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# THE CHANGING FACE OF DISPARATE IMPACT ANALYSIS

by Captain Dean C. Berry\*

## I. INTRODUCTION

To remove the barriers that prevented the United States from existing as a "united and classless society,"<sup>1</sup> Congress enacted the Civil Rights Act of 1964.<sup>2</sup> Equal employment opportunity falls under Title VII of this statute.<sup>3</sup> As interpreted by the Supreme Court, the goal of Title VII is to eradicate those employment practices that "operate invidiously to discriminate on the basis of racial or other impermissible classification."<sup>4</sup> Over the years, courts have developed two principal methods of determining whether an employer has violated this statutory proscription. The first, disparate treatment analysis, considers whether the employer acted with discriminatory intent and covers a wide array of employment practices.<sup>5</sup> The second, disparate impact analysis, focuses on the systemic effects of employment practices adopted without discriminatory intent but which still operate to exclude groups protected under Title VII.<sup>6</sup>

Although devised with the same general policy considerations in mind, the two theories are quite different in their pristine forms and methods of application. Nowhere is this more apparent than in situa-

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<sup>1</sup>Special Message to Congress on Civil Rights. Pub. Papers of J.F. Kennedy 221 (Feb. 28, 1963).

<sup>2</sup>Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in various sections of 42 U.S.C. (1982)).

<sup>3</sup>42 U.S.C. §§ 2000e-2000e-17 (1982).

<sup>4</sup>*Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

<sup>5</sup>See *infra* notes 18-44 and accompanying text.

<sup>6</sup>See *infra* notes 45-62 and accompanying text.

tions where Title VII plaintiffs attack the discriminatory effects of an employer's subjective decisionmaking. Although disparate treatment has traditionally applied to such cases, over the past few years plaintiffs have also tried to use disparate impact analysis to attack the same subjective processes. Because the Supreme Court's disparate impact cases, beginning with *Griggs v. Duke Power Company*,<sup>7</sup> dealt only with the effect of objective measures of employment aptitude, there was a lack of clear guidance as to whether this was an appropriate use of the theory, and federal courts reached different decisions concerning the issue.<sup>8</sup>

In *Watson v. Fort Worth National Bank* the Supreme Court held, in what was ostensibly an important victory for Title VII plaintiffs, that the disparate impact theory first enunciated in *Griggs* applies to subjective employment practices.<sup>9</sup> Whether this will be a long-term victory, however, depends on future interpretations of the Court's opinion. This is largely because the Justices, though deciding the issue of disparate impact unanimously, differed significantly over the respective burdens of proof borne by the parties in such cases.<sup>10</sup>

This article contends that in the wake of *Watson*, disparate impact analysis theory is in retreat as a theory of discrimination. Sanctioning an ill-advised extension of the theory to subjective practices, the Court now threatens the very foundations of *Griggs*, one of the most important civil rights cases ever decided. In sum, the plaintiffs' victory in *Watson* may spell long-term defeat for future Title VII plaintiffs.

Part II of this article discusses the general provisions of Title VII and how the Supreme Court devised separate theories of discrimination to fully enforce those provisions. Part III explains and evaluates the nature of subjective employment practices and how the two theories of discrimination apply to those practices. This section also

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<sup>7</sup>401 U.S. 424 (1971).

<sup>8</sup>See *infra* notes 112-139 and accompanying text.

<sup>9</sup>108 S. Ct. 2777 (1988). Thereafter, the Court vacated an Eighth Circuit judgment in favor of the Army and remanded the case for further consideration in light of *Watson*. *Emanuel v. Marsh*, 108 S. Ct. 2891 (1988). The appeals court had ruled that a minority employee may not use disparate impact analysis to show that a subjective promotion system discriminates on the basis of race in violation of Title VII. *Emanuel v. Marsh*, 828 F.2d 438, 442 (8th Cir. 1987).

<sup>10</sup>*Watson's* lack of clarity regarding burdens of proof was ameliorated somewhat by the Court's recent decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989). Although dealing primarily with the issues of assessing relevant labor markets and the impact of cumulative employment practices, *Atonio* became a vehicle for the Court to resolve the basic burden of proof dispute raised by the plurality opinion in *Watson*. See note 240 *infra*.



discusses the split among the circuit courts of appeals regarding the use of disparate impact analysis to attack subjective practices. The Supreme Court's resolution of *Watson* is the subject of Part IV, and this section outlines both the plurality opinion and the separate concurring opinion. Finally, Part V critiques *Watson* and argues against the Court's extension of disparate impact theory to subjective practices. Included is a discussion of the implications that the opinion has for future disparate impact cases.

## II. BACKGROUND: TITLE VII, THE COURTS, AND THEORIES OF DISCRIMINATION

### A. STATUTORY PROVISIONS AND POLICY GOALS

Title VII of the Civil Rights Act of 1964 makes it unlawful for any employer, employment agency, or labor organization engaged in an industry affecting commerce to discriminate in employment against any individual because of race, color, religion, sex, or national origin. It was the first major federal legislation prohibiting such discrimination in private employment and, as such, was a watershed event in the country's civil rights movement.<sup>11</sup> The basic anti-discrimination statement with regard to employers is found in section 703 of the statute, which provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>12</sup>

Despite the seeming clarity of this language, the provisions of Title

<sup>11</sup>*Morton v. Mancari*, 417 U.S. 535, 545 (1974).

<sup>12</sup>42 U.S.C. § 2000e-2a (1982).

VII, in application, are often complex, confusing, and contradictory. Prior to its passage, the bill, which later became Title VII, went to the Senate floor without the standard committee report. Thus, courts tasked with interpreting and applying Title VII have done so without a key source of policy guidance. What legislative history we do have, largely gleaned from the floor debates and amendments, is often ambiguous and prompted at least one court to observe that "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication."<sup>13</sup>

Nevertheless, courts have been able to discern the fundamental purposes of Title VII and that Congress intended to achieve equality of employment opportunity by protecting individuals from disadvantage based on certain immutable characteristics. Given Title VII's remedial purposes, and the background of deliberate discrimination that had plagued the country for many years, Title VII is often given a liberal application. A clear limit on this approach, however, is that employers are not required to employ unqualified workers.<sup>14</sup> Moreover, not all seemingly unfair or arbitrary actions taken against members of protected groups are illegal; the action must be linked to that protected status.<sup>15</sup>

Title VII illegality attaches only under specific circumstances as determined by the statute itself. First, the respondent in the case must be one covered under Title VII (i.e., an employer, employment agency, or labor organization of sufficient size and engaging in interstate commerce). Second, the act of discrimination at issue must be one recognized by Title VII. For example, the employer's action must relate to hiring, discharge, compensation, or other terms and conditions of employment. Third, the Title VII plaintiff must be a member of a group protected under Title VII. Finally, the plaintiff must allege that the

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<sup>13</sup>*Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970).

<sup>14</sup> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly subject to discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

*Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

<sup>15</sup>For example, an employer may have a policy of discharging employees for one occurrence of tardiness. Despite the harshness of such a policy, a member of a protected group who is discharged under such a policy will not have a Title VII claim unless it can be shown, for instance, that the employer routinely excuses white males from the policy but enforces it against racial minorities and women. The selective application of the policy, as opposed to its fairness, is the issue. See generally B. Schlei & P. Grossman, *Employment Discrimination Law* 13-22 (2d ed. 1983 & Supp. 1987).

employer's action was taken because of the former's membership in a protected group.<sup>16</sup>

This final element, causation, generates the most difficulty during Title VII litigation. While the first three elements are generally easy to satisfy, the crux of most discrimination cases is whether the individual's protected status motivated the employer's action. This is often very difficult to prove. In response to the problem of proving causation and thus enforcing Title VII's core purposes, courts have devised various theories of discrimination. Depending on which theory is used, the range of potential Title VII liability may vary. The remaining portions of this section will describe the two primary theories of discrimination, disparate treatment and disparate impact.<sup>17</sup>

### ***B. THE DISPARATE TREATMENT MODEL***

When Congress enacted Title VII it was clear that employers could no longer intentionally select among applicants and employees on the basis of race, sex, and the other enumerated criteria. This core policy gave rise to the disparate treatment theory of employment discrimination. As succinctly described by the Supreme Court in *Teamsters v. United States*,

[d]isparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it created Title VII.<sup>18</sup>

While disparate treatment can be easily understood as a theory of employment discrimination, actually proving an employer's discriminatory motive is more difficult. Naturally, direct evidence of such a motive could be dispositive; for example, the plaintiff might have evidence of an employer's explicit statement that he or she will not hire nor promote blacks. The chance of a plaintiff obtaining such evidence is remote, however, in light of the social opprobrium associated with such

<sup>16</sup>See B. Schlei & P. Grossman, *supra* note 15, at 1-2.

<sup>17</sup>The remaining theories of discrimination are: 1) policies or practices which perpetuate in the present the effects of past discrimination; and 2) failure to make reasonable accommodation of an employee's religious practice. See generally B. Schlei & P. Grossman, *supra* note 15, at 23-79, 206-45 (discussion of the circumstances giving rise to the application of these theories of discrimination).

<sup>18</sup>431 U.S. 324, 335 n.15 (1977) (citation omitted).

attitudes.<sup>19</sup> Accordingly, in deciding claims of disparate treatment, courts rely upon evidentiary models through which indirect evidence is analyzed with a view toward inferring discriminatory treatment. The seminal case in developing this model was *McDonnell Douglas Corp. v. Green*.<sup>20</sup>

In *McDonnell Douglas* the plaintiff, Green, was a black male who had been employed by McDonnell Douglas as a mechanic. When the company laid him off during the course of a general work force reduction, Green responded by participating in a protest against alleged racial discrimination by McDonnell Douglas in its employment practices. His protest activities included a "stall in" where he and other former employees stopped their cars along roads leading to the company plant, thus blocking entry during the morning rush hour. When McDonnell Douglas later advertised for mechanics, Green applied for reemployment but was rejected by the company on the asserted ground of his participation in the "stall in." Green sued under Title VII, alleging that McDonnell Douglas had refused to rehire him because of his race and in retaliation for his activities in protesting against racial discrimination. After several setbacks in the lower courts, Green's case eventually came before the Supreme Court.<sup>21</sup>

Noting the opposing factual contentions of the parties and the lower courts' "notable lack of harmony" regarding an appropriate prima facie case and attendant burdens of proof, the Supreme Court set forth the classic model for establishing a prima facie case of disparate treatment. This model requires that the plaintiff first prove four elements: 1) that he is a member of a group protected under Title VII; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that despite his qualifications he was rejected; and 4) that after his rejection, the position remained open and the employer continued to seek applicants with the plaintiff's qualifications.<sup>22</sup> Because the trial court had not used this method of analysis, the Court remanded the case for further proceedings.<sup>23</sup>

Under the *McDonnell Douglas* model direct proof of discriminatory intent is not required. The plaintiff need only establish a prima facie

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<sup>19</sup>See, e.g., *United States v. Board of School Commissioners*, 573 F.2d 400, 412 (7th Cir.) ("in an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find"), *cert. denied*, 439 U.S. 824 (1979).

<sup>20</sup>411 U.S. 792 (1973).

<sup>21</sup>*Id.* at 794-98.

<sup>22</sup>*Id.* at 802.

<sup>23</sup>*Id.* at 807.

case, which creates an inference of illegal discrimination. This inference is permissible because the model eliminates at the outset the most likely legitimate causes for an employer's action—lack of adequate qualifications or the absence of a job opening.<sup>24</sup> In effect, once these more benign reasons for rejection are eliminated, the possibility of invidious discrimination increases and needs to be addressed directly. Thus, after the plaintiff establishes a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>25</sup> If the employer succeeds in doing this, the plaintiff must still be afforded the opportunity to demonstrate that the employer's proffered reason is actually a pretext for discrimination.<sup>26</sup> In other words, the plaintiff may try to show that the seemingly legitimate reason offered by the employer is not the real reason and actually conceals illegal motives.

Despite its relative simplicity, the *McDonnell Douglas* test generated considerable confusion for courts, confusion largely centered on the nature and extent of the employer's burden of explaining its actions after being confronted with a prima facie case of discrimination. Some courts held that *McDonnell Douglas* merely established a burden of production and that employers need only come forward with some credible evidence of a legitimate, nondiscriminatory justification.<sup>27</sup> Other courts viewed such a minimal burden on employers as unworkable and held that a plaintiff's establishment of a prima facie case shifted the burden of persuasion to the employer. Accordingly, the employer would have to prove by a preponderance of the evidence that its actions were taken for nondiscriminatory reasons.<sup>28</sup>

The Supreme Court first attempted to address this issue in *Furnco Construction Corporation v. Waters*.<sup>29</sup> In that case three black bricklayers applied for employment at a job site with a company that routinely delegated hiring decisions to the superintendent of the site. The superintendent did not know the three men and thus did not accept their applications; he hired only bricklayers that he knew were experienced and competent or who had been recommended as being so

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<sup>24</sup>In *Teamsters* the Court stated that the two most common reasons for rejection of job applicants are "an absolute or relative lack of job qualifications or the absence of a vacancy in the job sought." 431 U.S. at 358 n.44.

<sup>25</sup>411 U.S. at 802.

<sup>26</sup>*Id.* at 807.

<sup>27</sup>See, e.g., *Barnes v. St. Catherine's Hospital*, 563 F.2d 324, 329 (7th Cir. 1977); *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292, 295-96 (9th Cir. 1974).

<sup>28</sup>See, e.g., *Williams v. Bell*, 587 F.2d 1240, 1245 n.45 (D.C. Cir. 1978); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

<sup>29</sup>438 U.S. 567 (1978).

skilled. The men sued, alleging that these hiring practices were racially discriminatory in violation of Title VII.<sup>30</sup>

After affirming the ruling below that the plaintiffs had established a prima facie case under *McDonnell Douglas*, the Court addressed the employer's burden. Unfortunately, the loose language used by the Court in its opinion did little to resolve this issue:

When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not on an illegitimate one such as race. . . . To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>31</sup>

The first highlighted word in the passage, "proving," implies the employer acquires a burden of proof, while the second highlighted word, "articulate," implies a burden of production. The subsequent portions of *Furnco* did not explain the Court's meaning and thus never clarified which burden an employer has.

Some of this confusion was resolved in *Board of Trustees v. Sweeney*,<sup>32</sup> where the Court clearly held that the employer's burden of articulating a legitimate nondiscriminatory reason for a job action does not require that it prove the absence of a discriminatory motive.<sup>33</sup> Nevertheless, the Court's opinion neither addressed the factual issue to which the employer must direct his evidence nor did it analyze the employer's burden of proof.<sup>34</sup> The precise allocation and nature of the shifts of burdens of proof were not fully resolved until *Texas Department of Community Affairs v. Burdine*.<sup>35</sup>

Burdine, a female employee of the Texas Department of Community Affairs, filed suit against the Department, alleging that its failure to promote her and subsequent decision to discharge her were based on her sex and thus violated Title VII. At trial, the district court heard

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<sup>30</sup>*Id.* 569-70.

<sup>31</sup>*Id.* at 577-78 (citation omitted).

<sup>32</sup>439 U.S. 24 (1978) (per curiam).

<sup>33</sup>*Id.* at 24-25.

<sup>34</sup>See generally Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 Cornell L. Rev. 1, 3-11 (1979), for a discussion of the Court's evolving opinions in this area.

<sup>35</sup>450 U.S. 248 (1981).

testimony from Department personnel that the promotion decision was based on a nondiscriminatory evaluation of the relative qualifications of the individuals involved. In addition, the Department presented evidence that Burdine and several of her co-workers did not work well together and that discharging each of them would improve overall workplace efficiency. Finding this evidence credible, the district court ruled against Burdine on both counts of her discrimination complaint.<sup>36</sup>

The Fifth Circuit affirmed the district court's finding that the Department did not discriminate against Burdine when it did not promote her, but reversed on the discharge issue, ruling that the Department had not adequately rebutted Burdine's prima facie case on that count.<sup>37</sup> Reaffirming its previous view that a Title VII defendant bears the burden of proving the existence of legitimate, nondiscriminatory reasons for the employment action, and that the defendant must also prove that those hired were better qualified than the plaintiff, the circuit court reversed and remanded.<sup>38</sup>

The Supreme Court granted certiorari and vacated the circuit court opinion. Writing for a unanimous Court, Justice Powell stated that once a plaintiff establishes a prima facie case, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."<sup>39</sup> The defendant need not persuade the court that it was actually motivated by these reasons, however, but need only raise "a genuine issue of fact as to whether it discriminated against the plaintiff."<sup>40</sup> The Court thus held that the defendant has only a burden of production and, upon carrying this burden, rebuts the presumption of unlawful discrimination created by the plaintiff's prima facie case. To avoid a judgment for the defendant at this point, the plaintiff must produce evidence of pretext. Furthermore, regardless of the actual stage of the case, the ultimate burden of proving that the defendant unlawfully discriminated against the plaintiff remains at all times with the plaintiff.<sup>41</sup>

*Burdine* thus laid to rest one of the more pressing issues regarding proof of disparate treatment. In doing so, the Court confirmed two key concepts: first, that the plaintiff bears the ultimate burden of proving intentional discrimination throughout the trial, and second, that the

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<sup>36</sup>*Id.* at 250-51.

