure or requisition of private property is to treat such requisitions or seizures as contracts, albeit "unauthorized" contracts. These contracts must then be ratified through contracting and command channels,[277] often an extended and difficult process. As expressed in the USAREUR Battle Book for Contracting: "The ratification process for an irregular procurement consumes extensive manhours and involves commanders at all levels."[278]

If seizure and requisition are used, a commander will more than pay back any contracting time saved in additional time spent on contract ratification.[279] Moreover, the involvement of a contracting officer is still required to "transform" the irregular transaction into a contract. Only in this way may public funds be used to pay for the items seized or requisitioned. In this regard, remember that a failure to afford adequate and timely compensation for seized or requisitioned property may be a violation of international law.[280]

B. MORE COMBAT-DEPLOYABLE CONTRACTING OFFICERS ARE NEEDED

One of the contracting problems evidenced in Grenada and in recent exercises in Honduras is the lack of trained, deployable contract-

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[271]*See supra* text accompanying notes 88, 89 & 93.

[272]*See supra* text accompanying notes 118-51.

[273]*See* AR 27-20, para. 10-11(b).

[274]Claims AAR, *supra* note 157, at 11. This after action report does not give a numerical breakdown between items seized and unauthorized attempted contracts.

[275]Braswell, *supra* note 5, at 10.

[276]Claims AAR, *supra* note 157, at 11.

[277]*See* FAR § 1.602-3; *see also infra* text accompanying notes 311-16.

[278]USAREUR Battle Book for Contracting XV-1 (2d ed. 1986).

[279]Recommended changes to the ratification process are discussed in part V of this article.

[280]*See supra* note 93 and accompanying text.

ing officers.[281] Although the Army has a procurement specialty, SC97, the vast majority of contracting officers are civilians.[282] Moreover, there are very few procurement non-commissioned officers.[283] While the XVIII Airborne Corps has acted to add deployable contracting officers to its organization as a result of its experience in Grenada, the number of such individuals is still very small.[284]

The training and utilization of SC97 officers is heavily weighted toward major weapons system procurement.[285] Such experience is of little direct value in deployment (combat) contracting. As one member of the Army Procurement Research Office has stated, "We won't be buying tanks at the next Grenada, we'll be buying fresh bananas."[286] One of the two contracting officers first deployed to Grenada had just completed basic procurement schooling one month prior to deployment. He recalls that very little of this schooling was directly applicable to the situation in which he suddenly found himself.[287]

The true experts in the types of procurement most likely to be required in deployment situations are the small purchase specialists at posts, camps, and stations. These personnel are almost exclusively nondeployable civilians, however. For those contracting officers who are deployable, Lieutenant Colonel Frank L. Powell III (who was deployed to Honduras as a contracting officer with five days notice) has offered the following advice: "You should review small purchase procedures in detail if you have never had experience in this area."[288]

1. Trained Ordering Officers are Needed

Ordering officers serve as the force multiplier for contracting officers. As noted earlier, these individuals may make small purchases with imprest funds and SF 44's. The dollar amounts involved are small, but many of the items required during deployments may be

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[281]Forces Command Msg. 131335Z Feb 84, subject: Procurement Career Programs. As part of the solution to this problem, SARDA is studying the possibility of forming a reserve unit composed of approximately 70 military procurement professionals to be available for deployment. Telephone interview with Mr. Ken Ginter, Office of the Ass't Sec. of the Army for Research, Development, and Acquisition (6 Jan. 1989).

[282]*See* sources cited *supra* notes 2 & 3.

[283]C. Lowe & P. Gilliatt, *supra* note 3, at 74; Telephone interview with Mr. P. Stephen Gilliatt of the Army Procurement Research Office at Ft. Lee, Virginia (1 Feb. 1988).

[284]Telephone interview with Mr. Ken Ginter, Office of the Ass't Sec. of the Army for Research, Development, and Acquisition (4 Feb. 1988).

[285]C. Lowe & P. Gilliatt, *supra* note 3, at 74.

[286]Gilliatt, *supra* note 283.

[287]Johnson, *supra* note 100.

[288]Powell & Toner, *supra* note 1, at 15.

acquired using these procedures,[259] and the dollar limits might be raised.[290]

Obviously, ordering officers must be well trained. A contracting officer present in Grenada has estimated that approximately $100,000 in irregular procurements were made by ordering officers under his technical supervision on Grenada, mostly "just stupid mistakes."[291] Much of the problem, he states, was that the ordering officers, lieutenants, would receive command pressure "to do something." And—they would, right or wrong.[292]

Training for potential ordering officers is available. The Army Logistics Management College at Ft. Lee offers a short course for such individuals. Not all potential ordering officers will receive the opportunity to attend this course, however.[293] To provide training in this area, ordering problems could be worked into routine training exercises in CONUS. While Army policy discourages excessive appointment of ordering officers,[294] the benefits derived from having trained ordering officers available for overseas deployments certainly justify prior on-the-job training. In those situations in which on-the-job training cannot be provided in the context of CONUS exercises, beneficial experience can be gained through work in the small purchase section of the local procurement office.[295]

2. Do Not Underestimate the Importance of Logistics

Some commanders may object to any diversion of assets from "tactical" training. Indeed, there is a general concern with "tooth to tail" ratio[296] that tends to obscure the vital importance of the logistics "tail." No matter how well trained, however, no matter how high their morale, soldiers require materiel in order to fight: "Even a battalion of eight hundred men will typically be spread out over

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[259]*See* "After Action Report—Contract Support for Urgent Fury," enclosure 1 to letter from M. S. Renegar, Ass't Adjutant General, XVIII ABN Corps & Ft. Bragg, to Commander, 1st Corps Support Command, Ft. Bragg, subject: Contract Support Responsibilities for Exercises/Deployments (20 Mar. 1984) [hereinafter Contracts AAR]. For a list of the types of items procured locally during an overseas exercise, see Little & Chambers, supra note 1, at 9.

[290]Representatives of the armed services at a JCS planning conference in January 1988 agreed that SF 44 limits needed to be higher. Gilliatt, *supra* note 283.

[291]Johnson, *supra* note 100.

[292]*Id.*

[293]Powell & Toner, *supra* note 1, at 15.

[294]AFARS § 1.698-1(a)(2).

[295]Ordering officers within a contracting office are limited to placing calls under blanket purchase agreements, AFARS § 1.698-1(a)(3), but such experience is a start, and this places the ordering officer in a position to observe the small purchase "experts" at their work.

[296]*See, e.g.*, Powell & Toner, *supra* note 1, at 14.

several square miles in modern war, and the enormous rates of consumption of fuel, ammunition, and other stores mean that organizing supplies becomes a critical factor."[297] No less a tactical authority than General Douglas MacArthur noted, "The history of war proves that nine out of ten times an army has been destroyed because its supply lines have been cut off."[298]

3. "Contingent" Contracting Officers

The need to maintain close control of funds makes it inadvisable to authorize too many individuals, other than the central contracting office personnel of an installation or activity, to enter into contracts.[299] Yet, as earlier noted, the need for a greater number of deployable contracting officers does exist. There is a solution to this problem.

Deployable contracting officers may be issued contingent warrants. The contracting authority granted in a warrant can be limited as stated on the certificate of appointment.[300] By limiting the authority to deployments outside the United States, this authority will be available only when it is most needed.[301]

Although this may seem a novel idea, it is very similar to the contingent powers of attorney long recommended to legal assistance clients who do not wish, prior to deployment, to grant their spouse, parent, or other agent any form of authority.

C. CONTINGENCY CONTRACTING KITS

Commanders may also prepare in advance for successful contingency contracting by having their contracting office and G-4 prepare a deployment contracting kit. Items recommended for inclusion range from required forms and regulations and a hand-held calculator with fresh batteries, to a catalog with pictures to use in surmounting language barriers. A list of recommended items appears in the Army's draft contingency contracting pamphlet.

In a similar vein, the 193rd Infantry Brigade (Panama) had developed a set of Contracting Instructions for Exercises (CIFE), including a "Manual for Contracting Officer's Representative" and an "Op-

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[297]G. Dyer, War 137 (1985).

[298]*Quoted in* W. Karig, M. Cagle, & F. Manson, Battle Report: The War in Korea 165 (1952).

[299]AFARS § 1.603-2(92) directs that the number of contracting officers "shall be kept to the minimum essential for efficient operation."

[300]FAR § 1.603-3.

[301]This is the approach recommended in the Draft FM, *supra* note 2, at 7.

eration Guide for Field Exercise Ordering Officers." The CIFE is a comprehensive guide to planning exercises and contains detailed checklists developed on the basis of prior experience.

The Office of the Assistant Secretary of the Army for Research, Development, and Acquisition (SARDA) is also developing a "kit" for contracting officer deployments.[302]

V. RECOMMENDATIONS FOR CHANGE

Even if additional deployable contracting officers are made available, maximum use of simplified procedures is made, and deployment contracting kits are developed, further improvements in contingency contracting can still be accomplished. This section will set forth recommendations for changes to ratification procedures, small purchase limits, and real estate contracting authority.

A. RATIFICATION OF "COMBAT COMMITMENTS"

As ratification of unauthorized commitments is the only current mechanism to pay for seized or requisitioned items from public funds,[303] this procedure requires relatively detailed examination to determine its effectiveness. It may appear to be somewhat contradictory to focus on the manner in which compensation for seizures and requisitions may be efficiently paid after having strongly advised commanders not to use such measures. Yet, even though seizure and requisition are seldom to be recommended, these practices are still sometimes used. The most likely use in the future will be the seizure of transportation assets after a rapid airborne or light infantry deployment.[304] A number of vehicles were seized in Grenada, some with their owners' permission, and some proved to be tactically valuable.[305]

Current compensation procedures used in connection with seizure and requisition are cumbersome and primarily "punish" the owner of the property. This individual not only is deprived of the use of his property, but also has to wait an extended period of time before he is adequately compensated. Moreover, if the "commitment" is not

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[302]Telephone interview with Mr. Ken Ginter, Office of the Ass't Sec. of the Army for Research, Development, and Acquisition (6 Jan. 1989).

[303]*See supra* text accompanying notes 271-80.

[304]*See* USMC Grenada Overview, *supra* note 256, at 30; *see also* DAJA-IA 1986/8019, 28 May 1986, at 3.

[305]*See* USMC Grenada Overview, *supra* note 256, at 26.

ratified and the person who seized or requisitioned the property cannot be located, or has no money, an unnecessary violation of international law will have been committed.[306]

1. Limitations of Current Ratification Procedure

The authority to ratify unauthorized commitments is strictly limited, and the process is complicated and unwieldy in a combat situation. This procedure is set forth in AFARS 1.602-3 and discussed below.

(a) *Ratification Authority*

Unauthorized commitments of up to $2500 (the amount established for use of SF 44's) can be approved by chiefs of contracting offices, if they are delegated this approval authority by the HCA. Such authority should be delegated to the deployed contracting officer.[307] This delegation of authority will allow on-site ratification of some seizures. The compensation owed in connection with a seized vehicle, however, can easily exceed $2500 if the vehicle cannot be returned in reasonable condition.[308] Ratification of such higher amounts must be accomplished at HCA level.[309] If communications prove to be a problem, as they were in Grenada,[310] such compensation could be difficult to arrange in a timely fashion.

(b) *Ratification Process*

The "individual making the unauthorized commitments" must initiate the process of ratification.[311] In the case of seizure, this individual would be the soldier who seized the property, or a superior who ordered it seized. The soldier may not be available to initiate the paperwork, due to enemy action or for other reasons. Moreover, it may not be possible to identify the individual concerned. Most owners of seized vehicles in Grenada were not provided with receipts that identified the individuals who had seized the vehicles in question.[312]

Paperwork required to initiate ratification includes a statement of the circumstances involved, an explanation of why normal procure-

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[306]*See supra* text accompanying notes 88 & 93.

[307]MAJ Johnson, *supra* note 100, possessed ratification authority in Grenada, for example, though he reports that he did not ratify any seizures made under the LOW.

[308]According to MAJ Johnson, *id.*, most of the owners of seized vehicles in Grenada did not want the vehicles returned; they wanted to be paid the full value of the car, usually because the roof had been torn off the car.

[309]AFARS § 1.602-3(b)(3)(i).

[310]*See supra* note 251.

[311]AFARS § 1.602-3(b)(3)(90)(1).

[312]Claims AAR, *supra* note 157, at 10.

ment procedures were not followed, a description of the "bona fide Government requirement" that made the commitment necessary, the value of any benefit received, and "any other pertinent facts" or documents.[313] If the commander concurs that ratification should be made, he must provide funding and describe "the measures taken to prevent a recurrence of unauthorized commitments, including a description of any disciplinary action (to be) taken."[314] Further findings and recommendations must be made by a contracting officer, including a summary of the facts and a finding that the price is reasonable.[315]

A strong focus of the ratification procedure is to discourage unauthorized commitments, particularly in light of the requirement for the commander to describe disciplinary actions taken as a result of the commitment. A February 22, 1988, change to the FAR explicitly states that unauthorized commitment ratification "procedures may not be used in a manner that encourages such commitments being made by Government personnel."[316]

2. Recommended Changes to the Ratification Process

For those few remaining situations in which requisition under the law of war is still required, a more suitable method of compensation should be developed. This form of compensation should be referred to as a "ratification of a combat commitment," rather than a "ratification of an unauthorized commitment." For the sake of clarity, the term "combat commitment" will be used to refer to those "unauthorized commitments" for which change in the method of effecting compensation has been recommended.

Rather than the determinations now required for ratification by AFARS 1.670, ratification of a combat commitment should be made if: 1) the seizure or requisition was lawful under the law of war; 2) a contracting officer was not reasonably available, or use of contract procedures was not reasonably possible under the circumstances; and 3) payment is required under international law.

The process should be initiated by the commander or designee of the lowest (company-size or larger) unit involved, if available. If this individual is not available, any U.S. personnel with knowledge of the

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[313]AFARS § 1.602-3(b)(3)(90)(1), (2).
[314]AFARS § 1.602-3(b)(3)(90)(3).
[315]AFARS § 1.602-3(b)(3)(92) and DFARS § 1.670-4.
[316]FAR § 1.602-3(b)(1).

facts involved should be able to initiate the paperwork. Some explanation of the circumstances should still be required, but the primary focus should be on identifying the "military necessity" for the seizure or requisition, rather than meeting the paperwork requirements now in effect. The requirement for the commander to explain how he will avoid such actions in the future should be deleted. If there was a "military necessity" for the seizure in issue, it would appear to make no sense for the commander to explain how he will "avoid" taking necessary actions in the future.

3. Inapplicability to Low-Intensity Conflict

The use of a special ratification procedure is inappropriate in a LIC environment. This procedure is intended to provide a mechanism by which seizures and requisitions may be compensated as required under international law. As discussed earlier in the section dealing with advice to commanders, seizure and requisition should not occur in LIC.

Even if a situation presenting an opportunity for lawful seizure or requisition should arise in a LIC, special ratification procedures should not be required. Even in the more violent stages of a LIC, as in Vietnam, it is probable that a more elaborate support structure will exist in the country. For example, in Vietnam the logistical support structure included three district engineers functioning under a U.S. Army Engineer Construction Agency.[317] A support structure of this nature would not exist in other deployment situations.

B. RAISE SMALL PURCHASE LIMITS

Deployed contracting officers would be able to function far more effectively if small purchase limits were raised from $25,000 to $100,000. Procedures for small purchases are streamlined,[318] and the use of these procedures would effectively provide much of the relief urgently recommended by individuals involved with procurement activities in Grenada.[319]

How many small purchases undertaken in a deployment situation would be affected by such an increase in dollar limits? During Fiscal

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[317]J. Heiser, Vietnam Studies: Logistic Support 192 (1974).

[318]*See supra* text accompanying notes 223-55.

[319]"The Army must change its contracting procedures during wartime operations. The procedures from peacetime cannot work during wartime because of the speed and quick reaction time required by our service units to support the Combat Commander and troops." Braswell, *supra* note 5, at 11. MAJ Johnson, *supra* note 100, expressed a similar wish: "Give us something we can operate with."

Year 1985, 60.3% of purchases in DOD that were over $25,000 were also under $100,000.[320] As most local purchases during a deployment will be low-dollar-value items,[321] the number of large purchases over $100,000 should be very small in number.

Even greater savings of time and effort on the part of deployed contracting officers could be saved by raising the monetary threshold for requiring competitive quotations from $1000 to $10,000. Approximately fifteen percent of all DOD procurements fall within this range (thirty percent are below $1000).[322] Again, given the relatively small dollar value of procurements typically undertaken in contingency contracting, the percentage of contingency contracts falling within the $1000 to $10,000 range will most likely be fairly high.

C. GREATER REAL ESTATE AUTHORITY OUTSIDE COE

There would appear to be little, if any, justification for allowing contracting officers other than those in the Corps of Engineers (COE) to execute "service contracts" for hotel rooms, but not allowing these individuals to execute short-term leases or ratify rental arrangements made before their arrival in country. A simple rental agreement for troop lodging is no more complex an undertaking than other forms of contracts. In fact, AR 405-10 includes a very simply rental agreement designed for use by commanders.[323] Conditions for its use are quite limited (e.g., the land or space leased must be in CONUS, outside urban areas, and rental for the entire period is limited to $500),[324] but it demonstrates the simplicity which could be achieved.

As an alternative, a provision providing for the ratification of rental agreements up to $1000 through other (command or contracting) channels would be most beneficial. The great majority of leases ratified by the COE in Grenada called for compensation under this amount.[325]

Another approach toward resolution of this issue would be increased real estate training for at least some combat engineers. Active duty engineers were present in Grenada, but none were available who possessed leasing expertise.[326]

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[320]DOD Mobilization study, *supra* note 121, at F-22.
[321]*See, e.g.*, Little & Chambers, *supra* note 1, at 9.
[322]DOD Mobilization study, *supra* note 121, at F-52.
[323]*Id.* at Appendix B, "Sample Short-term lease."
[324]*Id.* para. 2-11(a).
[325]*See* Contracts AAR, *supra* note 289.
[326]*See* Claims AAR, *supra* note 157, at 3-4.

If the Corps of Engineers insists on retaining exclusive real estate authority, COE real estate teams must be routinely included in those deployments during which rental agreements are likely to occur.[327]

VI. CONCLUSION

Contingency contracting is not a panacea that will satisfactorily resolve all of the Army's logistical problems. Local inhabitants may not possess the supplies required. Or, they may possess such supplies but be unwilling to part with them on reasonable terms or at a reasonable price. Potential contractors in many countries are not completely familiar with the relatively complicated, "get it all down in writing," U.S. method of contracting. Indeed, many U.S. contract clauses may offend potential foreign contractors.[328] Nevertheless, contingency contracting is a very positive step in the right direction. Some progress in this area has been made since the U.S. experience in Grenada; however, there is much more to be done. Now is the time to move beyond theory and to develop contingency contracting procedures attuned to the realities of overseas deployments.

[327]*See* Braswell, *supra* note 5, at 11.
[328]Johnson, *supra* note 100.

THE USE OF CO-CONSPIRATOR STATEMENTS UNDER THE RULES OF EVIDENCE: A REVOLUTIONARY CHANGE IN ADMISSIBILITY

by Major Frederic L. Borch III*

I. INTRODUCTION

The United States Supreme Court decisions of *United States v. Inadi*[1] and *Bourjaily v. United States*[2] dramatically alter rule of Evidence 801(d)(2)(E),[3] which governs the admissibility of co-conspirator hearsay. First, *Bourjaily* abolishes an old common law rule that had been considered to be a part of Rule 801(d)(2)(E). This rule provided that statements of co-conspirators were admissible only if evidence independent of them proved the existence of the conspiracy and the accused's membership in it. Second, *Inadi* and *Bourjaily* in concert

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[1]106 S. Ct. 1121 (1986).

[2]107 S. Ct. 2775 (1987).

[3]Fed. R. Evid. 801(d)(2)(E). The relevant text reads: "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

end the need for co-conspirator hearsay proffered under Rule 801(d)(2)(E) to be analyzed in terms of the sixth amendment's right to confrontation. The Supreme Court's abolition of these two significant requirements—both of which had acted as barriers to the admissibility of out-of-court statements of non-testifying co-conspirators—is nothing short of revolutionary. *Inadi* and *Bourjaily* have so altered the traditional requirements for admissibility under Rule 801(d)(2)(E) as to now permit nearly *all* statements which satisfy the literal language of Rule 801(d)(2)(E) to be received into evidence.

This article examines this revolutionary change in the law of evidence. It is divided into two parts. The first part examines co-conspirator statements and Rule 801(d)(2)(E) in general terms and addresses the common law requirement for independent evidence of the existence of the conspiracy and the accused's participation in it as a prerequisite for admissibility of co-conspirator hearsay as substantive evidence. The continuing applicability of the independent evidence rule to federal and military law *after* the adoption of the Federal Rules of Evidence (FRE) and Military Rules of Evidence (MRE) is examined. Next, the end of the independent evidence requirement after *Bourjaily* is addressed, and the effect of this change on the operation of Rule 801(d)(2)(E) is analyzed. Finally, there is a discussion of whether this change is correct as a matter of law and wise as a matter of policy.

The second part of this article examines the sixth amendment's right to confrontation as applied to co-conspirator hearsay. It begins with a look at the confrontation clause generally. Next, it examines the right of confrontation as applied to co-conspirator hearsay and Rule 801(d)(2)(E) prior to *Inadi* and *Bourjaily*. Finally, it looks at the demise of any confrontation clause analysis under Rule 801(d)(2)(E) after *Inadi* and *Bourjaily*.

After discussing the abolition of the independent evidence requirement and the demise of the sixth amendment's applicability to co-conspirator statements offered under Rule 801(d)(2)(E), this article concludes with a look at the practical effect of this revolutionary change in admissibility in criminal prosecutions. In particular, it addresses the new ability of trial counsel to utilize Rule 801(d)(2)(E) to gain admissibility for statements which otherwise might be admitted under other hearsay exceptions—present sense impressions, statements against penal interest, excited utterances, or statements of family history—but which now are more easily admitted under Rule 801(d)(2)(E). The effect that this revolutionary change in admissibility under Rule 801(d)(2)(E) may have on the fairness of the judicial system is also explored.

II. CO-CONSPIRATOR HEARSAY AND RULE OF EVIDENCE 801(d)(2)(E)

A. GENERALLY

FRE 801(d)(2)(E) provides that "a statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."[4] MRE 801(d)(2)(E) is identical.[5]

Thus, before the out-of-court statement of a non-testifying co-conspirator can be admitted under Rule 801(d)(2)(E), the government must prove that: 1) the conspiracy existed, and the accused and the non-testifying co-conspirator were both members of it; and 2) the proffered statement was uttered during the course of and in furtherance of the conspiracy.[6] Once these two requirements are met, statements of a non-testifying co-conspirator uttered "during the course and in furtherance of the conspiracy"[7] may be used without the maker of the statements ever appearing in court to testify under oath.

B. THE INDEPENDENT EVIDENCE REQUIREMENT

1. Co-Conspirator Statements and the Independent Evidence Requirement Prior to the Rules of Evidence

Prior to the adoption of the Federal Rules of Evidence by federal civilian courts in 1975, the common law governed the admissibility of evidence in federal criminal trials. Similarly, the admissibility of evidence in the military before the adoption of the Military Rules of Evidence in 1980 was governed by general common law principles as codified in successive Manuals for Courts-Martial.

The prevailing rule in both federal and military courts was that independent evidence of the conspiracy's existence, separate and apart from the proffered co-conspirator's statements, was required as a prerequisite for receiving the statements into evidence. The authority for this rule was the 1942 United States Supreme Court case of

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[4]*Id.*

[5]*Id.* Mil. R. Evid. 801(d)(2)(E) is modeled after its federal counterpart.

[6]Case law and commentators agree that the content of the proffered co-conspirator statements itself can be considered in proving that the statements were uttered during the course of and in furtherance of the conspiracy. *See* Brief for Petitioner at 25, Bourjaily v. United States, 107 S. Ct. 2775 (1987) (No. 85-6725); Brief for the United States at 17, Bourjaily v. United States, 107 S. Ct. 2775 (1987) (No. 85-6725).

[7]Fed. R. Evid. 801(d)(2)(E).

Glasser v. United States.[8] In *Glasser* the court decided that the declarations of a non-testifying co-conspirator were admissible against the accused co-conspirator who was not present when the statements were made "only if there is proof *aliunde* that he is connected with the conspiracy . . . . [O]therwise hearsay would lift itself by its own bootstrap to the level of competent evidence."[9]

In the 1974 case of *United States v. Nixon*[10] the Supreme Court again stated in dictum that declarations by one co-conspirator may be admitted against another co-conspirator only "upon sufficient showing by independent evidence of a conspiracy among one or more other co-conspirators. There must be substantial independent evidence of a conspiracy."[11] This language reaffirmed the Court's holding in *Glasser* some twenty-five years earlier.

The Manuals for Courts-Martial of 1951[12] and 1969[13] did not address bootstrapping, but military practice clearly followed the rule in *Glasser*. In the 1962 case of *United States v. LaBossiere*[14] the accused was charged with conspiracy to commit larceny of government property. The prosecution sought to prove LaBossiere's participation in the criminal agreement through the statements of a non-testifying co-conspirator. The court held that "bootstrapping of this sort is impermissible."[15] Quoting from its decision in *United States v. Mounts*,[16] the court stated: "It would be faulty and circuitous reasoning with a vengeance to permit the questioned declaration itself to furnish the essential basis for its own guaranty."[17]

In 1974 the Air Force Court of Military Review cited *LaBossiere* in stressing that independent evidence was still required. Thus it was erroneous for the judge to have relied on a non-testifying co-conspirator's "conversations with the various witnesses to establish the existence of a conspiratorial agreement with the accused. . . . Bootstrapping of this sort has long been held to be impermissible."[18]

Scholarly literature on military law agreed that the law was well-settled. One commentator, writing in the *Military Law Review* in 1971, stated that "the general rule is that each accused must be con-

[8]Glasser v. United States, 315 U.S. 60 (1942).
[9]*Id.* at 74-75.
[10]418 U.S. 683 (1974).
[11]*Id.* at 701 n.14 (emphasis added).
[12]Manual for Courts-Martial, United States, 1951.
[13]Manual for Courts-Martial, United States, 1969 (Rev. ed.).
[14]32 C.M.R. 337 (C.M.A. 1962).
[15]*Id.* at 339.
[16]2 C.M.R. 20 (C.M.A. 1951).
[17]*Id.* at 25.
[18]United States v. Duffy, 49 C.M.R. 208, 210 (A.F.C.M.R. 1974).

nected with the alleged conspiracy by evidence independent of the statements of co-conspirators before these statements are admissible against him."[19]

A final point germane to a discussion of the pre-Rules prohibition on bootstrapping was the issue of whether the judge or the jury determined the existence of the conspiracy. The prevailing practice in both the federal and military courts was for the judge to decide the issue. In *United States v. Dennis*[20] Judge Learned Hand stated that the judge, not the jury, should determine the conspiracy's existence.[21] In *Carbo v. United States*[22] the court held that the judge was to decide the issue as a preliminary question. To hold otherwise would risk confusion. Because proof of the conspiracy by independent evidence is a preliminary question not requiring proof beyond a reasonable doubt, to expect the jury "not only to compartmentalize the evidence, separating that produced by the declarations from all other, but as well to apply to the independent evidence the entirely different evidence weighing standards . . . is to expect the impossible."[23]

In sum, prior to the adoption of the FRE's and MRE's the prohibition against bootstrapping was the law, with the judge deciding as a preliminary question the existence of the conspiracy. A prima facie showing or evidence by a preponderance was the proof required.[24]

2. Co-Conspirator Statements and the Requirement for Independent Evidence After the Adoption of the Rules of Evidence until Bourjaily v. United States

After the adoption of the Federal Rules of Evidence on July 1, 1975, the vast majority of federal circuit courts continued to hold that the requirement for independent evidence remained unchanged.[25] In

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[19]Yawn, *Conspiracy*, 51 Mil. L. Rev. 211, 233 (1971).
[20]183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).
[21]*Id.* at 230.
[22]314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).
[23]*Id.* at 737.
[24]Comment, *Restructuring the Independent Evidence Requirement of the Co-conspirator Exception*, 127 U. Pa. L. Rev. 1439, 1448-52 (1979).
[25]Prior to the decision in *Bourjaily* nine circuit courts held that the independent evidence rule was codified in FRE 801(d)(2)(E). United States v. Rabb, 752 F.2d 1320 (9th Cir. 1984), *cert. denied*, 471 U.S. 1019 (1985); United States v. Ammar, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983); United States v. Portsmouth Paving Corp., 694 F.2d 313 (4th Cir. 1982); United States v. Mastropieri, 685 F.2d 776 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982); United States v. Salisbury, 662 F.2d 738 (11th Cir. 1981), *cert. denied*, 457 U.S. 1017 (1982); United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980); United States v. James, 590 F.2d 575 (5th Cir.) (en banc), modifying 576 F.2d 1121 (1978), *cert. denied*, 442 U.S. 917 (1979); United States v. Andrews, 585 F.2d 961 (10th Cir. 1978); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978),

United States v. Martorano,[26] however, the First Circuit suggested in dictum that rule 104(a) removed the proscription against "bootstrapping," and allowed the judge to consider the proffered co-conspirator statements in deciding the conspiracy's admissibility under Rule 801(d)(2)(E). The rationale was that a statement's admissibility under Rule 801(d)(2)(E) is a preliminary question decided by a judge, and Rule 104(a) plainly says that the judge is not bound by the rules of evidence except those with respect to privileges. Therefore, the court stated in *Martorano,* the judge could properly consider the proffered statements themselves.[27]

Nearly every other case prior to *Bourjaily* strongly rejected the reasoning in *Martorano.*[28] *United States v. James*[29] is a good example of this majority view that the Rules of Evidence did not allow bootstrapping. In *James* the accused was convicted of conspiracy to possess cocaine and heroin with the intent to distribute. The Fifth Circuit, sitting en banc, addressed specifically the impact of Rule 104(a) on Rule 801(d)(2)(E) as it related to the requirement for independent evidence of the existence of the conspiracy as a foundation for admissibility of co-conspirator statements. The court decided that Rule 104 required the trial judge to decide whether a conspiracy existed based on evidence independent of the statements themselves, so as to preclude "bootstrapping." Although it recognized that Rule 104(a) literally stated that a trial judge was "not bound by the Rules of Evidence except those with respect to privileges,"[30] the court held that it would "not construe this language as permitting the court to rely upon the content of the very statement whose admissibility is at issue."[31] Citing *Glasser* and *Nixon,* the court in *James* reasoned that this con-

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Another, the Seventh Circuit, did not decide whether bootstrapping was still forbidden under the FRE's. United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978). The law in the First Circuit is unclear. In the 1977 case of *United States v. Martorano,* the court suggested in dicta that the bootstrapping rule was overridden by Rule 104(a). Yet, three years later, in *United States v. Nardi,* that court held that the existence of a conspiracy in which the accused participated must be proven by a preponderance of independent evidence. United States v. Martorano, 557 F.2d 1 (1st Cir.), *reh'g denied,* 561 F.2d 406 (1977), *cert. denied,* 435 U.S. 922 (1978); United States v. Nardi, 933 F.2d 972 (1st Cir. 1980). Only the Sixth Circuit failed to adhere to the majority view that only independent evidence may be used to prove the existence of a conspiracy and the accused's membership in it. United States v. Arnott, 704 F.2d 322 (6th Cir.), *cert. denied,* 464 U.S. 948 (1983). *See* Brief for Petitioner, *supra* note 6, at 21-22.

[26]557 F.2d 1 (1st Cir.), *reh'g denied,* 561 F.2d 406 (1977), *cert. denied,* 435 U.S. 922 (1978).

[27]*Id.* at 12.

[28]557 F.2d 1 (1st Cir. 1977).

[29]590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917 (1979).

[30]*Id.* at 581 (quoting Fed. R. Evid. 104).