<sup>37</sup>*Burdine v. Texas Department of Community Affairs*, 608 F.2d 563, 567-69 (1979).

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

<sup>39</sup>*Burdine*, 450 U.S. at 255.

<sup>40</sup>*Id.* at 254-55.

<sup>41</sup>*Id.* at 253-56.

defendant bears only an intermediate burden of production. The latter burden is appropriate, the Court reasoned, because it addresses the analytical core of the disparate treatment model. In effect, the defendant responds to the plaintiff's prima facie case by presenting a specific reason for the action; this, in turn, frames the factual issues of the case "with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."<sup>42</sup> Given the plaintiff's relatively easy burden of establishing a prima facie case of disparate treatment,<sup>43</sup> and because most defendants can satisfy the burden of providing some legitimate nondiscriminatory reason for the action in question, most disparate treatment cases turn on the plaintiff's demonstration that the defendant's proffered reason was a pretext for discrimination.<sup>44</sup>

### C. THE DISPARATE IMPACT MODEL

Although disparate treatment of individuals based solely on their race, sex, religion, or national origin may be the most obvious and easily understood violation of Title VII,<sup>45</sup> not all perceived impediments to equal employment opportunity are so clear. After the passage of Title VII, certain employment practices, although neutral on their face, appeared to have the effect of hindering employment opportunities for protected groups. Arguments ensued over whether an employer could be held liable for employment practices adopted and applied without discriminatory intent. Even though Title VII's language seemed to address only intentional discrimination, employment practices having only the effect, but not the intent, of discrimination came under increasing attack. In its landmark decision in *Griggs v. Duke Power*<sup>46</sup> the Supreme Court set forth its resolution of these cases.

In *Griggs* the Duke Power Company had organized its Dan River Plant in North Carolina into five operating departments. In one department, Labor, the highest paying jobs paid less than the lowest paying jobs in the other four departments. Blacks were employed in the Labor department while the other four departments employed only whites. Although prior to July 2, 1965 (the effective date of Title VII), the company openly discriminated in hiring and assigning on the basis of race, such policies had ceased by that date. Nevertheless, on July 2,

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<sup>42</sup>*Id.* at 255-56.

<sup>43</sup>*Id.* at 253 ("the burden of establishing a prima facie case of disparate treatment is not onerous").

<sup>44</sup>See generally B. Schlei & P. Grossman, *supra* note 15, at 1316-22, for a discussion of pretext issues.

<sup>45</sup>See *supra* notes 18-26 and accompanying text.

<sup>46</sup>401 U.S. 424 (1971).



1965, the Company instituted a requirement that new employees, in order to qualify for jobs in any department except Labor, had to register satisfactory scores on two aptitude tests and must have completed high school. For employees hired before the effective date of these requirements, only a high school diploma was needed for transfer to one of the better paying departments.<sup>47</sup>

Apparently, few incumbent black employees could satisfy the high school diploma requirement and thus qualify for a transfer.<sup>48</sup> As a result, a group of those employees brought suit against the company, alleging that the high school diploma requirement violated Title VII because it preserved the effects of the company's past policy of racial discrimination. The district court dismissed their case, holding that because Title VII applied only prospectively, the impact of prior inequities was beyond the reach of the statute's corrective power. The court of appeals reversed in part, holding that residual discrimination arising from past practices could be corrected under Title VII. Because there was no indication the requirements had a discriminatory purpose, however, the appeals court ultimately held that the diploma and test requirements did not violate Title VII.<sup>49</sup>

The Supreme Court granted certiorari on a question of first impression under Title VII. Although Title VII clearly outlawed intentional discrimination based on race, sex, and other enumerated criteria, could an employer, in good faith and without the intent to discriminate, still use standardized screening devices for employment purposes when the effect of using such devices is disproportionately adverse to persons in the protected groups? In answering this question, a unanimous Court, in an opinion written by Chief Justice Burger, initially cited Title VII's goals of achieving "equality of employment opportunity" and "remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees."<sup>50</sup> Given this statutory purpose, certain employment practices, even if facially neutral and enacted without discriminatory intent, cannot be maintained if they perpetuate prior discriminatory practices.<sup>51</sup> Turning to the high school diploma and testing requirements at issue in *Griggs*, the Court noted the history of inferior education traditionally received by blacks in North Carolina and the man-

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<sup>47</sup>*Id.* at 426-28.

<sup>48</sup>In North Carolina census statistics indicated that only 12% of black males had completed high school (compared to 34% of white males). *Id.* at 430 n.6.

<sup>49</sup>*Id.* at 428.

<sup>50</sup>*Id.* at 429-30.

<sup>51</sup>*Id.* at 430.

ifestation of this deprivation through reduced high school completion rates.<sup>52</sup> Given these circumstances, the Chief Justice formulated Title VII's response to the company policies as follows:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.<sup>53</sup>

The company had no evidence that the high school diploma requirement or aptitude tests bore any relationship to successful job performance. In fact, both were adopted based on the company's generalized belief that they would improve the overall quality of the work force.<sup>54</sup> Thus, the challenged requirements, lacking a "demonstrable relationship to successful performance of the jobs," could not justify the racially disparate impact.<sup>55</sup>

Despite this failure of proof, the Court still noted evidence of record that the company had adopted the requirements without any discriminatory intent. Indeed, the company had made special efforts to finance two-thirds of the costs of its employees' high school tuition.<sup>56</sup> Nevertheless, lack of discriminatory intent was not the focus of this type of case, the Court reasoned, because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."<sup>57</sup> Because the company had not carried this burden, the requirements could not stand, even when viewed alongside evidence that they were devised without discriminatory animus.<sup>58</sup>

Although *Griggs* was undoubtedly a landmark case in its application of Title VII's anti-discrimination provisions to facially neutral

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<sup>52</sup>*Id.* at 430 & n.6.

<sup>53</sup>*Id.* at 431.

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

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 432.

<sup>57</sup>*Id.* (emphasis in original).

<sup>58</sup>*Id.* Although the disparate impact theory set forth in *Griggs* applies most obviously to aptitude tests or intelligence testing, courts have applied it in various other situations. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (minimum height and weight requirements); *Green v. Missouri Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975) (criminal convictions); *Gregory v. Litton Sys. Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970) (arrest record); *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972).

practices, the disparate impact model it set forth underwent further refinement. This came principally in the Court's next significant disparate impact case, *Albemarle Paper Co. v. Moody*.<sup>59</sup> In *Albemarle Paper* the Court evaluated claims that the company's internal testing program disproportionately impeded the advancement of black employees to skilled positions at the company's paper mill. Although the company had conducted some validation studies of the tests, the Court rejected them as being insufficient for the company to carry its burden of proof regarding business necessity. In reaching this conclusion, the Court, citing *Griggs*, clearly set forth the order and allocation of proof in disparate impact cases. First, the plaintiff has the initial burden of establishing a prima facie case showing that the defendant's policy or practice has a disproportionate effect on members of a protected group.<sup>60</sup> Once this is done, the burden shifts to the employer to prove that the practice is mandated by business necessity or has a manifest relationship to the business.<sup>61</sup> Finally, the Court announced, for the first time, that even where an employer meets the burden of proving that its requirements are job related, the plaintiff is still free to show that other tests or selection devices, ones without a similarly undesirable disparate impact, would also serve the employer's business interest.<sup>62</sup>

Thus, as with the disparate treatment model, the Court's development of the disparate impact model required subsequent refining decisions. Contrasted with *McDonnell Douglas* and its progeny, however, *Griggs* and *Albemarle Paper*, taken together, established an order and allocation of proof that actually shifted the burden of proof to the defendant-employer once the plaintiff has made a prima facie case. Moreover, while disparate treatment focuses on the employer's intent to discriminate, disparate impact regards intent as irrelevant and focuses instead on the consequences of, and justifications for, the employer's practices.

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<sup>59</sup>422 U.S. 405 (1975).

<sup>60</sup>*Id.* at 425. The prima facie case of disparate impact almost always relies on statistical evidence. Plaintiffs normally will attempt to show that the challenged practice operates in such a manner as to affect persons in a protected class at a significantly higher rate than others in the same labor pool. Issues such as what constitutes a statistically significant disparity and whether the analyzed labor pool is truly representative of the available employment prospects are often hotly contested. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121-24 (1989); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); Boardman & Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 Law & Contemp. Probs. 189 (1983); Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 Harv. L. Rev. 793 (1978).

<sup>61</sup>*Albemarle Paper*, 422 U.S. at 425.

<sup>62</sup>*Id.*

The Court's next disparate impact case, *Washington v. Davis*,<sup>63</sup> arose outside the Title VII context. The case involved a class action attacking a verbal skills test administered to District of Columbia police recruits. The plaintiffs, a group of black males who had been denied admission into police training because of low test scores, alleged that the test discriminated against black applicants on the basis of race because it excluded a disproportionately large number of blacks. As such, the plaintiffs argued, the test violated their rights under the due process clause of the fifth amendment and its equal protection component.<sup>64</sup>

In its resolution of the case, the U.S. Court of Appeals for the District of Columbia Circuit determined that *Griggs*, though a Title VII case, was the appropriate model for analyzing disparate impact claims alleging constitutional violations. Because blacks failed the skills test at four times the rate whites did, and because there was no proof that the test was job related or predictive of success in police training, the court ruled in favor of the plaintiffs.<sup>65</sup>

The Supreme Court, in an opinion by Justice White, reversed, stating that the lower court had "erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it."<sup>66</sup> The appeals court, in applying *Griggs*, had concluded that plaintiffs posing a constitutional challenge to government hiring practices need not concern themselves with employer motive because the *Griggs* test focuses solely on the racially disparate impact of the challenged practice. The Supreme Court disagreed, holding that such a claim under the equal protection component of the fifth amendment requires a showing of intent to discriminate.<sup>67</sup> Emphasizing the police department's affirmative efforts to recruit black officers, and seeing some relationship between the test and success in the training program, the Court concluded there was no intent to discriminate.<sup>68</sup> Contrasting this analysis with Title VII, which "involves a more probing judicial review of, and less deference to, seemingly reasonable acts of administrators and executives than is appropriate under the Constitution," the Court found no equal protection violation.<sup>69</sup>

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<sup>63</sup>426 U.S. 229 (1976).

<sup>64</sup>*Id.* at 232-33, 239.

<sup>65</sup>*Id.* at 236-37. Although Title VII standards affected the case, the statute did not apply to federal or District employees when the plaintiffs filed their complaint, nor did the plaintiffs amend their complaint after the 1972 amendments. Thus, the case did not proceed as a Title VII case. *Id.* at 238 n.10.

<sup>66</sup>*Id.* at 238.

<sup>67</sup>*Id.* at 239.

<sup>68</sup>*Id.* at 246.

<sup>69</sup>*Id.* at 247.

The Court's next disparate impact case, *Dothard v. Rawlinson*,<sup>70</sup> saw the application of the theory to claims of sex discrimination. In *Rawlinson* an Alabama statute specified minimum height and weight requirements of five feet, two inches and 120 pounds for state prison guards. A class of female job applicants challenged the statute, alleging that the requirements excluded a disproportionate number of women from prison guard positions and thus violated Title VII's proscription against sex discrimination.<sup>71</sup>

Holding that the plaintiffs had established a prima facie case of disparate impact, the Court noted that the Alabama requirements would exclude over 41% of the nationwide female population while excluding less than one percent of the male population. Moreover, adult women made up almost 37% of Alabama's labor force yet held only 13% of correctional positions. Given the disproportionate impact of the requirements, and their manifestation in actual hiring numbers, the state offered little more than generalized assertions that the height and weight requirements were related to the amount of strength needed to be a prison guard. Because there was no evidence correlating these requirements with actual job performance, the Court concluded that the state had failed to rebut the prima facie case and that the height and weight requirements therefore violated Title VII.<sup>72</sup>

In its final pre-*Watson* disparate impact case, *Connecticut v. Teal*,<sup>73</sup> the Court considered another challenge to an employer's written examination. In *Teal* several black employees of a state agency failed the examination and were thus precluded from selection as supervisors. Because the passing rate for blacks was only 68% of the passing rates for whites, and because passing the test was an absolute condition for consideration for promotion, the employees sued under Title VII, arguing the disparate impact of the test and that it was not job related.<sup>74</sup>

Prior to trial on the merits, the state agency made promotions from the eligibility list generated by the examination and promoted 22.9% of the black candidates but only 13.5% of the white candidates. Presented with these numbers, the district court ruled that the "bottom line" percentages, more favorable to blacks than whites, precluded a

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<sup>70</sup>433 U.S. 321 (1977).

<sup>71</sup>*Id.* at 323-24.

<sup>72</sup>*Id.* at 331-32. This fairly straightforward application of the disparate impact model added little to development of the theory other than showing it could be applied in sex discrimination cases. In this light, the case is probably more noteworthy for its discussion of section 703(e) of Title VII, which permits some forms of sex discrimination where sex is a bona fide occupational qualification. See *id.* at 333-37.

<sup>73</sup>457 U.S. 440 (1982).

<sup>74</sup>*Id.* at 442-44.

finding of Title VII liability because there was no statistically significant disparity in advancement.<sup>75</sup> The court of appeals reversed, however, holding that the district court erred in finding that the test results alone were insufficient to support a prima facie case of disparate impact.<sup>76</sup>

In a 5-4 opinion written by Justice Stevens, the Supreme Court affirmed the appeals court decision. The Court stated that "bottom line" inquiries such as those made by the district court ignore the fact that Title VII gives each individual the opportunity to compete equally for jobs on the basis of job-related criteria. Regardless of the eventual promotion numbers by class, individual rights under Title VII are still violated unless the employer can justify the test at issue as job related.<sup>77</sup> Although a higher selection rate for blacks could serve as an indication of lack of discriminatory intent, the Court reasoned, intent is not at issue in cases such as these, where the focus is on effects.<sup>78</sup> In the Court's view, Congress never intended to give employers the latitude to discriminate against some employees on the basis of race or sex (through an unvalidated test) by treating other members of the same group more favorably at a later stage in the process.<sup>79</sup>

Thus, prior to its decision in *Watson*, the Supreme Court decided four disparate impact cases involving education and testing practices (*Griggs v. Duke Power, Albemarle Paper Company v. Moody, Washington v. Davis, and Connecticut v. Teal*) and one involving physical characteristics (*Dothard v. Rawlinson*).<sup>80</sup> Although each case involved widely varying fact patterns and legal issues, one factor was consistent

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<sup>75</sup>*Id.* at 444-45.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* at 451-52.

<sup>78</sup>*Id.* at 454.

<sup>79</sup>*Id.* at 455. *Teal* provoked a sharp dissent. Joined by three other members of the Court, Justice Powell argued that when claims of disparate impact are made, the case can only be decided by reference to "the result of the employer's total selection process." *Id.* at 458 (Powell, J., dissenting) (emphasis in original). Accepting the view that "bottom line" numbers would constitute a defense, the dissenters accused the majority of blurring the distinction between disparate treatment cases, which focus on how an individual was treated, and disparate impact cases, which focus on how a group was treated. *Id.* at 457-58. It is interesting to note that two of Justice Powell's fellow dissenters, Justices Rehnquist and O'Connor, formed half the plurality in *Watson*. Their dissent was a likely precursor to the positions taken in the later case.

<sup>80</sup>A fifth disparate impact case, *New York City Transit Authority v. Beazer*, 440 U.S. 566 (1979), involved neither testing nor physical requirements but rather a transit authority policy of not hiring persons enrolled in methadone maintenance programs. Based on an analysis of the relevant labor market, the Court concluded there was no prima facie case of disparate impact and thus did little to change the face of disparate impact theory. *Id.* at 582-87. Nevertheless, language from the case would assume larger importance in *Watson*. See *infra* notes 214, 216-220 and accompanying text.

throughout: the use of objective employment practices as screening devices. None of these cases involved any employment practice other than one applied in a straightforward, unambiguous manner to all candidates. As is well-known, however, not all employment decisions are made so mechanically. At this juncture, therefore, it is worth considering employment practices involving more subjective judgments, and how the two theories of discrimination address their potential for abuse.

### III. SUBJECTIVE EMPLOYMENT PRACTICES AND TITLE VII

#### A. SUBJECTIVE PRACTICES IN GENERAL

Criteria for employment decisions can essentially be classified into two general types: subjective and objective. Objective practices are standards or requirements that are automatically applied and involve no discretion by the decisionmaker. Examples would be the diploma and testing requirements found in *Griggs* or the height and weight requirements in *Rawlinson*. Subjective practices, on the other hand, encompass those decisions that involve some amount of judgment or discretion on the part of the employer. An example might be an interview process designed to assess an applicant's personality or poise. The Second Circuit has described a subjective decisionmaking process as "one that is not exclusively comprised of quantifiable or objectively verifiable selection criteria which are automatically applied."<sup>81</sup> The Eighth Circuit has observed that "[a] subjective personnel procedure, by definition, functions not solely through facially objective measures of ability, but employs judgment and intuition in conjunction with objective measures, such as education and demonstrated skill to achieve ends."<sup>82</sup>

Certainly there is nothing innately unlawful in using subjective criteria in making employment decisions. Indeed, many employment decisions simply cannot be made without using them.<sup>83</sup> Nevertheless, probing the potential discriminatory effects of the use of subjective criteria in employment decisions has created a myriad of problems in the Title VII area.