[31]*Id.*

struction of Rule 104(a) "comports with earlier Supreme Court pronouncements that admissibility must depend upon independent evidence in order to prevent this statement from lift[ing] itself up by its own bootstraps to the level of competent evidence."[32]

As a petition for certiorari was denied in 1979, the majority of commentators accepted the holding of *United States v. James* as the leading precedent in the application of Rules 104(a) and 801(d)(2)(E).[33] Subsequent to *James* the Supreme Court continued to refuse to change the independent evidence rule when it denied certiorari in four similar cases.[34]

Military law likewise continued to forbid bootstrapping after the adoption of the MRE's in 1980. In 1983 the Court of Military Appeals held in *United States v. Ward*[35] that out-of-court statements made by a co-conspirator were admissible, provided that the "illicit association between the declarant and the defendant" and the conspiracy's existance itself were shown with "sufficient particularity."[36] In *Ward* the court refused to allow the non-testifying co-conspirator's statement to be admitted because the record lacked sufficient independent evidence.[37]

Similarly, in 1985 the Air Force Court of Military Review held in *United States v. Ludlum*[38] that it was error to prove the existence of the conspiracy "by the language of the statement sought to be admitted. To allow this would be bootstrapping, and would permit the questioned evidence itself to furnish the predicate for its own

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[32]*Id.*

[33]*See* Comment, *supra* note 24; S. Saltzburg, L. Schinasi & D. Schlueter, Military Rule of Evidence Manual 618 (2d ed. 1986).

[34]*Rabb*, 752 F.2d 1320 (substantial independent evidence required); *Ammar*, 714 F.2d 238 (preponderance of independent evidence required); *Mastropieri*, 685 F.2d 776 (preponderance of independent evidence required); *Salisbury*, 662 F.2d 738 (preponderance of the independent evidence). *But see* United States v. Arnott, 704 F.2d 322 (6th Cir. 1983), where the Sixth Circuit affirmed a district court's holding that a trial judge can consider the content of the proffered statements in determining their admissibility, and where the Supreme Court denied certiorari. Justice White in his dissent of the denial of certiorari stated that the Sixth Circuit's affirmance is so contrary to precedent that the Court should grant certiorari. Interestingly, the government side-stepped the issue of whether Rule 104(a) modified prior law to the contrary so as to authorize bootstrapping; the government argued that certiorari should be denied because *in fact* there was sufficient independent evidence of the conspiracy's existence and the accused's membership in it, and that regardless of whether bootstrapping was or was not permitted under Rule 104(a), the outcome in *Arnott* would have been the same.

[35]16 M.J. 341 (C.M.A. 1983).

[36]*Id.* at 352.

[37]*Id.* at 353.

[38]20 M.J. 954 (A.F.C.M.R. 1985).

admission."[39] Finally, in *United States v. Kellent*[40] the Navy-Marine Corps Court of Military Review agreed that statements of a co-conspirator were properly admitted under MRE 801(d)(2)(E) as the prosecution had used independent evidence to demonstrate that a conspiracy existed.

The 1984 *Manual for Courts-Martial*[41] provides some guidance, although it does not resolve the issue. It says that bootstrapping "was not permitted under prior military law"[42] and that although some circuits have ruled that Rule 104(a) ends the prohibition against a trial judge considering the proffered statements themselves in deciding the existence of the conspiracy and the accused's membership in it, "discretion would dictate that prior military law be followed and that bootstrapping not be allowed."[43]

Saltzburg, Schinasi, and Schlueter in their *Military Rules of Evidence Manual*[44] also agree "that bootstrapping ought not to be permitted."[45] In short, the majority of the federal courts and the military courts and commentators agreed that there continued to be a requirement for independent evidence as a prerequisite for statements to be admissible under Rule 801(d)(2)(E).

C. BOURJAILY V. UNITED STATES *AND THE INDEPENDENT EVIDENCE REQUIREMENT: DECISION OF THE COURT*

In June 1987 the United States Supreme Court dramatically changed the requirement that independent evidence of a conspiracy's existence and the accused's membership in it was needed for admissibility under Rule 801(d)(2)(E).

Bourjaily, convicted of conspiring to distribute cocaine and possession of cocaine with intent to distribute, appealed on the ground that the trial court had considered the statements of his co-conspirators in determining whether the conspiracy existed. The use of the statements was in violation of the bootstrapping prohibitions of *Glasser* and *Nixon*. Chief Justice Rehnquist, joined by five other Justices, held that Rule 104(a) now allowed co-conspirator statements them-

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[39]*Id.* at 957.
[40]18 M.J. 782 (N.M.C.M.R. 1984).
[41]Manual for Courts-Martial, United States, 1984.
[42]*Id.* at App. 22-47.
[43]*Id.*
[44]S. Saltzburg, L. Schinasi & D. Schlueter, *supra* note 33, at 618.
[45]*Id.*

selves to be considered in deciding admissibility under Rule 801(d)(2)(E): "if *Glasser* and *Nixon* are interpreted as meaning that courts *cannot* look to the hearsay statements themselves for any purpose, they have been superseded by Rule 104(a)."[46] "In making a preliminary factual determination under Rule 801(d)(2)(E), [a court] *may* examine the hearsay statements sought to be admitted."[47]

The Supreme Court emphasized that both *Glasser* and *Nixon* were decided before the adoption of the Federal Rules of Evidence in July 1975. As "[t]hese Rules now govern the treatment of evidentiary questions in federal courts,"[48] the Court asserted that the issue was "whether any aspect of *Glasser*'s bootstrapping rule remains viable after the enactment of the"[49] Rules of Evidence.

A plain reading of FRE 104 convinced the Court that Congress decided that federal courts may consider hearsay—including out-of-court statements by non-testifying co-conspirators—in making preliminary factual determinations. Thus, *Glasser* and the bootstrapping rule were superseded by the adoption of the Federal Rules of Evidence. In so reasoning, the Court specifically rejected Bourjaily's contention that the bootstrapping rule "survived the apparently unequivocal change in the law unscathed and that Rule 104, as applied to the admission of co-conspirator's statements, does not mean what it says."[50] The plain language of FRE 104 prevails over the bootstrapping prohibitions of all previous legal precedent. In fact, the Court seems to imply that it could not have decided otherwise.

The Court stopped short of holding that a judge could rely *solely* on the proffered co-conspirator statements to decide that a conspiracy existed.[51] It held, however, that the statements *can* be considered: "the judge should receive the evidence and give it such weight as his judgement and experience counsel."[52] The bootstrapping rule is dead.

D. ANALYSIS OF BOURJAILY V. UNITED STATES

A literal reading of Rule 104(a) now seems to allow bootstrapping. The Supreme Court refused to conclude, absent a statement by Con-

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[46]107 S. Ct. 2775, 2777 (1987).
[47]*Id.* at 2782.
[48]*Id.* at 2780.
[49]*Id.*
[50]*Id.*
[51]*Id.* at 2781-82.
[52]*Id.* at 2782 (quoting United States v. Matlock, 415 U.S. 164, 175 (1964)).

gress in the legislative history of Rule 104, that the drafters intended the bootstrapping rule of *Glasser* to live on in the Federal Rules of Evidence. In the words of the Chief Justice, "[s]ilence is at best ambiguous, and we decline the invitation to rely on speculation to import ambiguity into what is otherwise a clear rule."[53] As the legislative history appears to be silent as to the bootstrapping prohibitions of *Glasser* and Rule 104 is plain on its face, the Court declined to hold that bootstrapping now was prohibited.

The government, in *Bourjaily,* insisted that the legislative history of Rule 104 reflected Congressional desire to sweep away "the technical exclusionary rules of evidence, which [are] unsuited to the judicial function."[54] Congress designed Rule 104 to permit judges to decide preliminary questions of fact—like the existence of a conspiracy before admitting a statement under Rule 801(d)(2)(E)—unfettered by any rules of evidence except those related to privileges.[55]

The government argued further that there is no need for a bootstrapping rule where a jury may no longer be used to determine the existence of a conspiracy and the accused's membership in it.

> In this historical context, the bootstrapping rule is easily understood as an exclusionary device intended to ensure that juries would not rely on incompetent evidence in making the admissibility decision. . . . As long as juries decided the admissibility of the co-conspirator statements, there was a logical basis to apply a rule that confined the scope of their decision-making authority.[56]

Implicit in this argument is the belief that a judge is to be trusted more in the fact-finding process than a jury, and that he will be more skeptical of the proffered hearsay than would a jury. Yet there is no guarantee that a judge will not consider unreliable evidence or give undue weight to a particular piece of evidence. Certainly Justice Blackmun, in his dissent in *Bourjaily,* has little faith in a trial judge's ability to properly consider the proffered co-conspirator statements in determining the conspiracy's existence. Blackmun asserts that the end of the bootstrapping rule can cause a trial judge to give undue weight to co-conspirator's statements:

> [S]uch a statement will serve the greatest purpose, and thus will be introduced most frequently in situations where *all* the other evidence that the prosecution can muster to show

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[53]*Id.* at 2781 n.2.
[54]Brief for the United States, *supra* note 6, at 12.
[55]*Id.*
[56]*Id.* at 11.

> the existence of a conspiracy will *not* be adequate. . . . [A]ccordingly, the statement will likely *control* the interpretation of whatever other evidence exists and could well transfer a series of innocuous actions by a defendant into evidence that he was participating in a criminal conspiracy.[57]

Allowing bootstrapping will make it more likely that an accused will be convicted of a conspiracy, the existence of which may be principally based on inherently unreliable statements. For example, a trial judge might believe an incriminating statement made by a co-conspirator, precisely because the accused could not explain it. This is not an unlikely possibility considering that an accused can be confronted at trial with many statements made by his co-conspirator "which he never authorized, intended, or even knew about."[58]

The dissenters, and Bourjaily's counsel, all vehemently denied that Congress intended to overrule the bootstrapping rule in creating Rule 104(a). They insisted that the majority was wrong to examine Rule 104(a) and its history separate from Rule 801(d)(2)(E). Bourjaily's counsel argued that the legislative history of Rule 801(d)(2)(E) shows that the drafters intended the bootstrapping rule to live on in the Rules of Evidence. The Advisory Committee's Note to Rule 801 reflected that the chief reason for admitting one co-conspirator's statements against another co-conspirator was based on an agency principle. In this regard, the Committee recognized that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established."[59] It follows that if there was no intent to expand admissibility under Rule 801(d)(2)(E), then the bootstrapping rule still applies to Rule 104(a). For if bootstrapping *is* permitted by the procedural mechanism of Rule 104(a), this has the *effect* of expanding admissibility under Rule 801(d)(2)(E).

Furthermore, everyone who testified or gave a written statement in the congressional hearings on the FRE's believed that Rule 801(d)(2)(E) reflected the common law approach. In particular, every participant concluded that the independent evidence requirement was codified in Rule 801(d)(2)(E).[60]

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[57]107 S. Ct. 2775, 2790 (1987).

[58]*Id.* at 2791.

[59]Reply Brief for Petitioner at 6, Bourjaily v. United States, 107 S. Ct. 2775 (1987) (No. 85-6725) (quoting Advisory Committee's Special Introductory Note to Article VIII, 56 F.R.D. 288, 299).

[60]The late circuit Judge Henry Friendly testified at the House Subcommittee Hearings on the FRE's that he did not believe Rule 801(d)(2)(E) changed the common law

Certainly the majority of the U.S. Courts of Appeals continued to follow *Glasser* and *Nixon* long after the FRE's were adopted.[61] Bourjaily's appellate attorneys stressed that these judges did so not only because bootstrapping was forbidden by legal precedent, but because the independent evidence requirement makes sense. The rule is "a clear, workable, and even-handed rule that has proved over the years it has been employed that it works to protect the interest of both sides in a federal criminal prosecution."[62]

Finally, Bourjaily's counsel stressed that most commentators believed that the independent evidence rule was not overruled by the adoption of the Rules of Evidence.[63]

Assuming arguendo that the legislative history of Rule 104(a) is unclear in relation to Rule 801(d)(2)(E), is there a legal basis for concluding that the bootstrapping rule should continue to be applied to co-conspirator hearsay?

Certainly, bootstrapping is not inherently evil. It is permitted in other areas of the Rules of Evidence. For example, other hearsay statements by their own contents may be admissible as hearsay. Thus statements against interest are admissible under Rule 804(b)(3),[64] as are statements of personal or family history under Rule 804(d)(4),[65] even though these statements "bootstrap" themselves into evidence. Similarly, a document may be authenticated by its own contents under Rule 902.[66] The rationale for such bootstrapping is "that some [documentary] evidence is so likely to be genuine that its proponent should not be compelled to lay a formal foundation. . . . [T]he evidence authenticates itself."[67]

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approach to the co-conspirator rule or "advance matters." *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93rd Cong., 2d Sess. 246. Senator McClellan, who greatly influenced the final text of the FRE's, believed the independent evidence requirement lived on in Rule 801(d)(2)(E). Letter from Senator McClellan to Judge Maris, August 12, 1971, in Supplement to House Subcomm. Hearings, *supra*, at 47, 57. Richard Keating and John Blanchard, who had worked on the California Evidence Code, specifically concluded in their lengthy analysis of the proposed FRE's that the bootstrapping prohibition of *Glasser* and *Carbo* was codified in Rule 801(d)(2)(E). *Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. 162. Finally, Herbert Semmen, testifying on behalf of a group of Washington, D.C. attorneys, specifically concluded that Rule 801(d)(2)(E) would not alter the then existing rules on co-conspirator statements. Senate Judiciary Comm. Hearings, *supra*, at 310. *See* Reply Brief for Petitioner, *supra* note 59, at 7.

[61]*See* cases cited *supra* note 25.

[62]Brief for Petitioner, *supra* note 6, at 23.

[63]*See supra* notes 24, 33, 59, & 60.

[64]Fed. R. Evid. 804(b)(3); Mil. R. Evid. 804(b)(3).

[65]Fed. R. Evid. 804(b)(4); Mil. R. Evid. 804(b)(4).

[66]Fed. R. Evid. 902; Mil. R. Evid. 902.

[67]S. Saltzburg, L. Schinasi & D. Schlueter, *supra* note 33, at 715.

That, of course, is precisely why bootstrapping should not be permitted under Rule 801(d)(2)(E): out-of-court statements of co-conspirators are inherently unreliable. "[S]uch statements in some cases may constitute, at best, nothing more than the 'idle chatter' of a declarant or, at worst, malicious gossip."[68]

Co-conspirator hearsay is inherently unreliable. For example, the witness reporting the conspiratorial statement of the non-testifying co-conspirator might fail to accurately remember or report the declaration. The co-conspirator, perhaps intending to incriminate the accused and to mislead the reporting witness as to the identity of the real conspirators, may have intentionally lied about the accused's part in the conspiracy. Additionally, an accused on the periphery of the conspiracy is unlikely to have sufficient knowledge to explain or contradict the statements of co-conspirators. Finally, hearsay evidence is generally untrustworthy. Taken together, these factors make easy the fabrication of co-conspirator statements, and at least call into question the reliability of such statements. The requirement for proof of the accused's involvement in the conspiracy, *independent* of the non-testifying co-conspirator, therefore is needed to ensure that only reliable evidence is presented to the finder of fact.

Thus, although bootstrapping ought to be, and is, permitted in some areas of the Rules of Evidence, *fairness* ought to preclude it where "the statements of co-conspirators are of dubious reliability at best. . . . [I]ndependent evidence should be required simply as an additional safeguard of trustworthiness."[69]

III. THE CONFRONTATION CLAUSE AND CO-CONSPIRATOR HEARSAY UNDER RULE 801(d)(2)(E)

A. GENERALLY

The Constitution of the United States gives an accused in a criminal trial "the right . . . to be confronted with the witnesses against him."[70] This reflects the Framers' desire that an accused have the

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[68]107 S. Ct. 2775, 2790 (1987).

[69]White, *The Preliminary Question of the Existence of Conspiracy for Admitting Statements Under Federal Rules of Evidence 801(d)(2)(E) and 104(a): The Continuing Vitality of The Federal Common Law of Evidence*, 1 ATLA Crim. L. Rep. 37, 44 (1978). *See also* Graham, *The Impact of Bourjaily on Admissions by Co-conspirators*, 24 Crim. L. Bull. 48, 53 n.41 (1988) (wisdom of *Bourjaily* is suspect both as a matter of construction of the FRE's and as a matter of policy).

[70]U.S. Const. amend. VI.

opportunity to cross-examine his accusers in open court.[71] Yet an accused charged with conspiracy often is denied the chance to confront the witnesses against him. In particular, out-of-court statements made by co-conspirators can be used against him under Rule 801(d)(2)(E) without the maker of the statements ever appearing in court to testify under oath.[72]

This dichotomy between the confrontation clause and Rule 801(d)(2)(E) means that statements offered under this rule of evidence seem to need a confrontation clause analysis before being admitted. The extent to which the confrontation clause applies to Rule 801(d)(2)(E) is the subject of this portion of this article.

B. THE CONFRONTATION CLAUSE

The origins of the sixth amendment's right to confrontation are unclear. Some scholars believe it reflects the Framers' reaction to the trial of Sir Walter Raleigh in 1603.[73] Raleigh was charged with conspiring to overthrow King James of England. The most damning evidence against him was the "confession" of his alleged co-conspirator, Lord Cobham, in which Cobham named Raleigh as a fellow traitor. Cobham later retracted this statement, and Raleigh believed that Cobham would testify at trial that Raleigh was not a conspirator. Accordingly, Raleigh requested that Cobham be called as a witness. The prosecution instead produced a boat pilot named Dyer, who swore that an unidentified Portuguese man had told him that Cobham and

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[71]California v. Green, 399 U.S. 149, 157 (1970); Ross, *Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 Mil. L. Rev. 31, 35-38 (1987); Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 Fla. L. Rev. 207, 208-11 (1984); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99 (1972).

[72]At common law co-conspirator hearsay statements were admissible as an *exception* to the hearsay rules. The Federal Rules of Evidence (effective July 1, 1975), the Military Rules of Evidence (effective August 1, 1980), and the state rules of evidence modelled upon the federal rules define co-conspirator hearsay statements *not* as exceptions to the hearsay rules, but as *exemptions*, i.e., as non-hearsay. The distinction is an important one in theory, but beyond the scope of this article to discuss. However, because the out-of-court statements of non-testifying co-conspirators are defined as non-hearsay, it might be argued that the confrontation clause, as it applies to hearsay statements, does not reach such non-hearsay. This is not a legitimate argument; since statements offered under Rule 801(d)(2)(E) are out-of-court statements offered to prove the truth of their contents, they look like hearsay, whether so labelled or not. *Accord* United States v. Inadi, 106 S. Ct. at 1128 n.6. Therefore, for the purposes of this article, the terms "co-conspirator hearsay" and "co-conspirator statements admitted under Rule 801(d)(2)(E)" are synonymous.

[73]California v. Green, 399 U.S. 149, 158 n.10; E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 273 (1983); D. Willson, A History of England 342 (2d ed. 1972); G. Davies, The Early Stuarts 1603-1660 at 3 (2d ed. 1959).

Raleigh were plotting together to kill the king. Raleigh objected to this double hearsay being used to prove his guilt, but was overruled. He was found guilty and condemned to death.[74]

Whatever the origins of the confrontation clause,[75] it exists to prevent abuses in criminal trials like those suffered by Sir Walter Raleigh. Its application today depends on its interpretation by the Supreme Court. A good starting point for understanding the Court's application of the right to confrontation in criminal proceedings is *California v. Green*.[76]

John Green was tried for furnishing marijuana to a minor, in violation of California law. At Green's preliminary hearing, a minor, Melvin Porter, testified that Green had supplied marijuana to him. Porter was extensively cross-examined by Green's attorney at this hearing. Two months later at Green's trial, Porter claimed to be unable to remember the actual events to which he had testified earlier. The government introduced as substantive evidence Porter's earlier testimony at the preliminary hearing. The practical effect was to prevent Green's lawyer from cross-examining Porter, since Porter insisted he could not remember the events to which his former testimony related. The California Supreme Court reversed Green's conviction, holding that the confrontation clause required the exclusion of Porter's prior testimony.[77]

In reinstating the conviction, the United States Supreme Court held that Green's sixth amendment right to confront the witness against him had not been violated. The Court reasoned that, although the confrontation clause and the hearsay rules "are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete."[78] Accordingly, the Court recognized that statements admitted under a recognized hearsay exception might violate the confrontation clause, just as statements admitted in violation of a hearsay rule might *not* violate confrontation rights. The Court, however, declined to "map out a theory of the Confrontation

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[74]Imprisoned in London after his conviction in 1603, Raleigh was released in 1616, then confined again in 1618, and beheaded shortly thereafter. G. Davies, *supra* note 73, at 55.

[75]Other commentators trace the origin of the confrontation clause to the abuses of the British vice-admiralty courts in the American colonies. These courts tried colonists who violated British trading laws. The accused did not have the right to a jury trial, and his right to examine and cross-examine witnesses was limited. Ross, *supra* note 71, at 37 n.30.

[76]399 U.S. 149 (1970).

[77]*Id.* at 151-54.

[78]*Id.* at 155.

Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements."[79] The Court concluded that Green's confrontation rights had been satisfied as to Porter's prior testimony for two reasons: first, Porter had been extensively cross-examined at the time he made the statements; second, he had been present at the trial and Green had the opportunity to confront him.[80] Unfortunately, the exact reasoning used to reach this conclusion is unclear; the majority opinion is mostly conclusory.

Justice Harlan's concurring opinion gives us the best view of the purpose of the confrontation clause. He reasons that the clause requires the government "to *produce* any *available* witness whose declaration it seeks to use in a criminal trial."[81] As Porter had been available to testify, and had been produced, Harlan believed there was no violation of Green's sixth amendment right to confront his accuser.[82]

Ten years later, in *Ohio v. Roberts*,[83] the Supreme Court decided its most important case involving the right of confrontation and the hearsay rules. The facts in *Roberts* are similar to those in *Green*. Roberts was charged with forgery and related offenses. At his preliminary hearing, the daughter of the victim testified that she had not given Roberts permission to use her father's checks. She refused to admit otherwise during a vigorous examination by Roberts' attorney. At Roberts' later trial, he testified that in fact she had given him permission to use her father's checks. Although subpoenaed, the daughter did not appear, so the government introduced her prior testimony into evidence. The issue, as in *Green*, was whether this use of the prior out-of-court testimony violated Roberts' rights under the confrontation clause. The Court held that it did not, and it created a two-part test for determining whether the use of hearsay statements will violate an accused's right of confrontation. There is no constitutional barrier to using such hearsay statements if: 1) the government establishes that the witness who made the statements is unavailable; and 2) the proffered statements reflect adequate indicia of reliability.[84] This reliability, said the Court, "can be inferred without more in a case where the evidence falls within a firmly-rooted hear-

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[79]*Id.* at 163.
[80]*Id.* at 166-69.
[81]*Id.* at 174 (emphasis in original).
[82]*Id.* at 173-89.
[83]448 U.S. 56 (1980).
[84]*Id.* at 67.

say exception."[85] In other cases, the evidence must be excluded, at least absent a showing of "particularized guarantees of trustworthiness."[86] Applying its new standard to the facts, the Supreme Court decided that the daughter's prior testimony passed muster because her examination by Roberts' lawyer was equivalent in form and purpose to that of cross-examination.

In the Court's view, the Framers' preference for live testimony in criminal trials and their desire that an accused have the chance to face his accuser in court gives away if the accuser is unavailable to testify. Thereafter, hearsay statements of a non-testifying witness can be admitted *only* if such statements reflect a high degree of reliability. The Court recognized in *Roberts* that traditional hearsay exceptions like "excited utterance"[87] or "present sense impression"[88] are exceptions to the rules against hearsay precisely because they are statements uttered under circumstances that human experience and life have shown to be trustworthy. As these firmly-rooted hearsay exceptions exist because of their proven reliability, it makes sense to conclude that the confrontation clause is satisfied if the out-of-court statements can be pigeon-holed into one of the established hearsay exceptions. Reliability is presumed and no additional inquiry is needed. If the hearsay statements do not fit into the category of a firmly-rooted exception, however, they still may be admissible if "particularized guarantees of trustworthiness"[89] can be demonstrated. Generally, this means that the statements must reflect the

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[85]This phrase comes from Mattox v. United States, 156 U.S. 237 (1895). What constitutes a firmly-rooted hearsay exception is not yet resolved in the federal courts. Of course, *Bourjaily* says co-conspirator hearsay is firmly rooted. In the military, the Court of Military Appeals has addressed the issue in several cases. In United States v. Arnold, 25 M.J. 129 (C.M.A. 1987), the court held the excited utterance to be firmly rooted, thus allowing reliability to be inferred. *Accord* United States v. Dunlap, 25 M.J. 89 (C.M.A. 1987); United States v. Hines, 23 M.J. 125, 129 and n.6 (C.M.A. 1986). On the other hand, in United States v. Dill, 24 M.J. 386 (C.M.A. 1987), the court held that statements against penal interest were *not* firmly rooted, but of "recent derivation." *Dill*, 24 M.J. at 388. Similarly, in United States v. Groves, 23 M.J. 374 (C.M.A. 1987), the court held that Rule 804(b)(4), as it modifies the "statement of personal or family history" exception to the hearsay rule, is no longer firmly rooted, thus requiring particularized guarantees of trustworthiness. Finally, in United States v. Broadnax, 23 M.J. 389 (C.M.A. 1987), the court held that as Rule 803(8) greatly expands the traditional hearsay exception for "official documents and records," it "could not reasonably be considered 'firmly rooted,' " and additional guarantees of trustworthiness were required. *Id.* at 393.

[86]*Roberts*, 448 U.S. at 67.

[87]Fed. R. Evid. 803(2); Mil. R. Evid. 803(2).

[88]Fed. R. Evid. 803(1); Mil. R. Evid. 803(1).

[89]*Roberts*, 448 U.S. at 67.

reliability equivalent to what in-court testimony subject to cross-examination would produce.[90]

The decision in *Roberts* gave judges and lawyers a clear, fair standard by which to balance the seemingly conflicting commands of the confrontation clause and the hearsay rules. Unfortunately, as applied to co-conspirator hearsay and Rule 801(d)(2)(E), the federal courts have been very much in disagreement.

C. THE CONFRONTATION CLAUSE APPLIED TO CO-CONSPIRATOR HEARSAY STATEMENTS PRIOR TO INADI *AND* BOURJAILY

If *Green* and *Roberts* reflect the general application of the confrontation clause to criminal trials, *Dutton v. Evans*[91] illustrates the clause as applied to the statements of a non-testifying co-conspirator. *Dutton* was decided nearly ten years before *Roberts,* so its value as precedent is limited. Nonetheless, Dutton continues to be cited in federal court opinions[92] dealing with confrontation challenges to Rule 801(d)(2)(E), the federal rule codifying the common law co-conspirator hearsay exception.[93] *Dutton* is apparently the only Supreme Court decision prior to *Inadi* and *Bourjaily* that directly addressed the application of the confrontation clause to co-conspirator hearsay.

In *Dutton* the accused was convicted of first-degree murder in the deaths of three policemen. His alleged co-conspirator in the crime, Williams, was asked by a fellow prisoner named Shaw what had happened at his arraignment. Williams replied that "[i]f it hadn't been for that son-of-a-bitch Alex Evans, we wouldn't be in this now."[94] Williams did not testify, but his out-of-court statement to Shaw was admitted through Shaw's testimony under Georgia's co-conspirator hearsay exception. On appeal to the Supreme Court, the issue was whether Alex Evans's confrontation rights had been violated in that he had been unable to cross-examine Williams about his statement.[95]

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[90]*Id.* at 64, 70-74. *See generally* Dutton v. Evans, 400 U.S. 74, 88-89 (1970). The best way to ensure reliability and satisfy the confrontation clause is through cross-examination; "the four testimonial characteristics [it tests are] accurate memory, perception, narration, and sincerity." Ross, *supra* note 71, at 53-54.

[91]400 U.S. 74 (1970).

[92]*See, e.g., infra* notes 101-07 and accompanying text.

[93]*See* White, *supra* note 69.

[94]400 U.S. at 77.

[95]*Id.* at 80.

Unlike *Green*, which had been decided six months earlier, or the later decision in *Roberts*, *Dutton* involved statements that were *not* prior testimony at a preliminary hearing or other judicial-type setting. Furthermore, Williams's unavailability to testify at trial was never demonstrated; the government apparently assumed that if subpoenaed, Williams would invoke his fifth amendment right to silence.[96]

In deciding that the confrontation clause had not been violated, the Court[97] stressed that "the mission of the confrontation clause is to advance . . . the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."[98] As the evidence was overwhelming that Evans was guilty of murder, any possibility that the statement related by Shaw "might have been unreliable was wholly unreal."[99] The Court further relied on the spontaneous nature of the statement and that it was against the declarant's penal interest to make it as proof that the statement was sufficiently reliable to warrant placing it before the jury.[100] In sum, *Dutton v. Evans* foreshadowed *Ohio v. Roberts* in identifying reliability as a chief goal of the confrontation clause, and that such reliability is ordinarily guaranteed through cross-examination of available witnesses. Nonetheless, in concluding in *Dutton* that the co-conspirator hearsay was admissible because other evidence corroborated its truth, the Court's plurality opinion created no test by which to analyze co-conspirator hearsay and the right to confrontation. The Court never addressed the issue of Williams's availability nor the fact that his statement was uttered in a prison, not in a trial-like setting. If anything, *Dutton* illustrates that where co-conspirator hearsay is concerned, the confrontation clause may not be applied with much rigor.

Despite the existence of the *Roberts* two-part test of unavailability and reliability, the federal courts have had as much difficulty as the

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[96]*Id.* at 104 n.4; Ross, *supra* note 71, at 52.

[97]The Court in *Dutton* was split badly. Justice Stewart wrote the opinion reversing the Fifth Circuit's grant of habeas corpus relief to Evans, in which the Chief Justice and two Justices joined; Justice Marshall and three Justices dissented. Justice Harlan concurred in the result reversing the lower court, but did not join in the "majority" opinion. In a concurring opinion, Justice Blackmun and the Chief Justice also wrote that they would have denied Evans's petition of habeas corpus on the basis of harmless error; Shaw's statements were "of peripheral significance" because 20 other witnesses had testified against Evans. *Dutton*, 400 U.S. at 87.

[98]400 U.S. at 89.

[99]*Id.*

[100]*Id.*

Supreme Court did in *Dutton* in determining the extent to which the confrontation clause applies to co-conspirator hearsay and Rule 801(d)(2)(E). An examination of federal circuit court opinions after the adoption of the Federal Rules of Evidence in 1975 until the decisions of *Inadi* and *Bourjaily* reveals that the courts were divided.

The Second, Third, Eighth, and Ninth Circuits held that admissibility under Rule 801(d)(2)(E) did not necessarily satisfy the confrontation clause.[101] Thus, in *United States v. Caputo,*[102] the Third Circuit reversed an accused's conviction for conspiracy to distribute methamphetamine, holding that the introduction of statements made by the accused's non-testifying co-conspirator violated his right to confrontation. Although the court agreed that the government had satisfied the requirements of Rule 801(d)(2)(E), the court determined that this was constitutionally inadequate. Applying *Roberts,* the court found that the government had failed to establish the unavailability of the accused's alleged co-conspirator, thereby violating the sixth amendment's command that a declarant be produced or shown to be unavailable.[103]

On the other hand, the First, Fourth, Fifth, and Seventh Circuits have held that statements that are admissible under Rule 801(d)(2)(E) presumptively satisfy the confrontation clause.[104] Thus, in *United States v. Chindawongse,*[105] the accused was charged with conspiracy to distribute heroin and related narcotic offenses. The government introduced statements of a non-testifying co-conspirator under Rule 801(d)(2)(E). Chindawongse objected on the ground that his right to confront the declarant was violated. The Fourth Circuit disagreed. It held that the standard of admissibility under that rule was "identical"[106] to the requirement for admissibility under the confrontation clause.[107]

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[101]*See* United States v. Massa, 740 F.2d 629 (8th Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985); United States v. Ammar, 714 F.2d 238 (3d Cir. 1983), *cert. denied,* 464 U.S. 936 (1983); United States v. Perez, 658 F.2d 654 (9th Cir. 1981); United States v. Wright, 588 F.2d 31 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979); United States v. Kelley, 526 F.2d 615 (8th Cir. 1975), *cert. denied,* 424 U.S. 971 (1976).

[102]758 F.2d 944 (3d Cir. 1985).

[103]*Id. at 945.*

[104]*See* United States v. Chindawongse, 771 F.2d 840 (4th Cir. 1965), *cert. denied,* 474 U.S. 1013 (1986); United States v. Xheka, 704 F.2d 974 (7th Cir. 1982), *cert. denied,* 464 U.S. 993 (1983); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), *cert. denied,* 464 U.S. 965 (1983); Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), *cert. denied,* 409 U.S. 1128 (1973).

[105]United States v. Chindawongse, 771 F.2d 840 (4th Cir. 1985), *cert. denied,* 474 U.S. 1013 (1986).