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<sup>81</sup>*Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984).

<sup>82</sup>*McCrae v. General Dynamics*, No. 84-2062, slip op. at 4, quoted in *Emanuel v. Marsh*, 628 F.Supp 564, 569 (E.D. Mo. 1986).

<sup>83</sup>See, e.g., *Rogers v. Int'l Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), vacated and remanded on different grounds, 423 U.S. 809 (1975).

One of the leading early decisions on the use of subjective employment practices is *Rowe v. General Motors Corporation*.<sup>84</sup> Rowe was a black production worker who alleged that he had been discriminatorily denied promotion to positions as a foreman and clerk. General Motors had two methods of promotion to such positions at the plant where Rowe worked. Supervisors could nominate workers for promotion, or the workers could nominate themselves. If the workers chose the latter method, the promotion committee would not act until it had received recommendations from the employees' supervisors. Thus, regardless of the promotion method used, the supervisors' subjective assessments of the employees' abilities and merit was always critical to the employees' promotion chances.<sup>85</sup>

Rowe's case eventually came before the Fifth Circuit, where the court held that the company's promotion practices violated Title VII in five respects: 1) the supervisor's recommendation was the most important factor in the promotion process; 2) the foreman had no written instructions regarding promotion criteria; 3) the criteria that did exist were vague and subjective; 4) employees were not notified of the qualifications necessary for promotion; and 5) there were no safeguards in the procedure designed to avert discriminatory practices.<sup>86</sup>

Although it is not entirely clear how each of the cited factors constitutes a violation of Title VII,<sup>87</sup> taken together they seem to highlight the characteristics of a subjective evaluation system that create undue risks of discriminatory application. As such, *Rowe* developed a fairly wide following among courts faced with attacks on subjective employment practices.<sup>88</sup> The primary concern for these courts was that subjective practices are particularly susceptible to discriminatory abuse and should therefore be closely scrutinized.<sup>89</sup> For some courts, the rejection of an otherwise qualified individual on the basis of subjective considerations provided a heightened opportunity for unlawful discrimination and strengthened the inference of such discrimination.<sup>90</sup>

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<sup>84</sup>457 F.2d 346 (5th Cir. 1972).

<sup>85</sup>*Id.* at 353.

<sup>86</sup>*Id.* at 356-59.

<sup>87</sup>For example, it is questionable whether written instructions to supervisors will guarantee that the same criteria will be applied to each employee in subjective practice cases. In addition, the fact that employees are not notified of job vacancies is a rather broad basis for finding a violation of Title VII.

<sup>88</sup>See B. Schlei & P. Grosman, *supra* note 15, at 192-98 (and cases cited therein).

<sup>89</sup>*Kimbrough v. Secretary of the Air Force*, 764 F.2d 1279, 1284 (9th Cir. 1985); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981).

<sup>90</sup>*Burrus v. United Tel. Co. of Kansas*, 683 F.2d 339 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982).



In this context, the majority of subjective employment practice cases won by plaintiffs involved blue collar jobs. In some cases courts went so far as to require employers to rely on objective criteria at that level, dismissing the subjective procedures as pretexts for discrimination.<sup>91</sup> Courts also were particularly wary where there was a predominance of whites in the group charged with exercising discretion. As the Fifth Circuit noted in *Rowe*:

[P]rocedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks. . . . We and others have expressed a skepticism that Black persons dependent entirely on decisive recommendations from Whites can expect non-discriminatory action.<sup>92</sup>

Such circumstances, combined with a lack of guidelines and the absence of internal review mechanisms designed to guard against bias, often proved fatal to subjective practices.<sup>93</sup>

Notwithstanding the close scrutiny given to subjective practices at the blue collar level, courts have been less likely to condemn subjective white collar employment standards, particularly where the jobs at issue are professional or supervisory.<sup>94</sup> As one court has stated, "[t]he validity of subjective devices increases in direct proportion to the level of employment sought."<sup>95</sup> While objective factors (e.g., education and licensing) have a critical screening role in professional or management positions, decisions as to actual hiring and placement will likely turn on intangible qualities, such as leadership skills, decisiveness, or the ability to get along with others. At this level, the only perceived limit is that the underlying goals of the subjective process are clear and job related.<sup>96</sup> For example, in *Zahorik v. Cornell University*,<sup>97</sup> the court

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<sup>91</sup>See, e.g., *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 453 (5th Cir. 1971) (employer has affirmative duty to devise and implement pertinent objective criteria in making promotion and transfer decisions), *cert. denied*, 406 U.S. 906 (1972); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 659-64 (2d Cir. 1971) (employer ordered to establish objective criteria for hiring and promotion).

<sup>92</sup>*Rowe*, 457 F.2d at 359.

<sup>93</sup>See Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 973-76 (1982), for a discussion of specific cases condemning subjective systems at the blue collar level.

<sup>94</sup>Bartholet, *supra* note 93, at 976-78; Weintroob, *The Developing Law of Equal Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45, 49-50 (1979).

<sup>95</sup>*Shidaker v. Bolger*, 593 F. Supp. 823, 834 (N.D. Ill. 1984), *rev'd in part on other grounds sub nom. Shidaker v. Carlin*, 782 F.2d 746 (7th Cir. 1986).

<sup>96</sup>*Shidaker*, 593 F. Supp. at 835.

<sup>97</sup>729 F.2d 85 (2d Cir. 1984).

upheld highly subjective procedures in tenure decisions. The only discernible standard was that the criteria be "legitimately related to the position of university professor."<sup>98</sup> In another case involving academic tenure decisions, the court examined a university's subjective evaluation system by this standard: "If the criteria used and procedures followed were reasonable and rationally related to the decision reached this is about as far as the court can go."<sup>99</sup>

The pronounced difference in judicial attitudes toward subjective evaluation systems based on level of employment is not easily rationalized. Despite the frequent necessity of subjective screening devices, the potential for discriminatory abuse persists regardless of the level of employment involved. In other words, an absence of selection guidelines, decisionmaking by a predominantly white supervisory force, and a lack of internal review could just as easily lead to discrimination at the white collar level as it would in lower level jobs. Nevertheless, courts sanction systems which give virtually unfettered discretion at the white collar level while they routinely strike down similar systems at the blue collar level. One commentator offers this explanation:

Judges are far more likely to have personal knowledge of the jobs of plaintiffs in the white collar context . . . than of the jobs of blue collar plaintiffs. They better appreciate the type of work upper level plaintiffs perform and recognize the different variables an employer might reasonably consider when searching for a person to fill these positions. Judges may also feel that employees who have greater contact with outsiders in the course of their work should be subject to some sort of subjective evaluation.<sup>100</sup>

In addition, courts may regard the use of subjective practices at the blue collar level, where job skills are usually more easily measured or quantified, as inherently suspect, whereas the same practices at the white collar level can be more readily justified. Regardless of the explanation, a clear difference in judicial perspective exists.<sup>101</sup>

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<sup>98</sup>*Id.* at 95-96.

<sup>99</sup>*Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1357 (W.D. Pa. 1977).

<sup>100</sup>Note, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. Det. J. Urb. L. 165, 186 (1976).

<sup>101</sup>Articles noting a more lenient standard include Barthelet, *supra* note 93, at 977-78, and Weintrob, *supra* note 94, at 49-52.

## B. SUBJECTIVE PRACTICES AND THEORIES OF DISCRIMINATION

In addition to struggling with the degree of deference to accord subjective practices based on the level of employment at issue, courts have had even greater difficulty in determining which theory of discrimination—disparate treatment or disparate impact—applies in evaluating those practices. Often it will appear that a subjective practice is applied more harshly to a member of a protected class, creating a problem of disparate treatment. On the other hand, the same practice may be applied identically in all cases yet appear to exclude members of protected groups at disproportionate rates, raising inferences of disparate impact. Given the complexity of the issues, it is not surprising that cases addressing the issue have yielded divergent results.

Typically, the application of disparate treatment theory is fairly straightforward. If an employer operates a subjective evaluation system in such a way as to treat members of protected groups differently, that theory is invoked. For example, in *Robbins v. White-Wilson Medical Clinic, Inc.*,<sup>102</sup> a black female, Robbins, applied for a job as a records clerk at a medical clinic. After being interviewed for the job, she learned that she had been rejected in favor of another applicant. Robbins asked about her rejection, and clinic personnel initially told her it was because of her age and, eventually, that it was because she lacked a pleasant personality. She filed suit, claiming that the clinic had discriminated against her on account of race.<sup>103</sup> The case eventually went before the Fifth Circuit, and the court of appeals agreed with Robbins's arguments, finding that the clinic's job requirements, including the requirement of a "pleasant personality," were largely subjective. According to the court, the evidence further indicated that the interviewer, whose impression of Robbins's personality was crucial to the selection process, equated a pleasant personality with the ability to work well with whites.<sup>104</sup> While a pleasant personality can be a legitimate job criterion, the court reasoned, the presence or absence of such a trait cannot be measured along racial lines. Because it had been in this case, Robbins was a victim of disparate treatment and was therefore entitled to relief.<sup>105</sup>

In another disparate treatment case involving subjective employ-

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<sup>102</sup>680 F.2d 1064 (5th Cir. 1981).

<sup>103</sup>*Id.* at 1065.

<sup>104</sup>*Id.* at 1067-68.

<sup>105</sup>*Id.* at 1068-69.

ment practices, *Davis v. Metropolitan Dade County*.<sup>106</sup> The plaintiff, Davis, was a black male who worked for Dade County as a fire fighter in training. After a series of negative evaluations of his training performance, the county's training supervisors discharged him from the program. Davis sued, arguing that the discharge was based on his race.<sup>107</sup> Evaluating the supervisors' subjective assessments of Davis's aptitude, the district court found that those assessments were a pretext for discrimination because the evaluation system was applied more harshly to Davis than it was to non-minority trainees with roughly equal levels of performance.<sup>108</sup>

As *Robbins* and *Davis* demonstrate, when an employer operates a subjective employment practice by applying its attendant criteria more harshly to protected group members, a classic case of disparate treatment is established. The touchstone of these cases is whether the decisionmaker's exercise of discretion and judgment was infected by discriminatory animus. If it was, Title VII liability follows.

Despite the relative ease of applying disparate treatment theory to subjective practices, disparate impact theory has resisted similar analytical cohesiveness. As noted previously, prior to 1988 the Supreme Court had never definitively ruled that disparate impact theory applied to subjective practices; each case involved practices that could only be characterized as objective. In fact, the only real hint the Court offered on the issue was in *Furnco*,<sup>109</sup> a disparate treatment case. As discussed earlier, the case involved an attack by three black bricklayers on the company's refusal to accept jobsite applications and reliance instead on personal recommendations. In applying the *McDonnell Douglas* formula of disparate treatment to these practices, which arguably involved the exercise of subjective decisionmaking, the Court mentioned in a footnote that the case did not involve standardized testing, as in *Griggs*, or height and weight requirements, as in *Rawlinson*.<sup>110</sup> To some commentators, the distinction drawn here was an indication that the Court limited disparate impact analysis to objective criteria.<sup>111</sup> Lacking a definitive holding until 1988, how-

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<sup>106</sup>480 F. Supp. 679 (S.D. Fla. 1979).

<sup>107</sup>*Id.* at 680.

<sup>108</sup>*Id.* at 682-83. See also *Nath v. General Electric Co.*, 438 F. Supp. 213, 220 (E.D. Pa. 1977), *aff'd*, 594 F.2d 855 (3d Cir. 1979) (plaintiff's allegations that subjective criterion "potential for greater contributions and/or responsibilities" violated Title VII analyzed under disparate treatment theory).

<sup>109</sup>438 U.S. 567 (1978).

<sup>110</sup>*Id.* at 575 n.7.

<sup>111</sup>See, e.g., A. Larson, 3 *Employment Discrimination* § 76.36 n.9C (1984 & Supp. 1985).

ever, the circuit courts of appeals expressed widely divergent views as to whether subjective employment practices could be evaluated under disparate impact theory.

Several circuits held that disparate impact analysis could not be used to analyze attacks on subjective employment practices and that only the disparate treatment theory was available. In *EEOC v. Federal Reserve Bank*,<sup>112</sup> for example, the Fourth Circuit considered a suit filed by the Equal Employment Opportunity Commission (EEOC) under Title VII alleging that the defendant bank's promotion practices, which included subjective merit ratings, had a disparate impact upon blacks. Finding no evidence of any "objective standards, applied evenly and automatically," in the bank's promotion scheme, the court rejected the claim that the challenged subjective practices had a disparate impact. Notwithstanding an obvious numerical disparity in promotion numbers, it was "manifest that the challenged practices did not meet the criteria for a disparate impact claim."<sup>113</sup> Rather than setting forth a disparate impact case, the factual circumstances presented by the plaintiffs fell within the "typical disparate treatment case."<sup>114</sup>

Similarly, in *Talley v. United States Postal Service*,<sup>115</sup> the Eighth Circuit refused to apply the disparate impact model. In that case a discharged black female employee brought an action against the Postal Service, alleging race and sex discrimination in her dismissal. She specifically contended that the subjective decisionmaking process regarding her dismissal, done by a primarily white supervisory force, disproportionately affected blacks and women.<sup>116</sup> Citing its earlier holding that a subjective decisionmaking system cannot, by itself, form a basis for a disparate impact claim,<sup>117</sup> the court held that the plaintiff's broad-based attack on the subjective process failed to identify a "facially neutral employment practice" that had a discriminatory impact. Accordingly, application of the disparate impact theory was inappropriate.<sup>118</sup>

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<sup>112</sup>698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984).

<sup>113</sup>*Id.* at 639.

<sup>114</sup>*Id.*

<sup>115</sup>720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984).

<sup>116</sup>*Id.* at 506-07.

<sup>117</sup>*See Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) (refusing to apply disparate impact analysis to claims of sex discrimination stemming from subjective decisions regarding "workmanship").

<sup>118</sup>*Talley*, 720 F.2d at 507.

Other circuits took a different view and held, often reluctantly, that disparate impact analysis applies to subjective practices. For example, in *Zahorik v. Cornell University*,<sup>119</sup> four women formerly employed as assistant professors at Cornell brought Title VII actions against the university, claiming denial of tenure based on gender. Each plaintiff alleged that she was a victim of disparate treatment in the tenure decision and also that the tenure criteria and procedures, largely involving subjective appraisals by various members of the respective teaching departments, had a disparate impact on women.<sup>120</sup> After finding insufficient evidence to sustain any of the claims regarding disparate treatment, the court turned to the disparate impact portion of the case. Evaluating an attack on a highly subjective tenure process, the court first noted that disparate impact theory was used "mainly in the context of *quantifiable or objectively verifiable selection criteria* which are *mechanically applied* and have consequences roughly equivalent to results obtained under systemic discrimination."<sup>121</sup> Given this focus of the disparate impact theory, and an attack upon an obviously non-quantifiable or objectively verifiable tenure process, the *Zahorik* court nevertheless agreed to apply disparate impact analysis. Because there was little statistical evidence of disparate impact,<sup>122</sup> however, and the selection criteria appeared to be job related, the court simply concluded that the plaintiffs failed to establish a prima facie case of disparate impact.<sup>123</sup>

The Ninth Circuit expressed similar reservations when it encountered arguments for application of disparate impact analysis in *Moore v. Hughes Helicopters, Inc.*,<sup>124</sup> a race and gender discrimination case. In *Moore* the plaintiffs focused on the company's subjective system of selecting employees for supervisory and upper level craft positions.<sup>125</sup> After acknowledging that "there is some question as to whether [disparate impact analysis] may be applied at all to subjective employment decisionmaking," the court nevertheless upheld the lower court's

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<sup>119</sup>729 F.2d 55 (2d Cir. 1984).

<sup>120</sup>*Id.* at 88.

<sup>121</sup>*Id.* at 95 (emphasis added).

<sup>122</sup>Forty-two percent of female candidates at Cornell achieved tenure compared to sixty-five percent of the male candidates, a statistical disparity that apparently did not trouble the court. *Id.* at 96.

<sup>123</sup>*Id.* Why the court felt it needed to consider at this point whether the selection criteria were job related is unclear. Without a prima facie case of disparate impact, *Griggs* and its progeny instruct, no such explanation of the challenged employment practice is required or even logical. While job-relatedness may well affect a disparate treatment issue insofar as evaluating whether the university's selection reasons were pretextual, the court had already disposed of this aspect of the plaintiffs' case.

<sup>124</sup>708 F.2d 475 (9th Cir. 1983).