[106]*Id.* at 847.

[107]*Id.*

This confusion in the federal appellate courts is readily understood. *Roberts* requires a showing of unavailability, yet the plain language of Rule 801(d)(2)[108] makes such a determination irrelevant to admissibility. Additionally, *Roberts* holds that the confrontation clause is removed as a barrier to the admissibility of hearsay only if such hearsay bears "indicia of reliability."[109] Yet Rule 801(d)(2) does not address this concern at all. Rather, it complicates the issues by labelling certain common law hearsay exceptions as non-hearsay.[110] As will be seen, the Supreme Court decisions of *Inadi* and *Bourjaily* resolved these questions.

D. THE CONFRONTATION CLAUSE AND RULE 801(d)(2)(E) AFTER INADI *AND* BOURJAILY

Inadi and *Bourjaily* changed dramatically the application of the confrontation clause to statements of co-conspirators admitted under Rule 801(d)(2)(E). Together, the two cases heralded the demise of any confrontation clause analysis of co-conspirator hearsay; the standards of *Ohio v. Roberts* now are of little importance to admissibility under Rule 801(d)(2)(E).

Joseph Inadi was convicted of conspiracy to manufacture and distribute methamphetamine. Part of the evidence against him consisted of tape-recorded statements of his alleged co-conspirators, including one Lazaro, that the government introduced at trial under Rule 801(d)(2)(E). Inadi objected to the admission of Lazaro's statements on the ground that the government had failed to establish his unavailability as a witness. The prosecution had subpoenaed Lazaro, but he failed to appear. Inadi's attorney made no further attempt to obtain Lazaro as a witness.[111] Inadi was convicted, and on appeal the Third Circuit reversed, holding that although Rule 801(d)(2)(E) had been satisfied, the government's failure to show Lazaro's unavailability had violated the confrontation clause. The Supreme Court re-

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[108]Fed. R. Evid. 801(d)(2). Mil. R. Evid. 801(d)(2) is identical.

[109]448 U.S. 56, 66 (1980).

[110]*See supra* note 72; S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 610 (2d ed. 1986).

[111]106 S. Ct. 1121, 1124. The Court does not hold in *Inadi* that the accused waived his confrontation rights by making no effort to secure Laxaro's presence in court. The Court recognizes, however, that the compulsory process clause and Federal Rule of Evidence 806 could have been used by the accused to obtain the testimony of Lazaro. The clear inference is that waiver might have been found had the issue been important to the decision in *Inadi*. *Id.* at 1127-29. *See infra* notes 135-37 and accompanying text.

versed, holding that the sixth amendment right of confrontation does not require that the non-availability of a non-testifying co-conspirator be demonstrated before his statements can be admitted under Rule 801(d)(2)(E).[112]

The Court agreed that *Ohio v. Roberts* generally requires a showing of unavailability before out-of-court statements of a non-testifying witness can be admitted. This rule does not apply to co-conspirator statements offered under Rule 801(d)(2)(E), however, because such statements "derive much of their value from the fact that they are made under circumstances very different from trial, and therefore are usually irreplaceable as substantive evidence."[113] According to Justice Powell, "[c]onspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand."[114] Moreover, since a co-conspirator testifying in court may be facing prosecution himself, he has little incentive to help the government, yet has little reason to help the accused.[115] It follows that a co-conspirator's out-of-court statements offered to prove the truth of their contents are more valuable as substantive evidence than would be the in-court testimony of this same declarant. Accordingly, says the majority opinion, the particular nature of such out-of-court statements means that their admission into evidence "thus actually furthers the 'confrontation clause's very mission' which is to advance 'the accuracy of the truth-determining process in criminal trials.' "[116] Therefore, the availability or unavailability of the co-conspirator declarant is irrelevant to the evidentiary value of the statements.

The Court also believes that requiring the government to show a declarant's unavailability as a prerequisite for admissibility of his statements under Rule 801(d)(2)(E) will not further the search for truth. Rather, such a requirement would place "a significant practical burden on the prosecution and the entire criminal justice system."[117] In conclusion, the Court makes inapplicable to Rule 801(d)(2)(E) the first part of the two-part test in *Ohio v. Roberts;* unavailability is no longer relevant to Rule 801(d)(2)(E).

Inadi expressly left undecided[118] the second issue of the *Roberts*

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[112]*Inadi*, 106 S. Ct. at 1129.
[113]*Id.* at 1127.
[114]*Id.* at 1126.
[115]*Id.*
[116]*Id.* at 1127.
[117]*Id.* at 1128.
[118]*Id.* at 1124 n.3.

test of whether the confrontation clause requires an analysis of the reliability of a statement offered under Rule 801(d)(2)(E) regardless of whether the statement satisfies the standard for admissibility contained in the rule itself.

The Supreme Court answered this question when it decided *Bourjaily v. United States*.[119] Bourjaily, convicted of conspiring to distribute cocaine and possession of cocaine with intent to distribute, appealed on two grounds: first, that the admission of his alleged co-conspirator's statements under Rule 801(d)(2)(E) had violated his sixth amendment right to confront his accuser; and second, that the trial judge had erred in considering the contents of the proffered statements themselves in determining their admissibility under Rule 801(d)(2)(E), instead of following the generally accepted standard that *independent* evidence of the conspiracy's existence and the accused's membership in it was a prerequisite to admitting statements under Rule 801(d)(2)(E).[120] As will be seen, the Court's decision of this second appellate ground substantially affected its resolution of the confrontation challenge to Rule 801(d)(2)(E).

In its opinion the Court reviewed its prior benchmark decision in *Ohio v. Roberts*. Chief Justice Rehnquist, writing for the majority, stated that "as a general matter only, the [confrontation clause] require[s] the prosecution to demonstrate both the unavailability of the declarant and the indicia of reliability surrounding the out-of-court declaration."[121] As to co-conspirator statements admitted under Rule 801(d)(2)(E), however, the Court stressed that *Inadi* ended the need to show unavailability.[122] The only remaining issue was whether the sixth amendment requires statements under Rule 801(d)(2)(E) to show "independent indicia of reliability."[123] The Court held that the Constitution imposed no such requirement. The majority opinion traced the 150-year case history of co-conspirator hearsay, and determined that the admission of such hearsay was "steeped in our jurisprudence."[124] Citing *Roberts*, the Court concluded that since co-conspirator statements fall within a firmly-rooted hearsay exception, their reliability can be inferred without more.[125]

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[119]107 S. Ct. 2775 (1987).

[120]Glasser v. United States, 315 U.S. 60, 74-75 (1942); *accord* United States v. Nixon, 418 U.S. 683, 701 n.14 (1974). The end of the independent evidence rule is extensively examined in the first part of this article.

[121]107 S. Ct. 2775, 2782 (1987).

[122]*Id.*

[123]*Id.*

[124]*Id.* at 2783.

[125]*Id.* at 2782-83 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

The Court dealt with Bourjaily's complaint that the trial judge had improperly considered the statements themselves in determining their admissibility under Rule 801(d)(2)(E) by declaring that the old bootstrapping prohibition had ended with the adoption of the new Federal Rules of Evidence in 1975.[126] Essentially, the Chief Justice and the majority concluded that the new Federal Rules changed the common law requirement for independent evidence, and now permitted the statements themselves to serve as part of the basis for their own admissibility.[127] The practical result is that co-conspirator statements now are easier to admit under Rule 801(d)(2)(E).[128]

Together, *Inadi* and *Bourjaily* give all federal courts a clear, workable standard by which to apply the confrontation clause to statements offered under Rule 801(d)(2)(E). The issue is whether the Court's unequivocal pronouncement that a confrontation clause analysis of Rule 801(d)(2)(E) is unnecessary is legally correct and wise as a matter of policy.

E. ANALYSIS OF INADI *AND* BOURJAILY

An analysis of these two cases must begin with the policy upon which rests the Rules of Evidence, or at least the Supreme Court's interpretation of that policy. This policy is for our legal system to give the fact-finder (usually the jury) as much evidence as possible, and then to permit it to give the evidence it receives whatever weight the evidence deserves. It follows that judges and counsel must be restricted in their efforts to determine the results of trial by keeping evidence from the fact-finder. Thus, the Federal Rules of Evidence reflect this policy of removing barriers to evidence reaching the fact-finder. There are many examples. The competency of witnesses, once a preliminary matter of substantial importance, is now unimportant: all witnesses are competent, and their testimony is given the appropriate weight by the fact-finder.[129] Similarly, Rules 804(b)(5)[130] and 803(24),[131] the residual hearsay provisions, have greatly increased the amount of evidence going to the fact-finder—evidence that would have been excluded at common law. The opin-

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[126]*Id.* at 2778-82.

[127]*Id.*

[128]*See infra* notes 147-48 and accompanying text. Note that the proffered out-of-court statements cannot serve as the *sole* proof of the conspiracy's existence and the accused's participation in it. 107 S. Ct. at 2781-82. But as the dissent argues, this distinction may be of little value in practice. *Id.* at 2790.

[129]Fed. R. Evid. 601. Mil. R. Evid. 601 follows the Federal Rule.

[130]Fed. R. Evid. 804(b)(5). Mil. R. Evid. 804(b)(5) follows the federal format.

[131]Fed. R. Evid. 803(24). Mil. R. Evid. 803(24) follows the federal format.

ions in *Inadi* and *Bourjaily* reflect this policy in their language: "The co-conspirator rule apparently is the most frequently used exception to the hearsay rule,"[132] and "the admission of co-conspirators' declarations into evidence . . . advanced the accuracy of the truth-determining process in criminal trials."[133] "[T]he goal of the [Confrontation] Clause—placing limits on the kind of evidence that may be received against a defendant—[must be harmonized] with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements."[134] The policy of getting more evidence to the jury clearly is evident.

Unfortunately, the Court in pursuing its goal of removing barriers to the admissibility of evidence in conspiracy trials has now greatly increased the likelihood that *unreliable* evidence will reach the fact-finder—unreliable evidence that could be the sole basis for a finding of guilty.

Both *Inadi* and *Bourjaily* have produced this result. As the unavailability of a co-conspirator declarant is now irrelevant to the admissibility of his out-of-court statements under Rule 801(d)(2)(E), the accused need never be confronted by the chief witnesses against him. In fact, the accused may only be able to confront his alleged co-conspirators through Rule 806,[135] and his failure to use the compulsory process mechanism inherent in this rule may be held to constitute waiver of his right of confrontation. Furthermore, where the accused uses Rule 806 to compel the production of his co-conspirator,[136] and the latter invokes his right to silence under the fifth amendment, the accused still will be denied his right to examine the co-conspirator, absent testimonial immunity, which the govern-

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[132]106 S. Ct. 1121, 1128 (1986).

[133]*Id.* at 1127 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

[134]107 S. Ct. 2775, 2782 (1987).

[135]Fed. R. Evid. 806. The Military Rule is taken from the Federal Rule without change. Mil. R. Evid. 806.

[136]Rule 806 provides that when a statement under Rule 801(d)(2)(E) has been admitted into evidence, the credibility of the declarant may be attacked. Such an attack includes calling the declarant as a witness, who may then be examined on the out-of-court statement as if under cross-examination.

In conjunction with the compulsory process clause of the sixth amendment, the accused has the power to confront the declarant at trial. The issue in several cases has been whether the accused's failure to use this power *waives* his rights under the confrontation clause. *See, e.g.*, United States v. Cree, 778 F.2d 474 (8th Cir. 1985) (court held confrontation to be waived where the child declarant was present in the courtroom but the accused declined to call her as a witness).

ment likely will be loathe to grant.[137] In any event, the practical effect of *Inadi* on Rule 801(d)(2)(E) will be to shift the burden of proof to the accused; the government will gain admissibility for co-conspirator statements under the new relaxed mechanism of Rule 801(d)(2)(E), and the accused, only with difficulty, will be able to defend against the presumptive truth of such statements. Yet such a result violates the Framers' desire that live testimony be used in criminal proceedings. It follows that *Inadi*'s conclusion that such in-court testimony is a waste of time and energy is not sufficient to overrule the clear preference of live testimony.

A further pernicious result of *Inadi* is that it may encourage judges to extend *Inadi*'s reasoning for making irrelevant the unavailability of a declarant under Rule 801(d)(2)(E) to other hearsay exceptions as well. Such an extension of *Inadi* might render the confrontation clause meaningless.[138]

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[137]The general rule is that the government cannot be compelled to grant transactional or testimonial immunity to any witness, absent extraordinary circumstances. United States v. Villines, 9 M.J. 807 (N.C.M.R. 1980), *aff'd*, 13 M.J. 46 (C.M.A. 1982). The accused's right to be confronted with the witnesses against him can be such extraordinary circumstances, according to the Court of Military Appeals. In United States v. Dill, 24 M.J. 386 (C.M.A. 1987), the prosecution introduced the confession of the accused's accomplice as a statement against interest under Military Rule of Evidence 804(b)(3). The accomplice was called to testify, but invoked his privilege against self-incrimination. As a result, he was unavailable. The accused objected to the admission of the out-of-court statement on the ground that he was being denied the opportunity to cross-examine his accomplice, and that the government should offer the latter a grant of immunity. In reversing the conviction, the court held that "[a]bsent an extraordinary showing by the government why the co-actor could not be immunized, his statement should not have been considered for receipt in evidence against" the accused. *Id.* at 389 (emphasis in original). The court's rationale is that the government had the power to immunize the co-actor, but chose not to do so. This left it "in the enviable position of reaping the benefits of the co-actor's statement without suffering his exposure to cross-examination." *Id.* Regardless of the practical problems inherent in granting immunity to a witness who the government intends to prosecute in the future, "it cannot be that an accused should be forced to surrender his constitutional rights in his trial just so the government will be in a better position, in a later trial, against some other person." *Id.* The court concludes that "fairness . . . should preclude use of such hearsay unless the government can show a strong reason for refusing the grant [of immunity]." *Id.* (citing J. Weinstein & M. Berger, Weinstein's Evidence § 804(a), at 804-37 to 804-38 (1985).

Dill is good authority that testimonial immunity *must* be given to a co-conspirator before his statements can be admitted under Rule 801(d)(2)(E), assuming the accused desires the declarant's presence at trial.

[138]The military courts *already* have extended *Inadi*'s reasoning to other hearsay exceptions. In United States v. Arnold, 25 M.J. 129 (C.M.A. 1987), Judge Cox held that unavailability need not be established in a confrontation challenge to hearsay statements admitted as an excited utterance under Military Rule of Evidence 803(2). Judge Cox based his decision on *Inadi;* the inherent reliability of excited utterances means that they satisfy the confrontation clause. Judge Cox says that the court continues to favor confrontation, but the spillover effect of *Inadi* is evident. Interestingly, Judge Sullivan, while concurring in the result, did not adopt Judge Cox's extension of *Inadi* to

Just as the reasoning and result in *Inadi* are flawed, so too is the Court's opinion in *Bourjaily*. The reasoning in the latter is erroneous because it is predicated on two assumptions that are suspect: first, that a firmly-rooted exception to the hearsay rules, while generally meaning that the statements meeting the exception are inherently reliable, means reliability where co-conspirator statements are involved; second, that admissibility under Rule 801(d)(2)(E) satisfies the confrontation clause because Rule 801(d)(2)(E) is the codification of the same firmly-rooted co-conspirator exception that existed at common law.

First, in examining why co-conspirator statements became firmly rooted, it is not necessarily because such statements are inherently reliable. Their admissibility was permitted not only on an agency theory,[139] but because necessity required their admissibility; to prohibit such statements would have made successful conspiracy prosecutions virtually impossible.[140] After all, conspirators conspire without written agreements. But if practical necessity requires co-conspirator statements to be admitted, a by-product of such admissibility is that statements of inherent unreliability are received into

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excited utterances. Chief Judge Everett strongly dissented and would have reversed. There was no showing of the declarant's unavailability, and "her out-of-court statements do not fall within any established hearsay exception." *Id.* at 134-35. Admission of the statements was "error of constitutional dimensions and transgressed [the accused's] right of confrontation." *Id.*

More cases are likely to follow, extending *Inadi*'s rationale still further and excusing a showing of the declarant's unavailability to testify.

[139]Reply Brief for Petitioner at 6, Bourjaily v. United States, 107 S. Ct. 2775 (1987) (No. 85-6725) (quoting Advisory Committee's Special Introductory Note to Article VIII, 56 F.R.D. 288, 299).