<sup>125</sup>*Id.* at 478-80.

application of the theory to the case.<sup>126</sup> Assessing the facts, however, the court of appeals held against the plaintiffs, finding their proof inadequate to show even statistical disparity, much less a significant disparate impact.<sup>127</sup>

Despite its approval of using disparate impact analysis to resolve the claims of discrimination, the *Moore* court seemed to question the general applicability of the theory to subjective practices. First, the court noted that a plaintiff receives an enormous benefit when disparate impact analysis is applied to subjective practices. In essence, a defendant employer incurs a burden of persuasion (regarding business necessity or job-relatedness) that he does not have under the disparate treatment theory, which requires only the articulation of a legitimate, nondiscriminatory reason for the action in question.<sup>128</sup> Second, the court stated that disparate treatment was traditionally the method used to analyze subjective systems:

Normally, when a Title VII plaintiff alleges widespread, systemic employment discrimination, such as in this case, courts have analyzed the claims under the disparate treatment mode of analysis. . . . This is particularly true in the case of subjective hiring systems that select employees in a manner disproportionately adverse to persons protected by Title VII. Subjective hiring systems "provide a convenient pretext for discriminatory practices," . . . and are thus well suited to the disparate treatment focus on intentional discrimination.<sup>129</sup>

In still other circuits, the various appellate panels reached conflicting results, applying disparate impact analysis in some cases and refusing to apply it in others. For example, in *Pouncy v. Prudential Insurance Co.*<sup>130</sup> the Fifth Circuit considered allegations of a lack of promotion opportunities for blacks because of the company's selection practices. Specifically, the plaintiff argued that the company's prac-

<sup>126</sup>*Id.* at 481-82.

<sup>127</sup>*Id.* at 485 & n.9.

<sup>128</sup>*Id.* at 482. The court further acknowledged, however, that this effect could be ameliorated by the more exacting proof requirements for plaintiffs in disparate impact cases. *Id.*

<sup>129</sup>*Id.* at 481 (citation omitted) (quoting *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981)). The Sixth, Tenth, Eleventh, and District of Columbia Circuits also allowed disparate impact claims to proceed with respect to subjective employment practices. See *Griffin v. Carlin*, 755 F.2d 1516, 1522-25 (11th Cir. 1985); *Hawkins v. Bouda*, 752 F.2d 500, 503 (10th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1286 n.34 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985); *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.*, 690 F.2d 88, 94-95 (6th Cir. 1982).

<sup>130</sup>668 F.2d 795 (5th Cir. 1982).

tices—not posting job openings, use of a level system (i.e., promoting from within specific job classifications), and use of subjective criteria in evaluation—had a disparate impact on black employees.<sup>131</sup>

The court determined that disparate impact theory is inappropriate for such an attack, holding that the theory applies only when the employer has instituted a specific procedure that can be shown to have caused “a class based imbalance in the work force.”<sup>132</sup> Emphasizing that only “facially neutral” practices are amenable to the requirement of showing a causal connection, the court explained:

None of the three Prudential “employment practices” singled out by [the plaintiff]—the failure to post job openings, the use of a level system, and evaluating employees with subjective criteria—are akin to the “facially neutral employment practices” the disparate impact model was designed to test. Unlike education requirements, aptitude tests, and the like, the practices identified by [the plaintiff] are not selection procedures to which the disparate impact model traditionally has applied.<sup>133</sup>

Thus, in the court's view, the plaintiff had not shown, nor could he show, that the challenged subjective practices caused the racial imbalance in Prudential's work force.<sup>134</sup>

Most subsequent Fifth Circuit cases reached similar results.<sup>135</sup> In *Page v. U.S. Industries*,<sup>136</sup> however, another panel from the same circuit ruled differently. In *Page* a class of blacks and Mexican-Americans challenged the employer's promotion system, which included subjective assessments by foremen regarding promotion potential.<sup>137</sup> Allowing application of the disparate impact theory, the court cited earlier circuit decisions to the contrary but held nevertheless that either theory of discrimination—disparate treatment or disparate impact—could apply to the same set of facts.<sup>138</sup> Without any

<sup>131</sup>*Id.* at 799.

<sup>132</sup>*Id.* at 800.

<sup>133</sup>*Id.* at 801.

<sup>134</sup>*Id.*

<sup>135</sup>*See, e.g., Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987) (“challenges to employment practices that rely on subjective criteria must be analyzed under the disparate treatment theory of discrimination, which requires a finding of intentional discrimination”); *Carroll v. Sears, Roebuck & Co., Inc.*, 706 F.2d 183, 188 (5th Cir. 1983) (“The use of subjective criteria . . . is not within the category of facially neutral practices to which the disparate impact model is applied.”).

<sup>136</sup>726 F.2d 1038 (5th Cir. 1984).

<sup>137</sup>*Id.* at 1041-43.

<sup>138</sup>*Id.* at 1045-46.



real discussion of the implications of such a ruling, the court concluded that the subjective promotion system could have a "class-wide impact" and that it was therefore appropriate to apply disparate impact analysis.<sup>139</sup>

Thus, before 1988 there was a sharp split among, and sometimes within, the various courts of appeals regarding the application of disparate impact theory to subjective practices. Some courts saw their methodology as applicable only to objective practices and were somewhat incredulous that a plaintiff could even identify a subjective practice as having caused a statistically significant disparate impact. Other courts adopted a more receptive approach to plaintiffs' allegations and were willing to consider such contentions. In this context, *Watson v. Fort Worth National Bank* came before the Supreme Court.

#### IV. *WATSON v. FORT WORTH NATIONAL BANK*

##### A. *BACKGROUND OF THE CASE*

Clara Watson, a black female, was hired by the Fort Worth National Bank in 1973 as a proof operator. Three years later she advanced to a position as teller in the bank's drive-in facility. In 1980 she applied to become a supervisor of tellers in the main lobby but a white male was selected instead. She then applied to become supervisor at the drive-in facility but a white female was selected. In 1981 the supervisory position in the main lobby became vacant and Watson again applied for it, but the job went to the white female who had been hired the year before to supervise the drive-in facility. Watson then applied for that job a second time but a white male was selected instead.<sup>140</sup>

The bank had no formal system or criteria for evaluating applicants for these positions. It relied exclusively on the subjective assessments of the supervisors, specifically their knowledge of the candidates and of the nature of the jobs to be filled. All supervisors involved in denying Watson's applications were white males.<sup>141</sup>

Watson filed a discrimination charge with the EEOC and, after exhausting her administrative remedies, brought suit in federal district court. She alleged that the bank had discriminated against her

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<sup>139</sup>*Id.* at 1046.

<sup>140</sup>*Watson v. Fort Worth National Bank*, 108 S. Ct. 2777, 2782 (1988).

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

and other blacks in hiring, promotions, pay, placement, and other terms and conditions of employment. After various rulings regarding class certification, the court addressed the merits of Watson's claims on behalf of black job applicants. Because the percentage of blacks in the bank's work force roughly approximated the percentage of blacks in the metropolitan area, however, the court concluded that she had failed to make a prima facie case of racial discrimination in hiring.<sup>142</sup>

Turning to Watson's individual claims of race discrimination, the district court concluded that she had made a prima facie showing of discrimination under the disparate treatment model. Nevertheless, because the bank had presented legitimate, nondiscriminatory reasons for her nonselection for promotion, and because Watson was unable to prove that these reasons were pretextual, the court dismissed the case.<sup>143</sup>

On review, the Fifth Circuit affirmed the lower court's dismissal of Watson's disparate treatment claims. In light of Watson's arguments that the district court should also have applied disparate impact analysis to her claims of discrimination in promotion, the court of appeals, as it had in several earlier cases,<sup>144</sup> addressed the applicability of this model to subjective practices. Relying on its precedents, the court ruled that Watson was limited to the disparate treatment theory in attacking a discretionary promotion system and affirmed the lower court.<sup>145</sup> Noting the conflict in the circuits on this issue, the Supreme Court granted certiorari.<sup>146</sup>

## B. THE PLURALITY OPINION

Justice O'Connor, writing for herself and three other Justices,<sup>147</sup> first reviewed both disparate treatment and disparate impact as the Court had devised those models for analyzing claims of employment discrimination. She stated that although the factual issues that dominate each type of case are different, the ultimate legal issue is the same: has there been unlawful discrimination? In this light, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."<sup>148</sup>

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<sup>142</sup>*Id.* at 2783.

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

<sup>144</sup>See *supra* notes 130-139 and accompanying text.

<sup>145</sup>*Watson v. Fort Worth National Bank*, 798 F.2d 791, 797 (5th Cir. 1986).

<sup>146</sup>*Watson*, 108 S.Ct. at 2783.

<sup>147</sup>Chief Justice Rehnquist and Justices White and Scalia were the other members of the plurality. 108 S. Ct. at 2782.

<sup>148</sup>*Id.* at 2785.

The plurality then observed that all of the Court's earlier decisions regarding disparate impact had involved standardized employment tests or criteria, while conventional disparate treatment analysis had been used to review employment decisions involving the application of subjective criteria.<sup>148</sup> After characterizing the parties' respective arguments as presenting "stark and uninviting alternatives," the plurality turned to the basic issue in the case: the applicability of disparate impact analysis to subjective practices.<sup>150</sup>

Initially, the plurality stated that *Griggs* and its progeny "could largely be nullified" if subjective practices were shielded from disparate impact analysis. To the plurality, employment practices that combine both subjective and objective practices would generally have to be considered subjective. Accordingly, employers such as those in *Griggs* could insulate their objective standards (i.e., aptitude tests or diploma requirements) from attack by adding a subjective component, such as a brief interview. As long as the objective criteria were not absolutely determinative, the plurality reasoned, employers could give those criteria as much weight as they chose without risking disparate impact challenges. Such a rule of law could effectively abolish the disparate impact test.<sup>151</sup>

Continuing, the plurality stated that disparate impact analysis "is in principle no less applicable to subjective employment criteria than to objective or standardized tests."<sup>152</sup> Such criteria run roughly the same risk of having effects identical to intentionally discriminatory practices. While acknowledging the necessity and reasonableness of leaving promotion decisions to the discretion of lower level supervisors, the plurality argued that "[i]t does not follow . . . that the particular supervisors to whom this discretion is delegated always act without discriminatory intent."<sup>153</sup> Even if disparate treatment analysis could cover these situations, the plurality continued, "the problem of subconscious stereotypes and prejudices would remain."<sup>154</sup> Thus, the plurality concluded that disparate impact analysis should apply "in appropriate cases."<sup>155</sup>

Having reached this conclusion, the plurality then turned to the evidentiary standards that should apply. Here, the plurality believed,

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

<sup>150</sup>*Id.* at 2786.

<sup>151</sup>*Id.*

<sup>152</sup>*Id.*

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

<sup>154</sup>*Id.*

<sup>155</sup>*Id.* at 2787.

the concerns of defendant employers "have their greatest force."<sup>156</sup> Once the prima facie case of disparate impact is established, the employer must justify the practice as a business necessity. Because subjective practices often involve intangible qualities not readily validated through traditional statistical methods, the plurality stated, employers will find this task difficult at best. Moreover, the plurality emphasized that using subjective criteria is nearly inevitable for selection decisions involving many upper level jobs. Employers will thus be unable to eliminate the subjective practice but will also find it prohibitively expensive to defend such practices in litigation. In this situation, the employer's only real alternative will be to adopt surreptitious quotas in order to defeat any possibility of an employee establishing a statistical prima facie case.<sup>157</sup>

Concerned with these prospects, and agreeing that it is "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces," the plurality offered two responses. First, plaintiffs in disparate impact cases have the burden of identifying the specific employment practices that they are challenging. This may be more difficult in subjective practice cases than in cases where the attack is upon, for example, a standardized test.<sup>158</sup> Moreover, if the plaintiffs rely on statistical data, such data must "be sufficiently substantial that they raise an inference of causation."<sup>159</sup> And, as in all disparate impact cases involving statistical evidence, the defendant employers are free to rebut the relevance and reliability of the plaintiffs' statistics.<sup>160</sup>

Second, the plurality saw the defendants' evidentiary burden as providing some relief. Although *Griggs* said that the employers have the burden of showing that any given requirement has a manifest relationship to the practice at issue, "such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant."<sup>161</sup> On the contrary, the plurality continued,

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<sup>156</sup>*Id.* It is also here that Justice O'Connor commenced speaking for only a plurality of the Court. While agreeing with her position on the applicability of disparate impact analysis to subjective practices, four Justices declined to join the remainder of her opinion. See *infra* notes 164-74 and accompanying text. Only eight Justices voted in *Watson* because the remaining member, Justice Kennedy, took no part in the case. In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), however, Justice Kennedy did participate in the Court's decision and provided a fifth vote for the plurality views expressed in *Watson*.

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* at 2785.

<sup>159</sup>*Id.* at 2789.

<sup>160</sup>*Id.* at 2789-90.

<sup>161</sup>*Id.* at 2790.

the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship."<sup>162</sup>

Thus, in the plurality's view, the allocation of burdens of proof under disparate impact analysis were sufficiently favorable to the defendant-employers to justify evaluation of their subjective practices under disparate impact analysis. Such standards of proof are, the plurality concluded, enough to reduce employer incentives to modify legitimate employment practices by introducing quotas or preferential treatment.<sup>163</sup>

### C. JUSTICE BLACKMUN'S SEPARATE CONCURRENCE

Writing for himself and two other Justices,<sup>164</sup> Justice Blackmun concurred with the plurality's extension of disparate impact analysis to subjective selection processes. He wrote separately, however, to express concern over "the nature of the burdens this Court has allocated for proving and rebutting disparate impact claims."<sup>165</sup> In Justice Blackmun's view, the plurality's allocation of burdens of proof in disparate impact cases "is flatly contradicted by our cases."<sup>166</sup> The plaintiff who carries his initial burden of establishing a prima facie case of disparate impact "shifts the burden of proof, not production, to the defendant to establish that the employment practice in question is a business necessity."<sup>167</sup> The plurality's proposed allocation of burdens, Justice Blackmun continued, more closely resembles the allocation of burdens in disparate treatment cases as set forth in *McDonnell Douglas*. What Justice Blackmun found "most striking" about the plurality's declaration, however, "is that it is a near-perfect echo of this

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<sup>162</sup>*Id.* at 2790 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

<sup>163</sup>*Id.* at 2791.

<sup>164</sup>Justices Brennan and Marshall were the other two Justices separately concurring.

*Id.*  
<sup>165</sup>*Id.* at 2792 (Blackmun, J., concurring).

<sup>166</sup>*Id.*

<sup>167</sup>*Id.*

Court's declaration in *Burdine* that, in the context of an individual disparate treatment claim, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."<sup>168</sup> In mixing those burdens, the plurality "turns a blind eye to the crucial distinctions between the two forms of claims."<sup>169</sup>

To Justice Blackmun, the distinction was crucial because the consequences of establishing a prima facie case under each theory are so different. Under the disparate treatment model, the prima facie case allows only an inference of discrimination that may not have actually occurred. Thus, it is appropriate to give defendant-employers the benefit of the doubt by leaving the burden of proof with plaintiffs at all times. On the other hand, a prima facie case of disparate impact, as explained by Justice Blackmun, already proves that the employment practice has had an improper effect. Under such circumstances, giving the employer the burden of proving the business necessity of the practice is justified in light of Title VII's policies against such barriers.<sup>170</sup> Simply allowing a defendant employer to meet this burden by producing evidence of a "legitimate business reason" will not suffice, Justice Blackmun stated, and again is an "echo from the disparate treatment cases."<sup>171</sup> Such an allocation of burdens simply does not justify an employment practice shown to exclude a protected class from employment opportunities.<sup>172</sup>

Finally, Justice Blackmun took issue with the plurality's suggestions as to how subjective practices can be justified. First, the fact that the job-relatedness of a subjective practice cannot be shown with usual scientific precision does not excuse an employer from its burden of proof on this issue. Different forms of evidence bearing on business necessity, as well as "common sense" assessments, can play an increased role here.<sup>173</sup> Second, the plurality's prediction that employers might find it easier to show business necessity in subjective practice cases troubled Justice Blackmun. In his view, an employer's mere articulation of vague and general criteria in the face of proven disparate impact would ill-serve Title VII's policy of eradicating discriminatory barriers in employment. Moreover, the less well-defined the

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<sup>168</sup>*Id.* (emphasis in original) (quoting *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1961)).

<sup>169</sup>*Id.* at 2792-93.

<sup>170</sup>*Id.* at 2794.

<sup>171</sup>*Id.*

<sup>172</sup>*Id.*

<sup>173</sup>*Id.* at 2796.

criteria, the more difficult it will be to establish a link between the criteria and the employer's business interest.<sup>174</sup>

## V. DISPARATE IMPACT ANALYSIS AFTER *WATSON*

On its surface, the Supreme Court's decision to extend disparate impact analysis to subjective practices can be viewed as an important victory for Title VII plaintiffs. It is now clear that a broader range of employment practices can be a basis for employer liability under the disparate impact theory. Nevertheless, it is submitted that this extension was unjustified, unnecessary, and doctrinally flawed. Moreover, the perceived victory won by Title VII plaintiffs in *Watson* may well turn out to be their long-term loss. This section of the article will address these points, discussing first why the Court incorrectly decided *Watson*, and second, why the decision could become a defeat for Title VII plaintiffs.