[140]The theory that co-conspirators are agents of each other is one explanation for the existence of the co-conspirator hearsay exception. "A more realistic view is that the agency theory is merely a convenient fiction and that such statements are admitted on policy grounds because the higher-ups in organized criminal activity are simply too difficult to convict without the use of the statements of others in the venture." White, *supra* note 69, at 37-38. *Accord* Comment, *Restructuring the Independent Evidence Requirement of the Co-conspirator Hearsay Exception*, 127 Pa. L. Rev. 1439 (1979). Co-conspirator statements are admitted "in order to secure convictions for secret, inchoate crimes that create substantial danger to the public as well as inherent difficulties of proof." *Id.* at 1442.

In sum, it seems unlikely that the co-conspirator hearsay exception is firmly rooted because such statements are inherently reliable. The dissent in *Bourjaily* emphasizes that neither the agency theory nor the necessity theory reflect reliability. *Bourjaily*, 107 S. Ct. at 2786.

Note also that at least one other hearsay exception appears to be based on a policy of necessity, i.e., the hearsay exception for dying declarations, codified in Rule 804(b)(2). Such statements are certainly not inherently reliable, but necessity requires them to be admitted. *See also* Yawn, *supra* note 19, at 229.

evidence. Conspirators make statements to impress the hearer of the statements with the scope and the strength of the conspiracy, often exaggerating the importance of the criminal agreement's ends if not the number and identity of those involved.[141] Thus, for Chief Justice Rehnquist and the majority to equate the firmly-rooted nature of the exception with the reliability standards commanded by the confrontation clause likely is the result of a false assumption. What the majority forgets is that the common law, as reflected in *Glasser v. United States*[142] and its progeny, acknowledged the reality that co-conspirator statements were necessary as evidence, but were unreliable. Not surprisingly, the law came to impose an independent evidence requirement to safeguard against the admission of unreliable statements.

Second, in deciding that admissibility under Rule 801(d)(2)(E) is *identical*[143] to admissibility under the confrontation clause, the Court really holds that the mechanism for admissibility of co-conspirator statements under the rule only allows reliable statements to be admitted. Yet, in permitting bootstrapping—in ending the requirement for independent evidence of the existence of a conspiracy and the accused's membership in it as a prerequisite for admissibility under Rule 801(d)(2)(E)—the Court has removed the *very* common law factor that safeguarded against the admissibility of unreliable co-conspirator hearsay. In altering the mechanism of admissibility of Rule 801(d)(2)(E), *Bourjaily* acts to reduce its value in guaranteeing that only reliable statements will be admitted. Yet, at the same time that it transforms the essential character of the firmly-rooted exception, the Court decides that the confrontation clause is satisfied if Rule 801(d)(2)(E) is satisfied.[144] The Court uses faulty logic in equat-

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[141]107 S. Ct. 2775, 2784-2788.

> The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than it in fact has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law.

Id. at 2788 n.7 (citing Levie, *Hearsay and Conspiracy: A Re-examination of the Co-conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1165-66 (1954)).

[142]315 U.S. 60 (1942).

[143]107 S. Ct. 2775, 2782.

[144]The Court recognizes that abolishing the bootstrapping rule will be seen by some as a change to the co-conspirator hearsay exception "such that it is no longer 'firmly rooted' in our legal tradition." *Id.* at 2783 n.4. It rejects the suggestion, and claims that only the "method of proof" has been changed. *Id.* Regardless of the Court's rationale, because the *effect* of abolishing the bootstrapping rule is to admit statements which previously would have been excluded, the firmly-rooted nature of the co-conspirator hearsay exception *has* been altered.

ing the now altered Rule 801(d)(2)(E) with the firmly-rooted exception, and then compounds its error by holding that it satisfies the confrontation clause test of reliability as enunciated in *Ohio v. Roberts*.[145]

In its haste to get as much evidence as possible to the fact-finder, the Court has modified the mechanism of admissibility under Rule 801(d)(2)(E) and removed the barrier imposed by the sixth amendment as well. The likelihood that the fact-finder will be given unreliable evidence is greatly increased. As Justice Blackmun explains in the dissent in *Bourjaily*, co-conspirator statements that lack constitutionally mandated indicia of reliability now can be admitted. This is because a trial judge may give undue weight to the co-conspirator statements that he now may consider in determining the existence of a conspiracy and the accused's participation in it. Since the bootstrapping prohibition is ended, such statements "will likely *control* the interpretation of whatever other evidence exists and could well transform a series of innocuous actions by a defendant into evidence that he was participating in a criminal conspiracy."[146] For example, a judge might believe an incriminating statement made by a co-conspirator, precisely because the accused cannot explain it. This is not an unlikely possibility considering that an accused can be confronted at trial with many statements made by his co-conspirators "which he never authorized, intended, or even knew about."[147] As a trial judge may now admit co-conspirator statements that would have been previously excluded, the danger has increased that an accused will be convicted for a guilty association rather than a criminal conspiracy.[148]

IV. CONCLUSION

The impact of *Inadi* and *Bourjaily* on Rule 801(d)(2)(E) cannot be understated. First, the lack of an independent evidence requirement will substantially alter trial practice in the federal civilian and military courts. Certainly prior military case law is overruled and MRE

For examples of military court decisions acknowledging that an altered hearsay exception is no longer firmly rooted, see *supra* note 85.

[145]Paradoxically, had the Court retained the independent evidence requirement, the confrontation clause generally would have been satisfied. At least Bourjaily's counsel so argued. Reply Brief for Petitioner, *supra* note 139, at 31 n.38.

[146]107 S. Ct. 2775.

[147]*Id.*

[148]*Id. See also* Roberts v. United States, 416 F.2d 1216, 1220 (5th Cir. 1969) ("It is elementary that neither association with conspirators nor knowledge of illegal activity constitute proof of participation in a conspiracy."), *quoted in* Yawn, *supra* note 19, at 215.

801(d)(2)(E) now allows the military judge to consider the sought-to-be-admitted statements along with any other evidence in determining the existence of a conspiracy. Whether the end of the bootstrapping rule will result in more prosecutions for conspiracy is conjecture, but there can be no doubt that a prosecutor now can more easily introduce co-conspirator hearsay under Rule 801(d)(2)(E). Depending on the facts of the particular case, the removal of the bootstrapping rule may cause a trial judge to consider the proffered co-conspirator statements as the most important piece of evidence of the existence of the conspiracy. This may allow the conviction of an accused for a guilty association rather than for a criminal agreement.

Regardless of the holding in *Bourjaily*, there are sound reasons for concluding that Rule 104 and 801(d)(2)(E) should be read together, and that the Rules of Evidence continue to require independent evidence as a prerequisite for admissibility of a non-testifying co-conspirator's statement. Furthermore, the inherent unreliability of co-conspirator statements and the prejudice inherent in the offense of conspiracy itself[149] offer compelling reasons for the continued prohibition against bootstrapping.

Second, the demise of the confrontation clause for co-conspirator hearsay likewise will significantly alter trial practice in the federal civilian and military systems. *Inadi* unequivocally holds that unavailability is not required for statements admitted under Rule 801(d)(2)(E), and *Bourjaily* decides with equal force that statements admissible under Rule 801(d)(2)(E) are so "firmly rooted" as to be per se admissible under the confrontation clause.

As *Inadi* and *Bourjaily* act together to remove the barriers to admissibility to hearsay offered under Rule 801(d)(2)(E), the knowledgeable prosecutor will use this enlarged window of admissibility to introduce (and gain admissibility for) evidence which might otherwise be barred. For example, the excited utterance and present sense impression, both admitted under Rule 803, and the statement against penal interest and statement of family history both admitted under Rule 804, are all admissible as hearsay exceptions provided that they

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[149]Conspiracy is "the darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). It "is so vague that it almost defies definition. . . . [T]he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding or abetting or of becoming an accessory . . . ." Krulewitch v. United States, 336 U.S. 440, 446-50 (1949). "[A] doctrine so vague in its outlines and uncertain in its fundamental nature as a criminal conspiracy lends no strength to the law; it is a veritable quicksand of shifting opinion and ill-considered thought." Yawn, *supra* note 19, at 211-212.

pass muster under a confrontation clause analysis as well. Yet, it often will be possible to take a statement which would otherwise be offered under Rule 803 or Rule 804 and use Rule 801(d)(2)(E) to gain admissibility for it into evidence. After all, conspiracy need not be charged to use Rule 801(d)(2)(E).[150] Therefore, a statement which would fail a confrontation clause analysis under Rule 803 or Rule 804 can be proffered under Rule 801(d)(2)(E), thereby *circumventing* the sixth amendment. The procedure would be to argue alternative theories of admissibility, but Rule 801(d)(2)(E) can undoubtedly be utilized to evade the strictness of the confrontation clause. For example, a statement against penal interest[151]—which fails to qualify as a firmly-rooted exception to the hearsay rule[152]—often will fit into the literal language of Rule 801(d)(2)(E). Similarly, a statement which might be offered under the residual hearsay clause of Rule 803[153]—which by definition does not qualify as a firmly-rooted exception to the hearsay rule and thus must undergo a confrontation clause analysis—could be received into evidence under Rule 801(d)(2)(E). The result in both examples will be admissibility and clear evasion of the sixth amendment.

This reveals the fundamental flaw in *Bourjaily* and *Inadi*. Instead of two decisions intended by the Supreme Court to permit co-conspirator hearsay to more easily reach the fact-finder *via* Rule 801(d)(2)(E), *Inadi* and *Bourjaily* have created a vast window of admissibility through which a prosecutor can offer much other hearsay and thus avoid the confrontation clause of the sixth amendment. This will permit unreliable evidence to more easily reach the fact-finder through a "back-door" mechanism.

The logic of both cases is poor. *Inadi*'s holding that unavailability is not required for statements admitted under Rule 801(d)(2)(E) not only disregards the commands of the confrontation clause, but ignores the precedent of *Ohio v. Roberts* as well. The authors of the Constitution wanted live testimony in criminal proceedings whenever possible. The Court's conclusion that the out-of-court statements of a non-testifying co-conspirator are *more* probative of truth than would be his in-court testimony, even if assumed to be true, is insufficient reason to disregard the clear language of the sixth amend-

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[150]Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 773 F.2d 238 (3d Cir. 1983); S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 782 (4th ed. 1986).
[151]Mil. R. Evid. 804(b)(3); Fed. R. Evid. 804(b)(3).
[152]United States v. Dill, 24 M.J. 386 (C.M.A. 1987). *See supra* note 85.
[153]Mil. R. Evid. 803(24); Fed. R. Evid. 803(24).

ment. The Court's decision that it will work a hardship on the prosecution to require a declarant's unavailability to be established as a predicate to admissibility of his statements under Rule 801(d)(2)(E) also is a poor reason for not confronting the accused with his accuser.

In reality, the decision in *Inadi* may not have much effect, as most declarants whose statements are offered under Rule 801(d)(2)(E) will truly be unavailable to testify, and the government would be able to show their unavailability, if it were required to do so. But the Court's reasoning in *Inadi* may spill over to other hearsay exceptions, thereby further weakening the confrontation clause.

Bourjaily does much more serious damage to the confrontation clause. It alters the firmly-rooted exception for co-conspirator statements when it abolishes bootstrapping, which makes it no longer a firmly-rooted exception. *Bourjaily* then compounds the damage done in changing this mechanism for admissibility when it holds that statements admissible under Rule 801(d)(2)(E) are per se admissible under the confrontation clause. Yet, with the independent evidence requirement removed, Rule 801(d)(2)(E) clearly no longer resembles the firmly-rooted exception.

In concert, *Inadi* and *Bourjaily* act to strip away the very safeguards needed to ensure that statements going to the fact-finder under the co-conspirator exemption are reliable and trustworthy. This revolutionary change in admissibility is likely to have a substantial impact, considering that major federal prosecution activity is focused on organized crime, especially drug-trafficking, in which a charge of conspiracy often features prominently. In prosecuting such conspiracies, the government now can introduce the out-of-court statements of co-conspirators virtually unchecked by any barriers to admissibility. Whether the result will be convictions based on unreliable evidence is conjecture, but the possibility is a real one.

THE THIRD AMENDMENT: CONSTITUTIONAL PROTECTION FROM THE INVOLUNTARY QUARTERING OF SOLDIERS*

by William Sutton Fields**

I. INTRODUCTION

Of the rights embodied in the United States Constitution, perhaps none was of greater importance to the revolutionary generation than the third amendment's prohibition against the involuntary quartering of soldiers in private homes.[1] Although the protection afforded by this great amendment is today widely taken for granted, it remains as one of the cornerstones of American liberty. The lack of controversy engendered by the right makes it unique and is indicative of the broad consensus as to both its purpose and meaning. The amendment is the only passage in the Constitution that is directly concerned with the rights of the individual vis-a-vis the military in both war and peace, and the right it secures for Americans still remains virtually nonexistent in much of the world.[2] The purpose of this article is to examine the history, development, and continuing significance of this fundamental right.

II. HISTORICAL BACKGROUND OF THE AMENDMENT

A. THE ENGLISH ORIGINS

By the time of its adoption in 1791, the principles expressed in the third amendment had already been widely accepted in both England

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[1]U.S. Const. amend. III. This amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

[2]Hardy, *A Free People's Intolerable Grievance—The Quartering of Troops and the Third Amendment*, 33 Va. Cavalcade 126, 135 (1984).

and the American colonies. As one of the amendments collectively known as the Bill of Rights,[3] the third amendment embodied one of the guarantees and immunities that the American colonists inherited from their English ancestors. The English origins of the amendment can be traced as far back as the Middle Ages, where the earliest legal enactments regulating the quartering of soldiers were embodied in the charters of towns and boroughs.[4] Some of those documents appeared before the Magna Carta, which contained no specific reference to quartering but did reaffirm all the "ancient liberties and free customs" of London and the other cities, boroughs, towns, and ports.[5] Examples of those early enactments include Henry I's London Charter of 1130, which contained the passage "[l]et no one be billeted within the walls of the city, either of my household, or by force of anyone else,"[6] and Henry II's London Charter of 1155, which provided "that within the walls no one shall be forcibly billeted, or by the assignment of the marshal."[7] A similar provision also appeared in John's Ipswich Charter of 1200.[8] These early legal restraints on involuntary quartering were applicable only in their respective jurisdictions and did not extend to the countryside.

During the Middle Ages the manner of lodging and feeding soldiers suffered from a lack of centralized control.[9] Obligations or immuni-

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[3]1 B. Schwartz, The Bill of Rights: A Documentary History 3 (1971) (the Bill of Rights consists of the first ten amendments to the Constitution). *Contra* L. Tribe, American Constitutional Law § 18-1, at 1147 n.1 (1978) (the Bill of Rights consists of only the first eight amendments).

[4]Hardy, *supra* note 2, at 126. It was not until after the Norman Conquest in 1066 that the concept of the involuntary quartering of soldiers began to take on its recognized identity. In Saxon times the problem would have been of lesser concern. Saxon defenses were based upon the *fyrd*, a militia of all able-bodied men that was only called up from the district threatened with attack. Service in the *fyrd* was usually of short duration and the participants were obligated to provide their own arms and provisions. The only professional soldiers during that period were the contingents of *housecarls* maintained by the kings and earls. These contingents were small in number because of their expense. After the Conquest, this system was modified by William of Normandy, who distributed the land to his followers to be held on a system of military tenure (feudalism). Each such estate was obligated to provide a particular number of knights for military service. Beginning in the twelfth century, the system of scutage was introduced, which allowed the barons to pay a fixed sum instead of actually producing knights for service. The King could then use the money to hire professional soldiers more amenable to his control. It was in the centralization of Norman rule, the militarization of the country, the abuse of the Saxon inhabitants, and the involvement in continental wars that the grievance against the involuntary quartering of soldiers first took root.

[5]C. Stephenson & F. Marcham, Sources of English Constitutional History 115, 117 (1937).

[6]D. Douglas & G. Greenway, English Historical Documents 1042-1189, at 945 (1953).

[7]*Id.* at 946.

[8]C. Stephenson & F. Marcham, *supra* note 5, at 96.

[9]Hardy, *supra* note 2, at 127.

ties relating to billeting were embodied in the local charters.[10] The authority to admit soldiers into the city and to determine where and in what number they would be lodged was vested by the charters in town marshals or constables.[11] These charters also prohibited the quartering of soldiers in a dwelling without the consent of the owner.[12] Soldiers lodged in civilian homes were supposed to pay for anything they took.[13] The usual method of payment was chits, tallies, or billets that could be redeemed from the government or used for the payment of taxes.[14] The receipts given by the soldiers, however, often proved worthless, and the legal prohibitions against involuntary quartering found in the charters were continually violated.[15] This situation remained essentially unchanged from the thirteenth through the sixteenth centuries.[16] In the sixteenth century attempts at more centralized control were made by the Tudors.[17] Those efforts, however, which involved the appropriation of "coat and conduct money" and the appointment of Lords Lieutenant, did not solve the quartering problem.[18]

In the seventeenth century problems associated with the quartering of soldiers during the reign of the Stuarts became one of the issues propelling the nation toward civil war.[19] The science of logistics had lagged behind the development of the large, modern army; and, for political reasons, the House of Commons had been unwilling to pro-

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[10]*Id.*
[11]*Id.*
[12]*Id.*
[13]*Id.*
[14]*Id.*
[15]*Id.* The abuse of the civilian population by soldiers during the Middle Ages is well documented. In that era, English soldiers often demanded free food and shelter from civilian households while in transit to and from the Continental wars. The complaint by a man, described in *Piers Plowman,* that he had lost his wife, barn, livestock, and the maidenhood of his daughter to soldiers is typical of the grievances of that time. Complaints such as that are not surprising, considering the large number of tramps, beggars, and criminals that were regularly pressed into military service. In a single year, Edward I pardoned 450 murderers and numerous lesser offenders in exchange for their service in the army.
[16]*Id.*
[17]*Id.*
[18]*Id.* C. Stephenson & F. Marcham, *supra* note 5, at 396-400. *See generally* G. Thomson, Lords Lieutenants in the Sixteenth Century (1923).
[19]Hardy, *supra* note 2, at 127. It was during this period that the issue of involuntary quartering became associated with two distinct but related issues: opposition to the maintenance of a standing army in peacetime; and opposition to the unreasonable searching of private homes. The latter issue received judicial recognition in the famous declaration in Coke's Reports that "the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose." Semayne's Case, 5 Co. Rep. 91a, 91b (1603), *quoted in* 1 B. Schwatrz, A Commentary on the Constitution of the United States, Part III, Rights of the Person, § 373, at 178 (1977).

vide the revenue necessary to pay for adequate barracks or for billeting in inns.[20] Those situations left soldiers with no choice but to seek quarters in private homes.[21] The popular dissatisfaction that resulted from those circumstances found expression in the Petition of Right presented to Charles I by the Lords and Commons of Parliament in 1628.[22] Included in the Petition was the grievance,

> whereas of late, great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants, against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people.[23]

Incorporation of that grievance into the "second great Charter of English Liberty" was a significant legal milestone in the development of the rights now embodied in the third amendment.[24]

Throughout the English Civil War, the Restoration of 1660, and the Third Anglo-Dutch War (1672-1674) the English continued to experience problems related to the quartering of soldiers in private homes,[25] despite the abolition of the system of military purveyance,[26] and the extensive use of tents as a means of sheltering the troops.[27] In 1679 Parliament passed the Anti-quartering Act, which provided that "[n]oe officer military or civill nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers."[28] In theory, the protection afforded by the Act was substantial, in that the Act applied in both war and peace and contained no exceptions.[29] In practice, however, the Act was ignored by James II, and the resulting abuses became a contributing cause of the Glorious Revolution of 1689.[30]

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[20]*Id.* at 128.

[21]*Id.*

[22]B. Schwartz, *supra* note 3, at 19.

[23]*Id.* at 20.

[24]*Id.*

[25]Hardy, *supra* note 2, at 128.

[26]Purveyance was the system of providing supplies or services for the Crown by preemption or impressment at a valuation fixed by appraisers appointed by the purveyors. The prices were often considerably below market value and the owner of the property had no choice as to sale. Payment was commonly in the form of treasury tallies. This royal prerogative was abolished by the Act Abolishing Feudal Tenures, 12 Car. 2, ch. 24 (1660).

[27]Hardy, *supra* note 2, at 128.

[28]31 Car. 2, ch. 1 (1679).

[29]*Id.* This Act protected inns and public houses as well as private homes from involuntary quartering—a significant extension of the right.

[30]Hardy, *supra* note 2, at 128.

The legal antecedents of the third amendment are again seen in the English Bill of Rights of 1689, the "third great Charter of English Liberty."[31] Enacted for the dual purpose of declaring certain "rights and liberties" and settling William III's succession to the throne, the statute recited the "keeping [of] a standing army within this kingdom in time of peace without consent of Parliament and quartering soldiers contrary to law" among the abuses attributed to James II.[32] Shortly after the adoption of the English Bill of Rights, Parliament enacted the Mutiny Act, which included a prohibition against the quartering of soldiers in private homes without the consent of the owners.[33] That Act, however, which did allow civilian authorities to quarter soldiers in public structures such as inns, alehouses, and stables, still made no provision for government financed barracks.[34] In that era it was assumed that the military presented less of a threat to the civilian government if their soldiers were quartered amongst the people.[35] Notably, the provisions of the Act did not extend to the American colonies.[36]

B. THE AMERICAN EXPERIENCE

The origins of the third amendment were, of course, directly rooted in the abuses experienced by the colonists as a result of the presence of British soldiers prior to and during the Revolutionary War. Although the conflicts of the 1700's served as the catalyst for the creation of the amendment, problems resulting from the quartering of soldiers amongst the civilian population had occurred throughout the history of the colonies each time there had been a significant British military presence. For example, complaints were raised in Massachusetts and Connecticut over the quartering of soldiers in private homes as early as King Philip's War (1675-1676), and similar allegations were later made in New York during the period of the Dominion of New England (1688).[37] Other colonies, such as Virginia, South Carolina, Nova Scotia, and those in the West Indies, also recorded problems related to quartered soldiers during the seventeenth century.[38] In response to those popular grievances colonial legislatures made early efforts to grant legal protection from the objection-

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[31]B. Schwartz, *supra* note 3, at 40.
[32]*Id.* at 42.
[33]1 W.& M., ch. 5 (1689).
[34]*Id.*
[35]Hardy, *supra* note 2, at 129.
[36]*Id.*
[37]*Id.* at 130.
[38]*Id.*

able practice. The earliest such expression appeared in the New York Assembly's 1683 Charter of Libertyes and Priviledges and read, "Noe freeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province."[39]

During this early colonial period, the problems related to the quartering of soldiers were usually associated with the presence of regular troops. Colonial defenses of the era were based on a militia system that required men over the age of sixteen to bear arms in the event of public danger.[40] Service in those militia units was usually of short duration, expiring with the passing of the emergency. Only on rare occasions was it necessary for militiamen to be lodged outside their own county.[41]

The quartering of soldiers became a significant problem for the colonies by the mid-1700's with the arrival of thousands of British regulars during the French and Indian War (1754-1763).[42] After the conclusion of Pontiac's War (1763) the problem became of greater concern as the British government looked for ways to shift the financial burden for the defense of the colonies' western frontier.[43] In 1765 the British Parliament passed the Quartering Act, which required the colonists to bear the cost of providing barracks and supplies for the resident British soldiers.[44] Where there was inadequate room in barracks, the Act authorized the soldiers to be quartered in inns, livery stables, and alehouses.[45] In order to raise revenue from the colonists to help cover the costs of maintaining those soldiers, the British Parliament also enacted the hated Stamp Act of 1765.[46] As a result, the problems related to the quartering of soldiers became entwined with the volatile political issue of "taxation without representation."

The growing opposition to British trade and revenue regulations led in 1768 to the redeployment of soldiers from the colonial frontier to locations near the seaboard cities.[47] These soldiers were used to assist in law enforcement and increasingly became the object of colo-

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[39]*Id.*
[40]*Id.* at 129.
[41]*Id.*
[42]*Id.* at 130.
[43]*Id.*
[44]5 Geo. 3, ch. 33 (1765).
[45]*Id.*
[46]5 Geo. 3, ch. 12 (1765).
[47]Hardy, *supra* note 2, at 130.

nial hostility.[48] In cities like Boston confrontations between soldiers and civilians sparked fistfights, riots, and similar incidents, of which the Boston Massacre of March 5, 1770, remains the most vivid example.[49] Although tensions eased at times, the quartering issue was revived when the British Parliament enacted the Quartering Act of 1774.[50] The 1774 Act, one of the "Intolerable Acts," was even more onerous than the 1765 Act in that it authorized the quartering of soldiers in the private homes of the colonists.[51]

The colonists deeply resented the financial burden of maintaining the British Army and the abuses to their persons, properties, and liberties that had resulted from the presence of British soldiers in their homes and cities. At the onset of the Revolution this popular resentment found expression in the First Continental Congress's Declaration and Resolves of 1774,[52] and in the Declaration of Independence of 1776, which included among its grievances the complaint that the King "has kept among us, in times of peace, Standing Armies without the consent of our legislatures."[53]

The American experience involved two distinct but related issues, with separate legal identities: the maintenance of a standing army in peacetime; and the involuntary quartering of soldiers in private homes. The grievances associated with those two issues had both political and personal aspects. The political aspects involved conflicts between the colonial legislatures and the mother country over the control of the military and the authority to tax and spend. The Framers addressed those concerns by the diffusion of the war powers throughout the new Constitution. The President was made the Commander in Chief of the armed forces[54] and was authorized to appoint officers with the advice and consent of the Senate.[55] The Congress was given the authority to declare war,[56] to raise and support armies,[57] and to make rules for the government and regulation of the armed forces.[58] As an added precaution, a two year limitation was placed on the

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[48]*Id.*
[49]*Id.*
[50]14 Geo. 3, ch. 54 (1774).
[51]*Id.*
[52]Documents Illustrative of the Formation of the Union of the American States 1 (C. Tansill ed. 1927).
[53]*Id.* at 22.
[54]U.S. Const. art. II, § 2, cl. 1.
[55]*Id.* at art. II, § 2, cl. 2.
[56]*Id.* at art. I, § 8, cl. 11.
[57]*Id.* at art. I, § 8, cl. 12.
[58]*Id.* at art. I, § 8, cl. 14.

appropriation of funds for the support of the military,[59] and authority over the militia was shared with the states.[60]

The personal aspects of the grievances involved intrusions on the privacy of the home, abuses of persons and property, and restrictions of individual freedom. Out of those experiences evolved the popular consensus that the sanctity of the home should receive specific legal protection from the oppressive intrusion resulting from the involuntary quartering of soldiers. Stirred by the memories of the 1770's, this consensus would also find a distinct place in America's organic law, in the form of the third amendment.

III. THE ADOPTION PROCESS

The third amendment, along with the rest of the Bill of Rights, was adopted to quiet popular apprehension expressed at the time of the ratification of the Constitution. Various proposed guarantees of rights had been considered during the Philadelphia Convention of 1787,[61] but the Constitution had ultimately been submitted to the states for ratification without their inclusion. There was considerable concern that the new national government would be as oppressive as its British predecessor—a fear exploited by the anti-federalists during the ratification debates. As part of the compromise process necessary to gather support for ratification, specific articles for inclusion in a national bill of rights were recommended by eight of the thirteen states.[62] Five of those eight states included among their articles a provision relating to the quartering of soldiers.[63]

The amendment as finally adopted in December 1791 differed little from the way it was initially introduced in the first Congress in 1789.[64] Its language was almost identical to similar provisions found in constitutions and declarations of rights drafted by a number of the colonies during the Revolution. For example, the Delaware Declaration of Rights of 1776 provided "that no soldier ought to be quartered in any house in time of peace without the consent of the owner, and in time of war in such a manner only as the legislature shall direct."[65]

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[59]*Id.* at art. I, § 8, cl. 12.

[60]*Id.* at art. I, § 8, cls. 15 & 16.

[61]Charles Pinckney of South Carolina had included a provision restricting forced billeting in his proposed guarantees of personal liberty.

[62]Hardy, *supra* note 2, at 134.

[63]*Id.*

[64]D. Watson, The Constitution of the United States 1413 (1910).

[65]2 W. Swindler, Sources and Documents of United States Constitutions 197, 199 (1973).

Similar expressions also appeared in the Maryland Declaration of Rights of 1776,[66] in the Massachusetts Declaration of Rights of 1780,[67] and in the New Hampshire Bill of Rights of 1784.[68]

Originally part of James Madison's first amendment,[69] the third amendment was included in every version of the Bill of Rights considered by the Congress.[70] Debate on the amendment in the House of Representatives was short.[71] Thomas Sumter of South Carolina spoke against the amendment and took the position that an owner's consent should be obtained before quartering soldiers in a private home whether in time of war or peace.[72] He moved to strike portions of the amendment so that it would read: "No soldier shall be quartered in any house without the consent of the owner."[73] His motion, however, was defeated by a majority of sixteen.[74]

Elbridge Gerry of Massachusetts also moved to change the amendment in an effort to assure civilian control over the quartering of soldiers in private homes in time of war.[75] With his amendment, the article would have read: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but by a civil magistrate in a manner prescribed by law."[76] His motion was defeated by a majority of twenty-two.[77]

Roger Sherman of Connecticut spoke against the efforts to alter the amendment. Sherman expressed the view that one individual should not be allowed to obstruct the public safety, whether in war or peace, when it was necessary that marching troops have quarters.[78] Thomas Hartley of Pennsylvania took a similar position and suggested that matters relating to the quartering of soldiers should be entrusted to the legislature.[79] Their arguments ultimately prevailed.

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[66]4 *id.* at 372, 374.
[67]3 The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America 1686, 1688 (F. Thorpe ed. 1909).
[68]4 *id.* at 2455, 2456.
[69]1 Annals of Cong. 451 (1789).
[70]Hardy, *supra* note 2, at 134.
[71]D. Watson, *supra* note 64, at 1413.
[72]1 Annals of Cong. 752 (1789).
[73]*Id.*
[74]*Id.*
[74]*Id.*
[76]*Id.*
[77]*Id.*
[78]*Id.*
[79]*Id.*

The amendment, as ratified, addressed the basic concerns that had been expressed throughout the entire Anglo-American history of the quartering problem: 1) that the quartering be voluntary; 2) that it be under the control of civilian authority; and 3) that it be conducted in accordance with established legal procedures.[80] The amendment also contained the traditional exception relating to the exigent circumstance of war. Unlike most of the other amendments, it was concise and addressed only a single issue. It was also unique in that its principle exception was embodied in its text.

IV. JUDICIAL DISCUSSION AND INTERPRETATION

The third amendment has rarely been the subject of litigation. The United States Supreme Court has never had occasion to directly interpret the amendment, although several of its cases mention it in dicta as one facet of the right to privacy.[81] Complaints arising under the amendment have been urged in a handful of lower court cases, but most of them have been summarily rejected as farfetched assertions.[82] The only case in which a court has been called upon to directly apply the amendment in a meaningful context requiring the interpretation of its "quartering" provisions is the 1982 case of *Engblom v. Carey*.[83]

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[80]Hardy, *supra* note 2, at 127.

[81]Griswold v. Connecticut, 381 U.S. 479 (1965). This was a Connecticut birth control case in which the Supreme Court stated:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy.

Id. at 484. *See also* Poe v. Ullman, 367 U.S. 497 (1961).

[82]Securities Investor Protection Corp. v. Executive Securities Corp., 433 F. Supp. 470 (S.D.N.Y. 1977) (claim that a subpoena violated the third amendment); Gosney v. Sonoa Independent School, 430 F. Supp. 53 (D. Tex. 1977) (claim that a preclusion on outside employment for school teachers and principals violated the third amendment); Jones v. United States Secretary of Defense, 346 F. Supp. 97 (D. Minn. 1972) (claim that the issuance of a parade order violated the third amendment); United States v. Valenzuela, 95 F. Supp. 363 (S.D. Cal. 1951) (claim that "[t]he 1947 House and Rent Act . . . was the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III.").

[83]677 F.2d 957 (2d Cir. 1982). It is interesting to note that the Civil War (1861-1865) produced no cases interpreting the amendment, even though it involved the domestic presence of large numbers of soldiers. Having seceded from the Union and closed the federal courts, the southern states had removed themselves from the amendment's protection. They did, however, include the right in the Confederate Constitution. C.S.