### A. DISPARATE IMPACT AND SUBJECTIVE PRACTICES

The doctrinal flaws in *Watson* are first apparent in the Court's contention that disparate impact is "in principle no less applicable to subjective employment criteria than to objective or standardized tests."<sup>175</sup> Although not objecting to the use of subjective practices per se, or to the delegation of discretionary decisionmaking to lower level employees, the Court still feared the potential for unlawful bias, arguing that "[i]t does not follow . . . that the particular supervisors to whom this discretion is delegated always act without discriminatory intent."<sup>176</sup> This may certainly be true, but is also precisely the situation for which the disparate treatment test was devised. The Court acknowledged this, but nevertheless went on to say that "the problem of subconscious stereotypes and prejudices would remain."<sup>177</sup> As an example, the Court cited statements made to *Watson* during the selection process "that the teller position was a big responsibility with 'a lot of money . . . for blacks to have to count.'"<sup>178</sup>

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<sup>174</sup>*Id.* The remaining Justice on the case, Justice Stevens, agreed that disparate impact theory should apply to subjective practices. He took no position on the evidentiary issues, however, preferring to wait until the district court had made appropriate findings. *Id.* at 2797. In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), Justice Stevens dissented and endorsed the views expressed by the other separately concurring Justices in *Watson*.

<sup>175</sup>*Id.* at 2786.

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

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

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

The foregoing analysis, especially when considered in light of the facts of *Watson*, argues for application of the disparate treatment theory and nothing more. At her trial Watson initially tried to prove that her supervisors, in exercising their subjective assessments of the candidates, judged her by different standards than whites who sought the same positions. Like most serious Title VII plaintiffs, she was able to establish a prima facie case of disparate treatment,<sup>179</sup> whereupon the bank, through its supervisors, was required to explain its reasons for selecting other candidates instead of Watson. The district judge, sitting as the trier of fact, heard the evidence from both sides, observed the demeanor of the witnesses, and had the unfettered opportunity to judge whether the supervisors' explanations were legitimate or were a pretext for discrimination. Watson was unsuccessful in carrying her burden of proof because the judge apparently concluded that the reasons offered by the bank were genuine and that the subjective selection process was not a pretext.

This was a rather ordinary application of the disparate treatment theory. Both sides met their initial evidentiary burdens, narrowing the facts gradually to ascertain the often elusive matter of intent. In this light, given that the discrimination issue was resolved in the adversarial setting of a federal district court, it is difficult to believe that plaintiffs like Watson are entitled to more under Title VII. Whether the application of subjective criteria leads to either conscious or unconscious discrimination, wherever the boundary between those realms lies, the ultimate issue in these cases will always be the intent of the decisionmaker. As outlined previously, subjective employment practices involve either unstructured personnel processes (e.g., personal interviews or supervisor evaluations based on personal contact) or assessments involving the unstructured evaluation of objective measurements (such as grades, education level, or prior experience). The key attribute of such decisions, as courts have consistently found, is the reliance on judgment, intuition, and discretion. Mental processes such as these are the focus of disparate treatment analysis and, where these processes are alleged to be tainted by discriminatory animus, it is disparate treatment analysis that guides us in evaluating the critical issue of intent.

Although the disparate treatment and disparate impact models are each designed to promote equal employment opportunity by uncovering an employer's use of impermissible factors in making employ-

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<sup>179</sup>In short, Watson presumably had little difficulty showing that she was a member of a protected group, applied for an available position, was qualified for that position, and was not selected. See *supra* note 22 and accompanying text for a discussion of the prima facie disparate treatment case.



ment decisions, the two theories are not identical and cannot be applied interchangeably. Each one has a different perspective in bringing about the goals for which Title VII was enacted. As explained previously, disparate treatment seeks to evaluate cases where an employer is alleged to have intentionally treated a member of a protected group differently solely because of their membership in that group. Conversely, the disparate impact theory identifies a "facially neutral practice" that has the effect of disproportionately excluding members of protected groups. Under disparate impact analysis, the employer's actual intent is irrelevant—the disparate effect of the practice, even if unintentional, will lead to Title VII liability unless justified by business necessity. With subjective criteria, however, unintentional discrimination is not a concern. As emphasized in most subjective practice cases, the principal fear has always been that subjective criteria will be influenced by the biases of the person making the decision.

Objective criteria are traditionally neutral in design and application. They are applied mechanically and without deviation among all applicants or employees. The disparate impact model evaluates whether these criteria have a disparate impact upon members of a protected class despite undeniable fairness and uniformity in treatment and application of the criteria. Conversely, subjective criteria are heavily influenced by factors that are personal to the one making the selection decision. They are unavoidably affected by the decisionmaker's own perspective, background, beliefs, and values, and their application will vary from case to case. Subjective practices thus lack the uniformity associated with objective criteria, which makes the latter amenable to disparate impact analysis.

In addition to these doctrinal flaws, the Court also overestimated the necessity of applying disparate impact analysis to subjective practices. Courts using disparate treatment analysis have long been sensitive to the possibility that decisions resulting from recourse to subjective selection practices can be motivated by discriminatory intent.<sup>180</sup> Ever since the seminal decision in *Rowe v. General Motors*,<sup>181</sup> courts have understood that subjective selection processes provide a ready mechanism for intentional discrimination, especially where the decisionmakers are of a race or sex different from that of the

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<sup>180</sup>See *supra* notes 84-93 and accompanying text. See also B. Schlei & P. Grossman, *supra* note 15, at 191-205; Denis, *Subjective Decisionmaking: Does it Have a Place in the Employment Process?*, 11 *Empl. Rel. L.J.* 269, 270-76 (1985) (and cases cited therein).

<sup>181</sup>457 F.2d 348 (5th Cir. 1972).

applicant.<sup>182</sup> Further, courts have readily found discriminatory treatment where the employer's very use of a subjective selection process was unjustified. This is particularly likely in cases involving jobs with minimal skill requirements or requirements that are easily quantifiable.<sup>183</sup> Given this extensive judicial history of closely scrutinizing subjective practices for their potential discriminatory application, it is difficult to see why the Court could conclude that disparate impact analysis also had a role to play in an area where disparate treatment analysis is more than equal to the task. Even conceding lesser judicial scrutiny of subjective practices at the white collar level, there is no real argument that disparate impact theory will resolve this perceived double standard.

In fact, *Watson* raises a rather paradoxical view with respect to the application of these theories of discrimination. On the one hand, the Court views subjective selection practices as suspect because of the risk that certain individuals, in certain situations, will make discretionary decisions that are influenced by their discriminatory feelings. On the other hand, the Court suggests that these same subjective processes are a facially neutral standard, the systematic application of which make their operation amenable to disparate impact analysis. As one court has cogently stated in a similar setting, it is "logically impossible to prove both propositions."<sup>184</sup>

This is not to deny, however, that the use of subjective selection processes may coincide with an under-representation of protected group members in certain jobs. Courts will frequently encounter large statistical disparities in relative employment groupings and not be able to trace them readily to any specific employment practice, objective or subjective. Nevertheless, without resorting to disparate impact analysis, plaintiffs in those cases can still make good use of statistics in attacking the subjective aspects of job selection. This is largely because, in appropriate circumstances, a significant statistical disparity will support an inference of intentional discrimination.<sup>185</sup> In assessing the role of statistics in inferring discriminatory intent, the Supreme Court has stated:

[T]he statistical evidence [should not be] offered or used to support an erroneous theory that Title VII requires an em-

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<sup>182</sup>See *supra* note 92 and accompanying text. See also *Royal v. Missouri Highway & Transp. Comm'n.*, 655 F.2d 159, 164 (8th Cir. 1981); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981).

<sup>183</sup>See *supra* notes 91-93 and accompanying text.

<sup>184</sup>*Rossini v. Ogilvey & Mather, Inc.*, 798 F.2d 590, 605 (2d Cir. 1986).

<sup>185</sup>*Hazelwood School Dist. v. United States*, 433 U.S. 299, 306-13 (1977).

employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one [involving subjective hiring practices] only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.<sup>186</sup>

Thus, plaintiffs attacking the discriminatory effects of subjective practices may still be able to prove discrimination in certain cases without the disparate impact theory. Under disparate treatment analysis, statistics showing a disproportionate representation of minorities in jobs at issue could seriously undermine employers' proffered legitimate nondiscriminatory justifications for their subjective decisions. Confronted with such statistics, the court could well conclude that those reasons were pretextual and that the subjective decisions were tainted by impermissible bias.<sup>187</sup>

In addition to its arguments equating the disparate treatment and impact theories in principle, the Court also maintained that confining disparate impact analysis to objective practices would render the *Griggs* test "a dead letter."<sup>188</sup> In reaching this conclusion, Justice O'Connor first stated that regardless of how subjective and objective criteria were distinguished, when a selection system combines both it would usually have to be considered subjective. Thus, when assessing a risk of a disparate impact challenge, employers would generally try to include some subjective component into the process. For example, by

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<sup>186</sup>*Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977).

<sup>187</sup>*Cf. Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1363 (9th Cir. 1985) (statistical evidence of employer's hiring and promotion practices is probative of motive and may create an inference of discriminatory intent); *Miles v. MNC Corp.*, 750 F.2d 867, 872 (11th Cir. 1985) (statistical evidence comparing racial composition of pool of qualified applicants with those actually hired used to assess discriminatory intent). See also Shoben, *The Use of Statistics to Prove Intentional Employment Discrimination*, 46 *Law & Contemp. Probs.* 219, 222 (1983) (arguing that if employment decision is based on subjective standards, statistics alone could often establish a prima facie case of intentional discrimination).

<sup>188</sup>*Watson*, 108 S. Ct. at 2786.

adding a brief interview (subjective) to an aptitude test (objective) an employer such as the one in *Griggs* could insulate the entire selection process from disparate impact challenge, so long as the objective component was not absolutely determinative.

The reasoning here is flawed in at least two major respects. First, employers will not always be able to shield their objective criteria so easily from disparate impact analysis. As noted previously, courts can be particularly hostile to the use of subjective selection processes where there is a statistically significant disparity in hiring or job placement and there is no apparent justification for their use. This is particularly true where the jobs involved require minimal or easily quantifiable skills. Indeed, such an argument could readily be advanced with respect to the blue collar jobs at issue in *Griggs* and seriously undercuts the Court's point here. In essence, it is rather doubtful that the company in *Griggs* could have masked the disparate effects of its testing and diploma requirements by adding a superfluous interview step that would only have bolstered inferences that the employment situation was bereft of equal opportunity. With this problem in mind, courts often excuse plaintiffs from incorporating any measure of subjective criteria in their statistical attacks on an employer's practices, reasoning that those criteria are too likely to be the subject of discriminatory influence in their application.<sup>189</sup> Thus, plaintiffs will often be able to mount statistical attacks on the effect of the remaining objective criteria even though they were not absolutely determinative in the employment decision. Moreover, even if the use of a subjective component could shield objective practices from strict disparate impact analysis, an employer may still not be in the clear. If there is a large statistical disparity in hiring or promotions, along with a subjective evaluation of dubious connection to any business purpose, courts will often find the subjective practices a pretext for discrimination.<sup>190</sup> In sum, the actions that the Court suggests employers will take to shield themselves from disparate impact liability may only set the stage for a finding of disparate treatment. The *Watson* opinion, though differentiating between the theories of discrimination, mistakenly assumes that they exist in vacuums of mutual exclusivity and

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<sup>189</sup>See, e.g., *James v. Stockholm Valves & Fittings Co.*, 559 F.2d 310, 332-33 (5th Cir. 1977) (merit ratings of predominantly white supervisors should not be included in regression analysis because there is a potential for racial bias in their subjective evaluations), cert. denied, 434 U.S. 1034 (1978); *Segar v. Civiletti*, 508 F. Supp. 690, 697, 712 (D.C. 1981) (promotion criteria should be included in regression analysis only if they are objective and quantifiable, and not if they are subjective), aff'd in relevant part sub nom. *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

<sup>190</sup>See *supra* notes 185-86 and accompanying text.

that practices adopted to minimize liability under one theory will have no effect on potential liability under the other.

Second, the Court's contention that subjective criteria can be merged with objective criteria to create a self-contained subjective system seems to be contradicted by language found later in the opinion. Discussing the evidentiary aspects of a disparate impact challenge to subjective practices, the plurality stated that "[t]he plaintiff must begin by identifying *the specific employment practice* that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our opinion responsible for *isolating and identifying the specific employment practices* that are allegedly responsible for any observed statistical disparities."<sup>191</sup> The plurality appears to be saying here that Title VII plaintiffs faced with an array of employment practices, some objective and others subjective, should be able to identify the specific practice or practices that have caused the disparate impact. Thus, it would seem to follow that a plaintiff, normally through the use of statistical analysis, should also be able to isolate and identify a specific objective standard as having a disparate impact after having separated its effect from that of the other subjective components of the employment decision. Whether this is realistic, however, calls for a brief look into how a statistical case of disparate impact is made.

As exemplified by *Griggs*, employment discrimination law relies heavily upon the use of statistics in establishing or rebutting inferences of discrimination. In *Griggs* the Court noted the absence of black employees in the higher levels of the company's work force and partially traced that absence to the company's high school diploma requirement. Because blacks in North Carolina were much less likely to have diplomas than were whites, this requirement had the impermissible effect of disproportionately blocking the advancement of black employees. Proving disparate impact in later cases often proved more complex, however.

Where a number of criteria, either objective or subjective, comprise an employment decision, a simple evaluation of hiring or promotion statistics usually will not satisfy a plaintiff's burden of proof. In evaluating a pool of applicants, a mere comparison of percentages

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<sup>191</sup> *Watson*, 108 S. Ct. at 2788 (emphasis added). Although the concurring Justices did not join this portion of the plurality's opinion, they voiced no specific objection to this proposition in their separate concurrence. *Id.* at 2791-97 (Blackmun, J., concurring). In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), however, the same Justices specifically took issue with the requirement of specifying the challenged practice. See *id.* at 2127 (Stevens, J., dissenting), 2136 (Blackmun, J., dissenting).

hired or promoted will say little as to whether the disparate effect resulted from differing qualifications or from discrimination. More importantly, there would be little insight as to which components of the employment decision had the greatest impact in the employment decision. Because of cases such as these, multiple regression analysis has assumed increasing importance in Title VII litigation.<sup>192</sup>

Simply put, multiple regression analysis is a statistical technique designed to estimate how one set of factors (e.g., education, test scores, age, or performance) influence another single variable (e.g., hiring or promotion). Regressions use a complex array of mathematical formulas that produce estimated numerical weights for each decision-influencing factor and that indicate the comparative effect those factors have on an outcome.<sup>193</sup> The regression also enables one to correlate the effects of those factors to determine the degree to which they might act in combination to influence an outcome.<sup>194</sup>

A twist arises in situations involving a blend of subjective and objective practices. While the latter involve test results and educational levels that are quantifiable and can be easily incorporated into a regression model, the same cannot be said for subjective criteria. First, there is the obvious problem of quantifying the intangible qualities (e.g., leadership, personality, trust, or judgment) which subjective selection processes seek to evaluate. Absence of such quantification often renders subjective criteria useless for incorporation into a mathematical model. Second, assuming the employer could quantify a subjective selection technique (through numerical merit ratings, for example), there is a further problem in using those results in a regression analysis. As explained earlier, while subjective criteria would admittedly affect the hiring or promotion decision, they may also be subject to discriminatory influence in their application. For this reason, courts have generally excused plaintiffs from incorporating subjective criteria in their regression analysis.<sup>195</sup>

Given that plaintiffs may not be able to incorporate a nonquantifiable or potentially biased subjective process into a regression analysis, all that remains is to show that some of the remaining objective criteria, whether test scores or educational levels, correlate with the

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<sup>192</sup>See generally W. Connolly & D. Peterson, *Use of Statistics in Equal Employment Opportunity Litigation* App. B, C (1968); D. Baldus & J. Cole, *Statistical Proof of Discrimination* ch. 8 (1980); Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737 (1980).

<sup>193</sup>D. Baldus & J. Cole, *supra* note 193, at ch. 8.

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

<sup>195</sup>See *supra* note 189 and accompanying text.

selection decisions regarding members of the protected group. Using regression analysis, this can be done, and the objective criteria can be either accepted or rejected as explanatory factors in the selection decision. In any event, the core purpose of *Griggs*, the identification and evaluation of objective factors having a disparate impact on protected groups, is preserved regardless of the employer's incorporation of subjective components into the process. Notwithstanding the *Watson* plurality's contrary assertion, it is simply not that significant whether an objective device such as a test is "absolutely determinative." If such a device is found to be an important factor in the selection process, and correlates adversely with minority hiring in a statistically significant way, a prima facie case of disparate impact is established.

There will be cases, however, where there is no statistically significant correlation between the isolated objective criteria and minority hiring or promotions. Presumably, attention would then focus upon the employer's subjective evaluation system, previously unevaluated because it was either nonquantifiable or possibly tainted by discriminatory application. In this situation, if discriminatory intent cannot be proven, the case should be over. Nevertheless, post-*Watson* plaintiffs might attempt to argue that the subjective component, by process of elimination, must be the moving force behind the statistical disparity. Perhaps this is what the Court meant by implication when it said plaintiffs raising disparate impact attacks must identify the specific employment practices causing the undesirable effects. Whether a prima facie case can be made in this manner is nonetheless one of the questions raised but left unanswered by *Watson*.<sup>196</sup>

In any event, it is difficult to reconcile the Court's insistence that plaintiffs identify the specific challenged practice causing the disparate impact with its earlier contention that defendants can shield their objective practices from the same attack by adding a subjective component. Either plaintiffs will be able to segregate a practice and show its impact, or defendants will be able to frustrate the entire process by adopting a multi-step selection procedure that necessarily shields all steps from disparate impact analysis. Although it is far from

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<sup>196</sup>Unfortunately, the Court's subsequent opinion addressing this issue, *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), shed virtually no additional light on this aspect of the prima facie case. See generally Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299 (1984) (explaining how "two-equation regression analysis" can be used to evaluate multi-step employment practices to identify the specific practices having a disparate impact on protected groups).

clear, the Court probably intended the former interpretation.<sup>197</sup> If this is so, then employers will not necessarily be able to shield their objective screening devices from disparate impact analysis by adding subjective components, and this concern collapses as support for the Court's argument that disparate impact analysis had to be extended to subjective practices to preserve the core *Griggs* test. In fact, the plurality's explanation of the respective burdens of proof in these cases, as discussed in the next subsection, points the law in the opposite direction. Needing only an additional vote to become controlling precedent, the *Watson* plurality places *Griggs* in a truly precarious position.