In *Engblom* the United States Court of Appeals for the Second Circuit addressed the issue of whether the third amendment rights of two correctional officers had been violated by the State of New York when it quartered National Guardsmen in their residences during a strike at a correctional facility.[84] The court concluded that the officers' possessory interests in their residences were sufficient to entitle them to protection under the amendment, and that the lower court had erred in granting the state's motion for summary judgment.[85] In deciding the case the court made first impression interpretations of significant portions of the amendment.

The appellants in *Engblom* resided in dormitory-style housing located on the grounds of the correctional facility.[86] The building in which they were housed was owned by the State of New York.[87] The housing arrangements at the facility were governed by two Correction Department documents that referred to the occupants as "tenants," and required them to maintain their abodes in accordance with "normal landlord-tenant responsibilities and practices."[88] The documents set out a number of conditions and restrictions on the occupancy, including prohibitions against long-term and overnight guests and the storage of personally owned firearms on the premises.[89] The documents also provided for a monthly deduction from the payroll of each occupant for "rent," and they empowered the Superintendent to "suspend such portions of any and all rules which might impede proper emergency action."[90] The housing at the facility was available only to employees, who could reside there at their option.[91]

In response to a statewide strike by correctional officers, the Governor of New York activated the National Guard for the purpose of maintaining order at the correction facility.[92] The appellants, who were participants in the strike, were barred by order of the Superintendent from the grounds of the facility, including their residences.[93]

Const. art. I, § 9, cl. 14. Other factors, such as the exigencies of war, the enhanced authority of the military, and the sensibilities of the era may also have played a role in precluding the assertion of the right.

[84] *Id.* at 961.

[85] *Id.* at 964.

[86] *Id.* at 959.

[87] *Id.*

[88] *Id.* at 959-60. The full text of the documents is set forth in the district court's opinion in Engblom v. Carey, 522 F. Supp. 57, 60 nn. 3-4 (S.D.N.Y. 1981).

[89] 677 F.2d at 960.

[90] *Id.*

[91] *Id.* at 959.

[92] *Id.* at 960.

[93] *Id.*

The National Guardsmen were then housed in the appellants' rooms until the conclusion of the strike.[94]

The appellants brought suit against the Governor and various state officials[95] in United States District Court, alleging among other things a violation of their third amendment right to be secure from military intrusion in their homes.[96] On motion for summary judgment, the district court dismissed their claims, concluding that the State of New York was the "owner" of the premises for the purpose of consenting to the quartering of soldiers, and that the appellants' possessory interest in their residences did not entitle them to protection under the third amendment.[97]

On appeal, the Second Circuit concurred with a number of the district court's findings. It agreed that the National Guardsmen were "soldiers" within the meaning of the third amendment,[98] a conclusion consistent with views of earlier commentators that the general term "soldiers" encompassed militia in active service as well as regular troops.[99] It also agreed that the National Guardsmen were, in this instance, state employees under the control of the Governor.[100] Finally, the court agreed that the third amendment was a fundamental right incorporated into the fourteenth amendment for application to the states.[101] Prior to that ruling, the amendment had never been expressly incorporated into the fourteenth amendment, although dicta in several Supreme Court decisions had assumed such in-

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[94]*Id.*

[95]The lawsuit was based upon 42 U.S.C. § 1983, which allowed a cause of action for the deprivation of civil rights by a person "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U.S.C. § 1983 (1976).

[96]677 F.2d at 958. The appellants also alleged a violation of their due process rights under the fourteenth amendment. For an analysis of that aspect of the case see Comment, *The Third Amendment's Protection Against Unwanted Military Intrusion: Engblom v. Carey*, 49 Brooklyn L. Rev. 857 (1983).

[97]677 F.2d at 961.

[98]*Id.*

[99]W. Rawle, A View of the Constitution of the United States 126-27 (1829).

[100]677 F.2d at 961. National Guardsmen are considered state employees except when "federalized" by unit under 10 U.S.C. §§ 331, 332, 672 (1976). *See* Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 46-47 (1965) (state governor commands the Guard except when it is called into federal service), *vacated on other grounds*, 382 U.S. 159 (1965); Gnagy v. United States, 634 F.2d 574, 580 (Ct. Cl. 1980) ("a National Guard unit not in active federal service is a state organization rather than a federal organization"); Mela v. Callaway, 378 F. Supp. 25, 28 (S.D.N.Y. 1974) ("[t]he National Guard, while something of a hybrid under both state and federal control, is basically a state organization . . . serv[ing] the state in time of civil emergencies within the state as well as being available for federal service during national emergencies").

[101]677 F.2d at 961.

corporation.[102] The applicability of the amendment to the states was consistent with the views expressed by earlier commentators.[103]

The Second Circuit disagreed, however, with the district court's conclusion that the State of New York was the "owner" of the premises for the purpose of consenting to the quartering of soldiers and that the appellants' possessory interest in their rooms was insufficient to entitle them to protection under the third amendment.[104] The court concluded, instead, that a literal reading of the term "owner," which would extend protection only to fee simple owners of houses, would be "wholly anomalous when viewed . . . alongside established Fourth Amendment doctrine."[105] Noting that the third amendment's purpose was to protect the fundamental right to privacy arising out of the use and enjoyment of property, the Second Circuit relied upon the rationale in *Rakas v. Illinois*,[106] where the Supreme Court had held that privacy interests protected under the fourth amendment need not be "based on a common-law interest in real or personal property," and that "one who . . . lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy."[107] Applying that line of reasoning to the third amendment for the first time, the Second Circuit held that the "property-based privacy interests protected by the Third Amendment [were] not limited solely to those arising out of fee simple ownership but extended to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."[108]

In analyzing the case before it the Second Circuit determined that the appellants' interest in their living quarters was analogous to a tenancy interest that reasonably entitled them to a legitimate expectation of privacy.[109] In support of its finding, the court looked to state property law and factors incidental to the occupancy that the court concluded were "tantamount to a lease."[110] Those factors included the deduction of a monthly "rent" from the appellants' salary

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[102]*Id.* *See* Palko v. Connecticut, 302 U.S. 319 (1937); Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 Yale L.J. 74 (1963).

[103]W. Rawle, *supra* note 99, at 126-27.

[104]677 F.2d at 962.

[105]*Id.*

[106]439 U.S. 128 (1978).

[107]*Id.* at 143-44 n.12.

[108]677 F.2d 962. The Second Circuit had no difficulty with the term "house" as used in the amendment, noting that its dictionary definition—"a structure intended for human habitation"—was sufficient to encompass "the various modern forms of dwelling." *Id.* n.11.

[109]*Id.* at 963.

[110]*Id.*

and the reference in the documents governing the housing arrangement to the occupants as "tenants" and to the facility as the equivalent of a landlord.[111] Particular weight was accorded the fact that the appellants' rooms at the facility had been their exclusive residences for two years prior to the strike, leaving them with no alternative housing in the event of an emergency.[112] Conversely, restrictions placed upon the occupancies, such as the prohibition relating to overnight guests and the inspection provision, were accorded little weight because the record did not reveal whether they had ever been enforced.[113]

In a separate opinion Judge Irving Kaufman dissented from the majority's finding that the appellants' possessory interest in their rooms was sufficient to entitle them to protection under the third amendment.[114] Judge Kaufman noted that the restrictions placed upon the appellants' use of their rooms were severe.[115] Under the documents governing occupancy, the appellants were prohibited from storing personally owned firearms in their rooms and from having long-term and overnight guests.[116] Additionally, the facility administration had reserved the right to inspect the premises at any time and to suspend any or all of the rules governing occupancy in the event of an emergency.[117] Judge Kaufman concluded that such restrictions were inconsistent with tenancy interests that normally involve the transfer of the absolute control and possession of the property.[118] Instead, he agreed with the district court's characterization of the appellants' living arrangement as analogous to a possession incident to employment.[119]

In analyzing the appellants' expectations of privacy, Judge Kaufman emphasized the prison context of the housing arrangement and the compelling need for the maintenance of security and discipline at the facility.[120] Judge Kaufman noted that the appellants, as correc-

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 966. Judge Kaufman did concur, however, in the other findings made by the majority. *Id.* at 966 n.1, 967.
[115] *Id.* at 968.
[116] *Id.* at 968-69.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 969. The majority had rejected this conclusion, noting that the cases relied upon by the district court had all involved employment positions that required occupancy on the premises. *Id.* at 963 n.12.
[120] *Id.* at 970.

tional officers, must have known of the limitations on their rights as occupants of prison housing and of the facility's need for an adequate number of guards at all times.[121] Under those circumstances it was unreasonable to conclude that the appellants could have a legitimate expectation that their rooms would not be used by replacements.[122] Accordingly, Judge Kaufman concluded that the appellants' housing arrangement "simply [bore] no resemblance to the kind of oasis of privacy our Forefathers undoubtedly envisioned when they fashioned the Third Amendment."[123]

Judge Kaufman's dissent served to highlight one of the criticisms of the Second Circuit's decision—its exclusive reliance on state property law as the basis for its resolution of the issue of third amendment protection.[124] In its opinion the court recognized that while state property law may serve as the "primary source of property rights," the issue of protection was ultimately one of "federal constitutional law."[125] Its analysis, however, did not concentrate on the issue of whether the appellants' property interest was of a type "recognized and permitted by society" as deserving of protection.[126] Had it done so, it might have reached a different conclusion, given the exigent circumstances of the strike.[127]

The Second Circuit's decision has also been criticized for not providing the district court with guidance in determining whether a third amendment violation occurred and what an appropriate remedy would be for such a violation.[128] Had the district court, on remand, found a tenancy interest entitled to third amendment protection, it would have had no standard for evaluating whether the state's interest in security at the facility justified its quartering of soldiers in the rooms of the appellants.[129] Likewise, the Second Circuit's decision

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[121] *Id.* at 970-71.
[122] *Id.*
[123] *Id.* at 970. It should be noted that

> Judge Kaufman's approach of considering the state's interest in determining whether a right exists would not be appropriate in the fourth amendment context. In that context, the state's interest in determining whether a right exists is not relevant to the nature of the privacy interest. Rather, it is germane at the next stage of inquiry: whether exigent circumstances exist to justify a search or seizure in the absence of a search warrant.

Comment, *supra* note 96, at 868.
[124] *Id.* at 867.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 868.
[128] *Id.*
[129] *Id.*

gave no indication of an appropriate measure of damages under such circumstances.[130]

On remand, the district court once again granted the defendants' motion for summary judgment.[131] The basis of the motion this time, however, was the defendants' assertion that they were entitled to qualified or "good faith" immunity from liability.[132] In reaching its decision the district court relied upon the case of *Harlow v. Fitzgerald*,[133] in which the Supreme Court had held that government officials performing discretionary functions were immune from civil liability to the extent that their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[134] Noting the absence of any preexisting case law interpreting the third amendment, the district court concluded that the defendants could not have reasonably known that the quartering of soldiers in the facility residences, under the exigent circumstances caused by the strike, would violate the plaintiffs' constitutional rights.[135] Accordingly, the district court held that prior to the Second Circuit's decision, the plaintiffs' third amendment rights had not been "clearly established."[136]

The significance of the *Engblom* case lies in the Second Circuit's extension of the third amendment to the states and its use of the "legitimate expectation of privacy" standard in determining the existence of third amendment rights.[137] With respect to the latter, the application of fourth amendment analysis to the third amendment emphasized an aspect of the right that was perhaps of only secondary importance in colonial times. In an age when expectations of privacy were limited, protection of property owners from the financial burden associated with the quartering of soldiers was undoubtedly an issue of greater concern. To the colonists the guarantees now embodied in the third amendment would have been viewed more in the context of a property right. By analyzing the right in a manner consistent with modern constitutional doctrine, the Second Circuit decision served to give greater emphasis to the personal protections also inherent in the amendment.

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[130]*Id.*
[131]572 F. Supp 44, 49 (S.D.N.Y. 1983).
[132]*Id.* at 46.
[133]102 S. Ct. 2727 (1982).
[134]*Id.* at 2738.
[135]572 F. Supp. at 47.
[136]*Id.* at 49.
[137]Comment, *supra* note 96, at 871.

V. CONCLUSION

The rights embodied in the third amendment have rarely been invoked, in part, because of circumstances unforeseen by the Framers. Advancements in military organization, technology, and the science of logistics eventually rendered obsolete the practice of quartering soldiers in homes, inns, and ale houses. Likewise, the security needs of the modern nation-state made the "standing army" an accepted necessity. The unique nature of civil-military relations in America's constitutional democracy also played a role in the right's evolution. The military's political neutrality, obedience to civil authority, and respect for the rule of law worked to assure adherence to the amendment's guarantees. Civilian involvement in the military through participation in the militia, Reserves, National Guards, and expanded wartime armies had a similar beneficial effect.

In his classic treatise on the Constitution, Justice Joseph Story devoted only one paragraph to the third amendment, concluding that its prohibitions were self-evident.[138] Over a century later another commentator expressed a similar view, noting that the right is "so thoroughly in accord with all our ideas" that extensive comment on it is unnecessary.[139] To the practicing attorney concerned about the prospects of litigation, the amendment will undoubtedly remain yesterday's quaint and curious memento. But for the ordinary citizen, the rights expressed in this great amendment endure as a pillar of our constitutional democracy.

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[138]3 J. Story, Commentaries on the Constitution § 1892 (1833).

[139]J. Peltason, Corwin & Peltason's Understanding the Constitution 145 (7th ed. 1976).

PUBLICATION NOTES

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time by the editor of the *Military Law Review*. With Volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. The number of publications received makes formal review of the majority of them impossible. Description of a publication in this section, however, does not preclude a subsequent formal review of that publication in the *Review*.

The comments in these notes are not recommendations either for or against the publications noted. The opinions and conclusions in these notes are those of the preparer of the note. They do not reflect the opinions of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

The publications noted in this section, like many of the books formally reviewed in the *Military Law Review*, have been added to the library of The Judge Advocate General's School. The School thanks the publishers and authors who have made the books available for this purpose.

Ronzitti, Natalino, ed., *The Law of Naval Warfare, A Collection of Agreements and Documents with Commentaries*. Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1988. Pages: xviii, 888. Preface, List of Contributors, Abbreviations, Introductory, Index, Agreements and Documents With Commentaries. Introductory by N. Ronzitti. Price: $225.00. Publisher's address: Kluwer Academic Publishers Group, P.O. Box 989, 3300 AZ Dordrecht, The Netherlands.

Professor Ronzitti has compiled a unique collection of materials relevant to the formulation of the law of naval warfare. Each of the twenty-four treaties, agreements and documents compiled includes commentary by a prominent international law scholar. These commentaries not only discuss the historical background and key provisions of the pertinent text, they also critically analyze its impact on the formulation of the law of naval warfare and its modern day relevance in light of current State practice and technological advancements in naval weapons.

In the preface, Professor Ronzitti shares with the reader the theme that will dominate the text: "new conventional law is needed to render the law of naval warfare consonant with reality." He develops this theme in his lengthy introduction, examining four modern day factors influencing the traditional law of naval warfare: the U.N.

Charter, the Law of the Sea Convention, Protocol I of 1977, and technological advancements in naval weapons. Recognizing the difficulties in getting the nations of the world to agree to a codified revision of the law of naval warfare, he makes the compelling argument that treaty interpretation and adaptation can no longer substitute for treaty revision, and that customary law is inadequate when addressing many contemporary legal issues. He identifies areas most in need of change, and concludes by identifying a starting point for this monumental undertaking.

The commentaries support Professor Ronzitti's argument. Often drawing from issues arising in such current conflicts as the Falklands War and the Iran-Iraq War, the commentators identify specific provisions of agreements in need of revision and the prospects for change.

This work is an invaluable tool for researching either the current state of the law of naval warfare, its background, its shortcomings, or its future direction.

International Security Council, *The Defense of Western Europe*, CAUSA International Seminar Series, 1988. Pages: 102. Preface, The London Declaration, List of Participants. Publisher's address: International Security Council, 393 Fifth Avenue, Suite 400, New York, New York 10016- 3315.

London's International Security Council provides a critical discussion of the advantages and disadvantages of the recent INF treaty and the pending START meetings. This book also addresses the impact of these initiatives on the defense of NATO and its neighbors not only from nuclear attack but also from attack by conventional forces using chemical and biological weapons. The positions presented by formal paper with rebuttal and subsequent discussions enlighten the reader to strategic and tactical considerations important to arms negotiation. No conclusion is drawn, but a strong argument is presented to support a cautious reception of the Soviet promise.

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