### **B. POST-WATSON DISPARATE IMPACT ANALYSIS**

Having determined that disparate impact theory should apply to subjective practices, the *Watson* plurality has given Title VII plaintiffs a victory they could probably do without. While the extension of the theory definitely broadens the scope of employment practices susceptible to disparate impact attack, the plurality's characterization of the respective burdens of proof threatens *Griggs*'s continued vitality. Before addressing this concern, however, one aspect of the plurality's allocation of burdens merits applause.

As noted previously, the plaintiff's burden of establishing a prima facie case of disparate impact in subjective cases includes the identification of the specific employment practice that is challenged. Usually this will not be a particularly easy task in subjective practice cases, given the difficulty in pinpointing how a fairly amorphous subjective practice, difficult to measure, causes a statistically significant disparate impact on a protected group. Nevertheless, this portion of the *Watson* opinion reflects a proper balance regarding the respective burdens of proof.

The wisdom of this result is apparent upon consideration of a pre-*Watson* Eleventh Circuit opinion in *Griffin v. Carlin*.<sup>198</sup> In that case, black employees of the postal service sued, claiming discrimination in the service's subjective promotion system. The employees specifically alleged that the promotion system denied advancement to blacks in disproportionate numbers. The promotion process included promotion advisory boards, along with records of awards and discipline.<sup>199</sup> Reject-

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<sup>197</sup>See *infra* notes 198-206 and accompanying text for a discussion of why the requirement that plaintiffs identify the specific employment practice causing the alleged disparate impact is critical to a properly evaluated disparate impact case.

<sup>198</sup>755 F.2d 1516 (11th Cir. 1985).

<sup>199</sup>*Id.* at 1522.



ing the service's arguments to the contrary, the court of appeals held that the plaintiffs need not identify the specific subjective practice alleged to be causing the disparate impact. Rather, the plaintiffs, armed only with statistics showing overall disparity in promotions, could use disparate impact analysis to challenge the results of a multi-component selection process without identifying a specific practice causing the challenged effect.<sup>200</sup>

In the wake of *Watson*, this aspect of *Griffin v. Carlin* is no longer good law. Plaintiffs will not be able to cite statistical disparities in the work force, claim that the disparity is the result of the systemic effects of multiple practices, and thereby force employers to validate each step in their hiring and promotion process. As the plurality noted in *Watson*, it is "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."<sup>201</sup> An enormous burden would fall on employers had the Court adopted a contrary position. Professional validation of selection procedures is an extremely expensive and time-consuming task. The validation of even one job requirement can be both lengthy and costly.<sup>202</sup> Requiring employers to validate every aspect of every subjective selection decision after a plaintiff has done little more than show a statistical disparity could be devastating. As the Fifth Circuit has noted, requiring a plaintiff to identify a specific practice causing the discriminatory impact is completely reasonable because it "allocate[s] fairly the parties' respective burdens of proof at trial. The aggrieved party must prove a disparate impact due to the selection procedure. The employer has the burden of proving that the selection procedure is justified by a legitimate business reason."<sup>203</sup> Permitting a plaintiff to challenge an array of practices

would allow the disparate impact of one element to require validation of other elements having no adverse effects. The burden of determining the validity of a screening procedure, weighing not only on the employer but also on the limited

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<sup>200</sup>*Id.* at 1525.

<sup>201</sup>*Watson*, 108 S. Ct. at 2787.

<sup>202</sup>See, e.g., Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18 n.6 ("adequate criterion validity studies tend to cost something between \$100,000 and \$400,000 and . . . take approximately two years"); Gwartzney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law. 633, 643 (1979) ("Employers seeking to validate the job-relatedness of a single employee characteristic such as an arithmetic test for machinists could expect to incur validation costs ranging from \$20,000 to \$100,000.");

<sup>203</sup>*Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800 (5th Cir. 1982).

resources of the district court, will not be imposed where proof of an absence of discriminatory effect attributable to the procedure shows it to be unwarranted.<sup>204</sup>

Furthermore, there is little merit to the suggestion, offered by the Eleventh Circuit in *Griffin v. Carlin*, that employers are better situated to identify the specific practice in a multi-component selection process that could have an adverse impact.<sup>205</sup> Multiple regression analysis, which evaluates the relative effects of several practices, is as available to plaintiffs as it is to employers in identifying the specific practice responsible for the disparity.<sup>206</sup>

Notwithstanding the plurality's commendable decision regarding this aspect of the plaintiff's prima facie case, the Justices did not reach similarly persuasive results when discussing the defendant's corresponding burden. Citing *Griggs*, the plurality reiterated the proposition that once disparate impact is established, a defendant employer has the burden of showing the challenged requirement has a manifest relationship to the employer's business purpose. In a rather startling departure from precedent, however, the plurality then stated that "such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant."<sup>207</sup> In their view, the ultimate burden remains with the

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<sup>204</sup>*Rivera v. City of Wichita Falls*, 665 F.2d 531, 539 (5th Cir. 1982).

<sup>205</sup>*Griffin v. Carlin*, 755 F.2d at 1526-28.

<sup>206</sup>See *supra* notes 192-96 and accompanying text. Perhaps the only exception to the requirement that plaintiffs identify the specific practice causing a disparate impact is a case like *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). In that case, the plaintiffs set forth a prima facie case of class-wide disparate treatment, prompting the defendants to offer a specific employment practice as the legitimate, nondiscriminatory reason for their hiring decisions. According to the D.C. Circuit, the employer's articulation of a practice as a defense to a treatment case establishes a prima facie impact case against the defendant. The defendants must then defend that practice under the business necessity test required by disparate impact analysis. *Id.* at 1270-72.

*Segar v. Smith* may well represent that peculiar situation where the disparate impact and disparate treatment tests are truly complementary. One leads directly into the other and, in fact, comprises part of the prima facie case of the other. Although *Watson* states that disparate impact plaintiffs must identify the specific challenged practice, the Court's opinion does not envision the situation of plaintiffs who do not discover until midway through litigation that they are in a disparate impact case. In these situations, it would seem advisable to allow the case to proceed under the disparate impact theory. The fact that the defendant employer, rather than the plaintiff, had identified the practice at issue would be immaterial given the presence of the prima facie case. By the same token, however, if the *Watson* plurality's position on burdens of proof becomes controlling, the employer's articulation of the practice as a defense in the disparate treatment case may well suffice as a defense in the impact case.

<sup>207</sup>*Watson*, 108 S. Ct. at 2790.

plaintiff at all times in these cases; the defendant meets this burden by merely producing evidence that the practices in question are based on legitimate business reasons.<sup>208</sup>

As Justice Blackmun's separate concurrence duly noted, the plurality's position here does not comport with the Court's earlier cases. Although the pertinent language in *Griggs* is somewhat unclear on the issue,<sup>209</sup> language in the Court's later cases seemingly clarified the defendant's burden in disparate impact cases. In its key post-*Griggs* disparate impact case, *Albemarle County v. Moody*, the Court plainly stated that the employer must "meet the burden of proving that its tests are 'job related.'"<sup>210</sup> Further, in *Dothard v. Rawlinson*, the Court again stated that an employer faced with a prima facie case of disparate impact must "prov[e] that the challenged requirements are job related."<sup>211</sup> As Justice Blackmun noted, again correctly, the plurality's proposed burden for the employer more closely resembled the burden of production found in disparate treatment cases.<sup>212</sup>

In support of its decision to reformulate the employer's burden, the plurality cited the Court's earlier decisions in *New York City Transit Authority v. Beazer*<sup>213</sup> and *Washington v. Davis*.<sup>214</sup> Unfortunately, neither case supports the plurality's view that defendants in disparate impact cases have only a burden of production. The first case, *Beazer*, involved a transit authority rule that barred from employment persons enrolled in methadone treatment programs. A group of methadone users brought suit, alleging that because over sixty percent of those in New York City receiving methadone maintenance in public programs were minority group members, the transit authority policy had a disparate impact on those groups and thus violated Title VII.<sup>215</sup> Noting that the plaintiffs had failed to include in their statistics data concerning 14,000 methadone users in private programs, the Court concluded that there was a strong possibility that the total percentage of minority group methadone users was no greater than the percentage

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

<sup>209</sup>"[T]he employer [has] the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis added).

<sup>210</sup>*Albemarle County v. Moody*, 422 U.S. 405, 425 (1975) (emphasis added).

<sup>211</sup>*Dothard v. Rawlinson*, 433 U.S. 321, 329 (emphasis added).

<sup>212</sup>*Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring). See *supra* notes 20-40 and accompanying text for a discussion of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny.

<sup>213</sup>440 U.S. 568 (1979).

<sup>214</sup>426 U.S. 229 (1976).

<sup>215</sup>*Beazer*, 440 U.S. at 572-77.

of minorities in the general New York City population. Accordingly, a prima facie case of disparate impact had not been established.<sup>216</sup> Then, in dicta, the Court stated that notwithstanding the lack of a prima facie case, the transit authority had shown that its policy was job related.<sup>217</sup> In a footnote, the Court posited that so long as the hiring rule was related to the "legitimate employment goals of safety and efficiency," it passed muster under Title VII.<sup>218</sup> Then, in a mixing of concepts that was perhaps a precursor to *Watson*, the Court found that there was no indication the policy was motivated by racial animus.<sup>219</sup>

At most, *Beazer* supports the proposition that in the face of weak, unproven claims of disparate impact, an employer's articulation of legitimate business interests will suffice to justify the challenged employment policy. Aside from its explanation of how to recognize a relevant labor pool, the case offers little to the development of disparate impact analysis per se, because the absence of a valid prima facie case shifts no burden, either of proof or production, to a defendant employer. Thus, the Court's analysis in *Beazer* regarding the employer's evidentiary burden, offered after it was clear there was no valid prima facie case, offers minimal support for the plurality's more far-reaching conclusions in *Watson*.

Similarly, the plurality's citation to the limited evidentiary burden allowed for the defendant-city in *Washington v. Davis* offers scant support for its reallocation of burdens in *Watson*. As discussed earlier, *Washington v. Davis* involved an equal protection attack on aptitude testing for police training and was therefore decided outside the context of Title VII. Thus, the Court was satisfied with the city's showing that the test had "some relationship" to success in police training because the city only needed to establish, in response to the constitutional attack, that it had acted without discriminatory intent. In sharp contrast to the Title VII scenario, where employer intent is irrelevant and the focus is upon the disparate effect of a facially neutral employment practice, the constitutional disparate impact test gives greater deference to governmental employment screening and is therefore far less useful to plaintiffs in attacking those practices.<sup>220</sup>

<sup>216</sup>*Id.* at 584-86.

<sup>217</sup>*Id.* at 587.

<sup>218</sup>*Id.* at 587 n.31.

<sup>219</sup>*Id.* at 587. As discussed previously *see supra* notes 56-58, 78 and accompanying text; discriminatory animus is considered irrelevant in disparate impact cases.

<sup>220</sup>In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), Justice White, writing for the majority, gave passing attention to the problems raised by the Court's previous decisions in *Albemarle County* and in *Rawlinson*. "[T]o the extent that those cases speak of an employers' 'burden of proof' with respect to a legitimate business justification defense," Justice White stated, "they should have been understood to mean an employer's production—but not persuasion—burden." *Id.* at 2126.

As with *Beazer*, the Court's opinion here sheds no real light on the precise issue of what burden an employer in a Title VII disparate impact case carries once a plaintiff has made a prima facie case. Indeed, the constitutional issues in *Washington v. Davis* make the case largely inapplicable to Title VII evidentiary issues. Considered against the relative clarity of the language and holdings in *Albemarle County* and in *Rawlinson*, the plurality's misuse of precedent in *Watson* is largely indefensible.

Aside from this clear break from precedent that would normally be controlling, other reasons going to the very heart of *Griggs* support maintaining a burden of proof with the employer. Once a plaintiff has shown that a specific, facially neutral practice has caused a disparate impact, an undeniable harm to Title VII's policy goals has been identified. As *Griggs* instructs, Title VII was enacted to provide equal employment opportunity and to remove the barriers that frustrated achievement of that goal. Employment practices, whether subjective or objective, that operate to exclude certain groups are certainly barriers Title VII was designed to eradicate. Indeed, a plaintiff making a successful prima facie case against a subjective employment practice has made at least as significant a showing as another plaintiff attacking an objective practice. Given the decidedly more difficult problems of proof, the subjective-practice plaintiff has arguably accomplished an even greater feat. Nevertheless, the *Watson* plurality would allow the practice to continue, subject only to the employer's articulation of some legitimate business justification. As a long line of disparate treatment cases has indicated, this burden is easily carried.<sup>221</sup> Unless the plaintiff can prove that some alternative practice would achieve the same business goal without causing a similarly undesirable disparate effect, the status quo will stand. This result is clearly at odds with Title VII's stated goal of eradicating such barriers to equal opportunity.<sup>222</sup>

Assuming that the plurality truly wants to extend disparate impact analysis to subjective practices, there is simply no persuasive reason for giving the employer a lighter burden in these situations. Indeed, the law should, and often does, impose a burden of proof on a party whose behavior has been shown to cause a socially undesirable effect.

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<sup>221</sup>See *supra* notes 43-44 and accompanying text.

<sup>222</sup>The *Watson* plurality opinion ripened into a majority holding in *Atonio*, where the Court saw little problem in keeping the burden of proof with plaintiffs at all times. The majority in that case asserted that this result "conforms with the usual method for allocating persuasion and production burdens in the federal courts." 109 S. Ct. at 2126. Moreover, in a mixing of methodologies that is gradually becoming the bane of this area of civil rights jurisprudence, the *Atonio* majority noted that its allocation of evidentiary burdens also "conforms to the rule in disparate treatment cases." *Id.*

An employer whose screening devices, either subjective or objective, operate to exclude statutorily protected groups certainly fits within this notion. Furthermore, the law often imposes a burden of proof on a party with superior access to the evidence.<sup>223</sup> Title VII defendants, knowing the needs of their businesses better than perhaps anyone else, particularly as those needs give rise to the challenged practices, can reasonably be expected to carry this burden or else abandon the practices.

Reading the plurality's opinion in *Watson*, one is struck by the Justices' concern that excluding subjective practices from disparate impact analysis would destroy *Griggs*. By so extending that analysis, and then by excusing the defendant employer from a burden of proof after the plaintiff has established a difficult prima facie case, the plurality is nonetheless doing precisely that. Indeed, employers now have an extra incentive to adopt subjective practices wherever they can, mindful that even if a plaintiff makes a disparate impact showing, they need only carry an easy burden of production to escape liability.

Nevertheless, part of the plurality's rationale for its reallocation of burdens of proof stemmed from its fear that employers, faced with an onerous burden of validating subjective practices, would resort to surreptitious quotas in order to ensure that no plaintiff could make a prima facie case. Although this is conceivable, the Court's reasoning does not provide conclusive justification for its redefinition of disparate impact analysis.

First, the plurality gives little weight to any possibility of validating subjective practices. Indeed, they seem to assume it cannot be done. This may be correct, but such a view is particularly puzzling in light of the plurality's counter conclusion that a plaintiff can identify a specific subjective practice as having a disparate impact. Although precisely how plaintiffs will do this is an open question, if a plaintiff can make such a showing (presumably with statistics), why could an employer not mount a corresponding defense (presumably using statistics from a validation study)? While presenting daunting problems of proof for both sides, the relative complications are not so obviously weighted to one side or the other as to justify a wholesale reallocation of the burdens of proof. In fact, there is some authority for the proposition that subjective practices can be validated.<sup>224</sup>

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<sup>223</sup>See generally C. McCormick, *A Handbook on the Law of Evidence* § 337 (E. Cleary 3d ed. 1984).

<sup>224</sup>In the employment context, validation refers to establishing a logical relationship between a particular selection device and job performance. This is normally done through a validation study conducted by an industrial psychologist. Doverspike, Bar-

Even if the process would be time-consuming and laborious, and would lend itself to highly complex litigation, the lack of an easy validation technique is simply no reason for excusing an employer from proving that a selection device having a disparate impact is either job related or justified by business necessity. Indeed, it is rather troubling that the Court dismissed prospects of an employer validating a particular practice while still assuming that a plaintiff could identify the same practice and show that it causes a statistically significant disparate impact. Such an imbalance of burdens of proof is surely at odds with the equal opportunity goals of Title VII.

Nevertheless, even if validation of subjective practices is possible, many employers, perhaps because of prohibitive costs, would choose not to validate their subjective practices. Given the prospect of disparate impact liability, however, they would still need to ensure that

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rett, & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35, 36 (1985). When a selection procedure is determined to be validated, industrial psychologists understand that the predictions inferred from the result have a high rate of accuracy. For validation to be meaningful, it must predict performance of a specific task or other relevant job behavior. L. Cronbach, *Essentials of Psychological Testing* 125 (4th ed. 1984). The Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 to 1607.18 (1978), recognize three ways of validating a selection device. Criterion-related validity, possibly the most used method, involves a determination that a test result is systematically related to some measure of job performance. Content validation involves a determination that the assessment device accurately reflects a representative sample of important aspects of job performance. The third type, construct validation, involves a determination that the assessment instrument accurately measures the degree to which certain characteristics have been determined to be important for successful job performance. *Id.* § 1607.5.

In concluding that employers would experience too much difficulty in validating their subjective practices, the *Watson* plurality may have given too much emphasis to traditional criterion-related validity (used in cases where it is relatively simple to quantify the screening device and job performance) and overlooked the two alternative methods of validation. See Doverspike, Barrett, & Alexander, *supra*, at 37 (noting tendency of disparate impact critics to give undue weight to criterion-related validity at expense of other two methods).

Using the latter two methods, particularly content validation, showing the job relatedness of subjective practices might become somewhat more manageable. Both validation methods require the employer to first perform a job analysis that clearly identifies the most important components of successful job performance. Such data could be obtained from supervisors, personnel specialists, job experts, or job descriptions. Thompson & Thompson, *Court Standards for Job Analysis in Test Validation*, 35 Personnel Psychology 865 (1982). From there, a close link between the subjective assessment device and the identified job content is established. See American Psychology Association, *Standards for Educational and Psychological Testing* 61 (1985). For example, in the interview context, interview questions and the data elicited would have to be carefully linked to the job analysis and the performance characteristics required. Some studies indicate that such interview judgments can be valid indicators of later job performance. See Avery & Campion, *The Employment Interview: A Summary and Review of Recent Research*, 35 Personnel Psychology 281 (1982).

no plaintiff, citing statistical disparities, can establish a prima facie case of disparate impact. The only way to do this, the plurality argued, is to adopt surreptitious quotas as a low risk alternative to an expensive validation system.

The plurality's fear in this regard, though understandable, is probably overstated. In the first place, it is questionable whether employers in a competitive business environment can ever systematically ignore quality when making selection decisions. There is simply too much truth to the common sense notion that an employer's business fortunes are directly tied to the quality of the people he hires. Moreover, *Griggs* has never stood for the proposition that an employer is required to hire unqualified people.<sup>225</sup> Nevertheless, the plurality is at least partially correct insofar as the preferential hiring of protected group members may skew the employer's hiring calculus when he strikes the difficult balance between hiring the best qualified people while still minimizing his exposure to Title VII liability.

While this dilemma certainly exists, a key issue the plurality never discusses is the impact of *Connecticut v. Teal*.<sup>226</sup> As discussed earlier, the employer in that case sought to defeat a prima facie showing of disparate impact by specifically promoting black candidates from an eligibility list at a much higher rate than white candidates on the list. Even though the testing requirement needed to get on the list was shown to have a disparate impact on blacks, the employer argued that his "bottom line" numbers provided a complete defense against Title VII liability. The Court disagreed, holding that so long as the test had a disparate impact on blacks and kept a disproportionate number from receiving what would eventually amount to preferential treatment, the actual promotion numbers, although indicating anything but discrimination, were no defense.<sup>227</sup>

This case could have significant impact in the subjective practice context. For example, an employer using interviews as a component of his promotion process may still face the possibility that minority group plaintiffs will be able to show through multivariate testing that the interviews have an exclusionary effect on their group, much as the objective screening test did in *Teal*. The fact that some of their group survive the "interview cut" and then are hired or promoted in disproportionate numbers would not, under *Teal*, excuse lack of employer

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<sup>225</sup>*Griggs*, 401 U.S. at 430-31, 436.

<sup>226</sup>457 U.S. 440 (1982).

<sup>227</sup>*Id.* at 445-51.



validation of that subjective component. In short, as in the objective testing case, "bottom line" numbers may not always be a safe haven.<sup>228</sup>

Furthermore, the plurality's fear of employers resorting to confidential quotas becomes even more unclear in light of the current law of affirmative action. As the plurality noted in *Watson*, there is an anti-quota provision in Title VII, which provides that

nothing contained in this subchapter shall be interpreted to require . . . preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.<sup>229</sup>

Thus, Title VII expressly provides that it not be read to require preferential treatment or numerical quotas. Moreover, granting such preferences at the expense of white candidates can lead to suits alleging reverse discrimination.<sup>230</sup> Nevertheless, in a rather novel interpretation of Title VII, the Court held in *United Steelworkers v. Weber*<sup>231</sup> that the statute permits preferences which are "designed to break down old patterns of racial segregation and hierarchy" and which do not "unnecessarily trammel the interests of white employees."<sup>232</sup> The affirmative action plan at issue, a system of reserving half of all apprenticeship openings for blacks, met these requirements. The parties designed the plan to increase the low proportion of blacks among skilled workers and enacted it in light of pervasive discrimination against blacks in admission to skilled jobs (although there was no evidence of actual

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<sup>228</sup>It is probably worth noting that the dissenters in *Connecticut v. Teal*, a 5-4 decision, included Chief Justice Rehnquist and Justice O'Connor, half of the plurality in *Watson*. Their dissent in *Teal* emphasized that disparate impact should focus only on the class-wide impact of a "total selection process," discounting the focus on specific practices. To the dissenters, ignoring "bottom line" numbers "is to ignore reality." 458 U.S. at 457-58 (Powell, J., dissenting). At least the latter portion of this analysis seems to have carried forward into the plurality's discussion of quotas in *Watson* and further indicates a failure to adequately address the implications of the majority opinion in *Teal*.

<sup>229</sup>42 U.S.C. § 2000e-2(j) (1982).

<sup>230</sup>B. Schlei & P. Grossman, *supra* note 15, at 775-870 (and cases cited therein).

<sup>231</sup>443 U.S. 193 (1979).

<sup>232</sup>*Id.* at 208.

discrimination by the employer or the union who made the affirmative action agreement).<sup>233</sup> The Court also concluded that the plan did not unduly burden white employees because: 1) it would terminate when the proportion of blacks in skilled positions approximated the proportion of blacks in the labor force; 2) white employees remained eligible for half the skilled positions; and 3) no white employees were to be discharged or replaced by black employees.<sup>234</sup>

Although *Weber* has been modified and reapplied in different situations,<sup>235</sup> one key point has carried forward since the case was decided. That point, unmentioned by the plurality in *Watson*, is that absent an employer's adoption of an affirmative action plan consistent with the standards set forth in *Weber* and its progeny, the use of quotas will open the door to reverse discrimination suits. This possibility can be plainly seen in cases such as *Lehman v. Yellow Freight System*.<sup>236</sup> There, the employer selected a black employee over a white employee for a driving position. The white employee sued, alleging that the decision was made pursuant to a racial quota and thus violated his rights under Title VII. The company's selecting official testified as to the existence of "attainment levels" but denied that the selection at issue was pursuant to a quota, adding that he merely counted the black employee's race as "a factor in his favor."<sup>237</sup> In finding this a violation of Title VII, the Seventh Circuit cited *Weber* and noted the Supreme Court's emphasis on the presence of a valid affirmative action plan. Given the absence of such a plan in *Lehman*, or of any of the criteria or factors associated with a valid plan, the employer's consideration of race as a factor, even when falling short of a rigid quota, was a violation of the white employee's rights under Title VII.<sup>238</sup>

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<sup>233</sup>*Id.* at 198 n.1, 208-09 nn.8,9.

<sup>234</sup>*Id.* at 208-09.

<sup>235</sup>See Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 Mich. L. Rev. 524, 527-37 (1987); Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. Rev. 467, 472-83 (1987); and cases cited therein.

<sup>236</sup>651 F.2d 520 (7th Cir. 1981).

<sup>237</sup>*Id.* at 522.

<sup>238</sup>*Id.* at 525-28. The use of affirmative action plans, confidential or otherwise, as a way to defeat disparate impact claims was not a new idea in *Watson*. Many commentators had argued that there was a straight line between *Griggs* and *Watson*. See, e.g., Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 457-63 (1985). Indeed, for some time there was concern that a valid affirmative action plan could not exist unless the employment circumstances indicated the presence of disparate impact. See *Wygant v. Jackson Board of Education*, 476 U.S. 267, 289-93 (1986) (O'Connor, J., concurring). The detrimental effect of such a view of the law was that it created a disincentive for employers to establish the factual predicates for a valid affirmative action plan because, by doing so, they would also be

Thus, the employer's resort to quotas as a way to defeat disparate impact claims is not without its own risks. The "bottom line" hiring numbers do not always provide a defense, as seen in *Connecticut v. Teal*, and a quota system itself, if done without a valid affirmative action plan, creates an opening for reverse discrimination suits. Although the plurality presumably saw the latter possibility, noting that these quotas would have to be surreptitious, it is highly debatable how long such a system could be kept secret in a business of any size. Given these countervailing risks, employer choice of quotas over validation might not be as inevitable as the plurality suggests.<sup>239</sup>

## VI. CONCLUSION

The great irony of *Watson v. Fort Worth National Bank* is that by purporting to preserve *Griggs v. Duke Power*, the Supreme Court came only one vote short of achieving the opposite result. Arguing from dubious underpinnings that disparate impact analysis should apply to subjective practices, the Court presented an inchoate understanding of the true meaning of a disparate impact case and thus, at least with respect to the plurality, could not carry through with the full implications of their holding when analyzing burdens of proof. It would have been far better, for both employers and Title VII plaintiffs, had the Court limited analysis of subjective practices to disparate treatment, a methodology far more attuned to the potential abuses those practices present. While this article has argued against the extension of disparate impact theory to subjective practices, the legal and policy ramifications of the contrary result in *Watson* pale next to the effect the case is likely to have on *Griggs*. Arguably the most important judicial contribution to Title VII jurisprudence, *Griggs* has served the salutary purpose of preventing employers from erecting barriers that keep entire classes of people from getting into an organization and showing

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constructing a case of disparate impact against themselves. *Id.* In any case, the Court resolved this issue in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), holding that a "manifest imbalance" in an employer's work force was enough to sustain an affirmative action plan. The Court viewed this standard as less than the degree of statistical disparity associated with a *prima facie* showing of disparate impact. *Id.* at 632-33.

<sup>239</sup>The problem with quotas becomes even more severe if the case involves a public employer. In those situations, not even a *Weber*-sanctioned affirmative action plan would save quotas designed to defeat claims of disparate impact. This is because the public sector employer, unlike its private sector counterpart, must comply with both Title VII and constitutional standards in enacting affirmative action plans. Particularly in light of the Supreme Court's recent decision in *City of Richmond v. J.A. Croson Company*, 109 S. Ct. 706, 723-24 (1989), it is becoming ever more clear that there must be some showing of past intentional discrimination by the public entity (or its agents) before a quota system can pass constitutional muster.

they can do the job. The jobs at stake, often involving basic skills that are easily measured, provide many people with their initial entry into the work force. Now, with *Watson*, protected classes may attack the disparate effect of subjective practices at this level. But such a gain is rather negligible given the longstanding judicial animosity toward subjective selection systems at lower employment levels. Regardless, along with their supposed gain, these plaintiffs are now facing the prospect of losing the critical leverage of requiring employer validation of employment practices shown to have a disparate impact. If the law develops along these lines with respect to both subjective and objective employment practices, and the language in *Watson's* plurality opinion gives every indication it will, the result will be truly regrettable. Stretched beyond its practical and theoretical groundings in objective practices, the *Griggs* test has buckled under the stress. As a consequence, traditional disparate impact analysis appears to be headed for its demise.<sup>240</sup>

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<sup>240</sup>Some have predicted that the Court's recent decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), where Justice Kennedy provided a fifth vote for the views expressed by the *Watson* plurality, marks the demise of *Griggs*. See, e.g., *How Far Will the Court Go?*, *The National Law Journal*, June 26, 1989, at 1, col. 1; *Is the High Court Hiding Reversals on Rights?*, *The National Law Journal*, June 19, 1989, at 5, col. 1. Although not explicitly overruling *Griggs*, the *Atonio* majority relied upon the rationale set forth in *Watson's* plurality opinion, a rationale which, at least in part, purported to save *Griggs* by extending disparate impact theory to subjective practices. The circular irony reflected in this line of cases is apt to lead only to further litigation of these issues.

# LIABILITY OF DEFENSE CONTRACTORS FOR HAZARDOUS WASTE CLEANUP COSTS

by Captain Margaret O. Steinbeck\*

*I am directing the Attorney General and the Administrator of the Environmental Protection Agency to use every tool at their disposal to speed and toughen the enforcement of our laws against toxic waste dumpers. I want faster cleanups and tougher enforcement of penalties against polluters.* [Address by President Bush to joint session of Congress, February 9, 1989.<sup>1</sup>]

## I. INTRODUCTION

The 1980 Comprehensive Environmental Response, Compensation and Liability Act<sup>2</sup> (CERCLA or Superfund) was enacted to address the threat posed by the 30-50,000 improperly managed hazardous waste sites in this country and to provide emergency response to hazardous waste spills.<sup>3</sup> The Act requires responsible parties to clean up hazardous waste sites and other dangerous chemical releases or to reimburse the government for the cost of cleanup.<sup>4</sup> Hazardous waste cleanup liability under CERCLA extends to past and present owners, transporters, and generators of hazardous waste.<sup>5</sup> CERCLA imposes strict, joint and several liability on these Potentially Responsible Parties (PRP's).<sup>6</sup>

The Superfund Amendments and Reauthorization Act (SARA) provides that CERCLA applies to facilities owned or operated by a de-

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<sup>1</sup>*Text of President Bush's Address to Congress*, Wash. Post, Feb. 10, 1989, at A20, col. 3.

<sup>2</sup>Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9657 (1982 & Supp. IV 1986)).

<sup>3</sup>For an excellent discussion of the purpose and legislative history of the Act, see *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-08 (S.D. Ohio 1983).

<sup>4</sup>42 U.S.C. §§ 9604, 9607, 9611 (1982 & Supp. IV 1986).

<sup>5</sup>*Id.* at § 9607(a).

<sup>6</sup>See, e.g., *United States v. Conservation Chem. Co.*, 589 F. Supp. 59, 62-63 (W.D. Mo. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805, 810 (S.D. Ohio 1983).

partment, agency, or instrumentality of the United States.<sup>7</sup> The Department of Defense (DOD) is therefore a PRP for cleanup costs at DOD facilities, as either an owner, transporter, or generator of hazardous waste.<sup>8</sup> Currently, DOD has identified more than 5,000 sites needing hazardous waste cleanup,<sup>9</sup> and DOD plans to spend about \$500 million on hazardous waste cleanup in the next fiscal year.<sup>10</sup>

In many situations, DOD contractors share DOD's CERCLA liability for hazardous waste cleanup costs at DOD facilities. While DOD may be liable as an owner, contractors often are liable as operators, transporters, or generators of hazardous waste.<sup>11</sup> When CERCLA does not impose liability on DOD (for example, for hazardous waste cleanup at contractor-owned, contractor-operated facilities), DOD may share liability for hazardous waste cleanup costs with the contractor under the terms of the contract.

This article examines the relationship between DOD and DOD contractors concerning hazardous waste cleanup costs<sup>12</sup> where CERCLA imposes some contractor liability. The article first discusses DOD and contractor responsibility for hazardous waste cleanup costs under the provisions of CERCLA. Applicable federal and DOD contracting regulations will then be examined to determine how these contract provisions modify the responsibility of DOD and DOD contractors to pay

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<sup>7</sup>Pub. L. No. 99-499, § 120, 100 Stat. 1614 (codified at 42 U.S.C. § 9620 (Supp. IV 1986)). Congress has indicated special concern about cleanup at DOD facilities and activities. Section 211 of SARA established the "Defense Environmental Restoration Program" to identify and cleanup contamination from hazardous waste at DOD facilities. 10 U.S.C. §§ 2701-2707 & 2510 (1986). The legislation created an "environmental restoration transfer account" to pay for the environmental restoration mandated by the Defense Environmental Restoration Program or any other provision of law. DOD must report annually to Congress concerning progress made in implementation of the program.

<sup>8</sup>Although there is statutory authority for the President to exempt a particular DOD facility from CERCLA requirements, such authority is limited. The exemption must be necessary to protect national security interests of the United States at the DOD site or facility. Further, the exemption may not be granted due to lack of appropriation unless the President has specifically requested such appropriation as part of the budgetary process and Congress has failed to make available the requested appropriation. Congress must be notified within 30 days of any such exemption. Exemptions must be for a specified period, not to exceed one year. 42 U.S.C. § 9620(j) (Supp. IV 1986).

<sup>9</sup>*Annual Report to Congress for Fiscal Year 1987* on activities of the Defense Environmental Restoration Program. 19 Env't Rep. 44 (BNA) (May 13, 1986).

<sup>10</sup>Sachell, *Uncle Sam's Toxic Folly*, U.S. News & World Rep., March 27, 1989, at 20, 22.

<sup>11</sup>This is especially true at the many government-owned, contractor-operated (GOCO) facilities. See *infra* part III(A).

<sup>12</sup>The term "cleanup costs" as used in this article refers to remedial actions to cleanup hazardous waste under 42 U.S.C. § 9607(a)(4)(A) (1982) and response costs under 42 U.S.C. § 9607(a)(4)(B) (1982).

for hazardous waste cleanup. First, federal procurement regulations concerning allowable costs in cost-reimbursement contracts and increased prices in fixed-price contracts will be discussed. Next, the discussion will explore the possibility of obtaining liability insurance to cover cleanup costs. Finally, the availability and effect of government indemnification of contractors for hazardous waste cleanup costs will be discussed. In conclusion, this article suggests a structure for future government contracts to fairly and efficiently allocate the costs of hazardous waste cleanup between DOD and DOD contractors to ensure the availability of essential goods and services to DOD.

## II. CERCLA LIABILITY FOR HAZARDOUS WASTE CLEANUP COSTS

### A. POTENTIALLY RESPONSIBLE PARTIES

CERCLA section 107(a) provides that four classes of persons may be liable for costs incurred in response to the release and cleanup of hazardous substances ("response costs") and damages to natural resources: 1) the owner and operator of a vessel or facility (the current "owner"); 2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of (past "owners"); 3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or for transport for disposal or treatment of hazardous substances ("generators"); and 4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities ("transporters").<sup>13</sup>

Current owners are liable for hazardous waste cleanup costs even if they did not own the site at the time of disposal or cause the release of the hazardous material.<sup>14</sup> Past owners are liable if the hazardous waste was disposed<sup>15</sup> of at the site at the time of their ownership.<sup>16</sup>

<sup>13</sup>42 U.S.C. § 9607(a) (1982).

<sup>14</sup>See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (present owner found liable for costs to cleanup hazardous material disposed on his property, even though he had not participated in the generation or transportation of the waste and had not caused the release).

<sup>15</sup>Disposal is "the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 9601(29) (1982) (incorporating 42 U.S.C. § 6903(3) (1982)). "[S]ignificantly [this definition] includes within its purview leaking, which ordinarily occurs not through affirmative action, but as a result of inaction or negligent past actions." *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

<sup>16</sup>E.g., *Emhart Indus., Inc. v. Duracell Int'l Inc.*, 665 F. Supp. 549, 574 (M.D. Tenn. 1987).

Under section 107(a)(1) of CERCLA, DOD is potentially liable as an "owner" for hazardous waste cleanup costs at any government owned facility.<sup>17</sup> This includes facilities where the government operates all of the activity (government owned/government operated, or GOGO), facilities operated at least in part by private contractors (government owned/contractor operated, or GOCO), and facilities owned by the government but leased to private parties.<sup>18</sup> At GOCO facilities, the contractor may also be liable under section 107(a)(1) as an "operator."

Contractors and other private parties operating on government owned facilities are also potentially liable for hazardous waste cleanup costs under CERCLA section 107(a)(3). This section imposes liability on anyone who arranges for disposal of hazardous waste. To be liable under this section, there is no requirement that the person own or possess the hazardous waste or the facility from which it is disposed.<sup>19</sup> Further, section 107(a)(3) "generators" are liable for hazardous waste cleanup costs even if they did not generate the hazardous substance.<sup>20</sup> The critical question is whether the PRP made arrangements for disposal of the hazardous waste.<sup>21</sup>

Section 107(a)(3) liability includes past generators of hazardous waste who merely arranged for disposal or transportation of hazardous material to a facility from which a present release is threatened or occurring.<sup>22</sup> A person "cannot escape liability by 'contracting away' [his] responsibility or by alleging that the incident was caused by the act or omission of a third party."<sup>23</sup> In other words, it is not necessary that the generator have anything to do with the

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<sup>17</sup>DOD is also potentially liable as a "generator" or "transporter" where government activities result in hazardous waste generation, or where the government is involved in transporting or disposing of hazardous waste.

<sup>18</sup>See Environmental Protection Agency, Federal Facilities Compliance Strategy III-7 (1988), for a complete list of terms and definitions of facilities with federal involvement.

<sup>19</sup>*United States v. N.E. Pharmaceutical and Chem. Co., Inc.*, 579 F. Supp. 823, 847 (W.D. Mo. 1984). *But see United States v. Ward*, 618 F. Supp. 884, 893 (D.N.C. 1985), in order to establish liability under section 107(a)(3), the government must prove the defendant owned or possessed hazardous substances.

<sup>20</sup>*United States v. Bliss*, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987).

<sup>21</sup>*United States v. A & F Materials Co., Inc.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984), *cited with approval in Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1260 (D.N.J. 1987); and *Allied Towing Corp. v. Great E. Petroleum Corp.*, 642 F. Supp. 1339, 1350 (E.D. Va. 1986).

<sup>22</sup>*Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428-29 (S.D. Ohio 1984).

<sup>23</sup>S. Rep. No. 96-848, 96th Cong., 2d Sess. 31 (1980), *quoted in New York v. General Electric Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1985).



release that necessitates clean up.<sup>24</sup> If the person arranged for disposal, he or she is a PRP.

Contractors and other parties operating on government owned facilities will be liable for CERCLA cleanup costs if they made arrangements to dispose of the hazardous waste that needs to be cleaned up. These parties will not be able to escape CERCLA liability by arguing that they did not own the waste or cause the release. They may also be liable under CERCLA section 107(a)(4) if they transport hazardous waste for disposal.

At contractor owned, contractor operated (COCO) facilities, the contractor is potentially liable for CERCLA cleanup costs as either an "owner", "generator" or "transporter." This liability is not shared with the government under CERCLA, unless the government arranges for disposal of the hazardous waste.<sup>25</sup>

## B. RESPONSE COST LIABILITY

Under the provisions of CERCLA, DOD and DOD contractors will often be PRP's for costs associated with the clean up of hazardous waste. CERCLA section 107(a) provides that PRP's are liable for "a release, or threatened release [of a hazardous substance] which causes the occurrence of response costs."<sup>26</sup> "Release" is defined in section 101(22) as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."<sup>27</sup> A "release" includes, for example, leaking tanks and pipelines, seepage from earlier spills, and leaking drums of hazardous materials.<sup>28</sup> A "threatened release" may include corroding or deteriorating tanks, the owner's lack of expertise in handling hazardous waste, and even the failure to license the facility.<sup>29</sup>

When there is a release of a hazardous substance,<sup>30</sup> PRP's are li-

<sup>24</sup>See, e.g., *New York v. General Elec. Co.*, 592 F. Supp. at 297. In this case, the defendant sold drums of used transformer oil containing hazardous substances to a drag strip. The defendant argued that he had not arranged for disposal of the waste because he sold the oil to be used as the drag strip owner saw fit and did not enter into an agreement to have the oil deposited or otherwise placed on the drag strip. Rejecting this argument, the court held the plaintiff was a PRP under section 107(a)(3).

<sup>25</sup>Even if CERCLA imposes no liability on the government, the government may share contractor liability under the terms of the contract. See *infra* part III.

<sup>26</sup>42 U.S.C. § 9607(a) (1982).

<sup>27</sup>*Id.* § 9601(22).

<sup>28</sup>*New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

<sup>29</sup>*Id.* at 1045.

<sup>30</sup>CERCLA defines "hazardous substance" by reference to other environmental statutes. 42 U.S.C. § 101(14) (1982). Generally, the term refers to wastes that may cause an increase in mortality or threaten human health or the environment when improperly treated, stored, transported, or disposed. See, e.g., 42 U.S.C. § 6903(5) (1982).

able for: 1) all costs of removal or remedial action incurred by the United States Government, a State, or an Indian tribe not inconsistent with the national contingency plan;<sup>31</sup> 2) any other necessary costs of response incurred by any other person consistent with the national contingency plan; 3) damages for injury to, destruction of, or loss of natural resources; and 4) the costs of any health assessment or health effects study carried out pursuant to CERCLA.<sup>32</sup>

Response costs<sup>33</sup> are incurred in two types of cleanup actions: 1) remedial action,<sup>34</sup> or long term or permanent containment or disposal programs; and 2) removal actions,<sup>35</sup> or short term cleanup arrangements. For purposes of this article, the term "cleanup costs" refers to liabilities generated by both remedial and removal actions.<sup>36</sup>

The United States Environmental Protection Agency (EPA) may seek recovery of response costs from DOD or DOD contractors for hazardous waste cleanup at federal facilities. EPA's enforcement process for executive branch agencies is purely administrative, however, and does not provide for civil judicial action or assessment of civil penalties.<sup>37</sup> Significantly, this limitation does not extend to government contractors. EPA has stated that it "will pursue the full range of its enforcement authorities against private operators of Federal facilities (e.g., GOCO's) where appropriate and also take action against Federal agencies at GOCO facilities in certain circumstances."<sup>38</sup>

States and private parties may also seek recovery of hazardous waste cleanup costs from DOD or DOD contractors. Under CERCLA section 107, states may seek to recover removal or remedial action costs "not inconsistent with the national contingency plan."<sup>39</sup> Private

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<sup>31</sup>The national contingency plan is a plan published by the President pursuant to CERCLA section 105 that establishes procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants. 42 U.S.C. § 9605 (1982 & Supp. IV 1986).

<sup>32</sup>42 U.S.C. § 9607(a)(4) (1982 & Supp. IV 1986).

<sup>33</sup>*Id.* § 9601(25).

<sup>34</sup>*Id.* § 9601(24).

<sup>35</sup>*Id.* § 9601(23).

<sup>36</sup>See *supra* note 12. This article does not address the issue of government or contractor liability for damages to natural resources or health assessment costs. This article also does not explore government or contractor tort liability for damages associated with hazardous waste cleanup. CERCLA does not provide for tort liability, but tort liability often exists under state law.

<sup>37</sup>Environmental Protection Agency, Federal Facilities Compliance Strategy xii, VI-1, VI-3 (1988). "This respects the position of the Department of Justice that civil suits within the federal establishment lack the constitutionally required justiciable controversy." *Id.* at VI-3.

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

<sup>39</sup>42 U.S.C. § 9607(a)(4)(A) (1982 & Supp. IV 1986).

parties may seek to recover costs which are "necessary" and "consistent with the national contingency plan."<sup>40</sup> State and private party recovery actions may include civil suits against both DOD<sup>41</sup> and DOD contractors.

### C. STRICT LIABILITY

CERCLA section 101(32) provides that the standard of liability under the Act will be the standard of liability imposed by section 311 of the Clean Water Act of 1977.<sup>42</sup> Based on the legislative history of CERCLA and the fact that section 311 has consistently been construed as a strict liability provision, courts have held that responsible parties are strictly liable under CERCLA.<sup>43</sup> In other words, claims that defendants exercised due care or were not negligent cannot be used to avoid liability under the Act.<sup>44</sup>

Although the standard of liability is strict liability, CERCLA does not impose absolute liability.<sup>45</sup> There are four enumerated defenses to liability under CERCLA. To avoid liability, a PRP must show that the release and the damages were caused by: 1) an act of God; 2) an act of war; 3) an act or omission of a third party, other than an employee or agent of the defendant, or one who has a contractual relationship with the defendant, provided the defendant exercised due care with respect to the hazardous substance concerned and that he or she took precautions against the foreseeable acts or omissions of the third party and the resulting consequences; or 4) a combination of the above.<sup>46</sup>

These defenses will rarely be available to either DOD or DOD contractors to avoid liability for hazardous waste cleanup costs. Because DOD and DOD contractors generate hazardous waste in the course of routine operations, the release and resulting damages will rarely be

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<sup>40</sup>42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. IV 1986). See *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1106 (N.D. Ill. 1988).

<sup>41</sup>CERCLA section 120 provides that "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." 42 U.S.C. § 9620(a)(1) (Supp. IV 1986). See *supra* notes 7 & 8 and accompanying text.

<sup>42</sup>42 U.S.C. § 9601(32) (1982), referring to the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (1981).

<sup>43</sup>*E.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). See also *United States v. N.E. Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984).

<sup>44</sup>*United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985).

<sup>45</sup>*New York v. Shore Realty Corp.*, 759 F.2d at 1042.

<sup>46</sup>42 U.S.C. § 9607(b) (1982).

caused by an act of God or an act of war. Further, the release and resulting damages will usually be the result of some act or omission of DOD's employee or agent, or the contractor's employee, agent or subcontractor. Therefore, neither DOD nor the contractor will be able to claim the third party defense. DOD and DOD contractors will likely be strictly liable under CERCLA for hazardous waste cleanup costs whenever they can be characterized as an owner, generator, or transporter.<sup>47</sup>

### D. JOINT AND SEVERAL LIABILITY

CERCLA does not delineate any degree of liability in cases involving more than one PRP. After examining the legislative history and policies of CERCLA, the first courts to consider the issue determined that joint and several liability should be imposed in appropriate multiparty cases.<sup>48</sup>

In developing a uniform federal common law in this area, the courts adopted the rule of the Restatement (Second) of Torts, that "when two or more persons acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he caused."<sup>49</sup> The burden of proof as to the apportionment in such cases is upon the defendant who seeks to limit his liability.<sup>50</sup> If the harm is indivisible, or there is no reasonable basis for division, each party is subject to liability for the entire harm.<sup>51</sup>

The issue, then, is whether the harm is "divisible" or "indivisible."<sup>52</sup> In many CERCLA actions there will be numerous hazardous waste generators or transporters who have disposed of wastes at a particular site. A rule of joint and several liability obviously assists in the recovery of cleanup costs from multiparty defendants in these cases, where the harm will likely be "indivisible."

Joint and several liability is permitted, but it may not be required in every case where harm is indivisible.<sup>53</sup> The legislative history of

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<sup>47</sup>See *supra* note 13 and accompanying text.

<sup>48</sup>E.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-10 (S.D. Ohio 1983); *United States v. Wade*, 577 F. Supp. 1326, 1337-39 (D. Pa. 1983).

<sup>49</sup>*United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984).

<sup>50</sup>*Id.* at 1255.

<sup>51</sup>*Id.* at 1255-56.

<sup>52</sup>*Chem-Dyne Corp.*, 572 F. Supp. at 811.

<sup>53</sup>*United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1083 n.9 (D. Colo. 1985). *Accord A & F Materials*, 578 F. Supp. at 1256-57.

the Act indicates concern that a joint and several liability standard could unfairly "impose financial responsibility for massive costs and damages . . . on persons who contributed only minimally (if at all) to a release or injury."<sup>54</sup> Recognizing this concern, courts may still apportion damages on a case by case basis, even if the defendant cannot prove his or her contribution to the injury.<sup>55</sup> To determine apportionment, courts focus on the following criteria:

- (i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
- (ii) the amount of the hazardous waste involved;
- (iii) the degree of toxicity of the hazardous waste involved;
- (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.<sup>56</sup>

### ***E. THE RIGHT OF CONTRIBUTION***

A person held jointly and severally liable under CERCLA may seek contribution from other potentially responsible parties. CERCLA section 113(f) was added by SARA to create an express right of contribution between liable PRP's.<sup>57</sup> Even though courts had already recognized a common law right of contribution under CERCLA,<sup>58</sup> the new statutory provision does validate this practice. It also gives wide discretion in contribution issues by directing that response costs may be allocated according to such equitable factors as the court determines are appropriate.<sup>59</sup>

Persons who have resolved their liability to the United States or a State in an administratively or judicially approved settlement are not liable for claims for contribution regarding matters addressed in the

<sup>54</sup>126 Cong. Rec. S15004 (Nov. 24, 1980) (statement of Sen. Helms), quoted in *Chem-Dyne Corp.*, 572 F. Supp. at 806.

<sup>55</sup>*A & F Materials*, 578 F. Supp. at 1256, cited with approval in *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 677 (D. Idaho 1986).

<sup>56</sup>126 Cong. Rec. H9461 (1980), cited in *A & F Materials*, 578 F. Supp. at 1256.

<sup>57</sup>42 U.S.C. § 9613(f) (Supp. IV 1986).

<sup>58</sup>*E.g.*, *United States v. New Castle County*, 642 F. Supp. 1258, 1265 (D. Del. 1986).

<sup>59</sup>42 U.S.C. § 9613(f)(1) (Supp. IV 1986).

settlement.<sup>60</sup> The settling party may, however, seek contribution from responsible parties who are not party to the settlement.<sup>61</sup>

### III. CERCLA LIABILITY: DOD v. DEFENSE CONTRACTORS

CERCLA specifically provides that no indemnification, hold harmless, or similar agreement shall be effective to negate liability in CERCLA cost recovery actions.<sup>62</sup> Agreements to insure, hold harmless, or indemnify another party for CERCLA liability are not prohibited, however.<sup>63</sup> In other words, "CERCLA expressly reserves the right of private parties to contractually transfer to or release another from the financial responsibility arising out of CERCLA liability."<sup>64</sup> Of course, PRP's remain accountable for any cleanup costs incurred by the government, regardless of conveyance or transfer of liability between private parties.<sup>65</sup> PRP's who have paid cleanup costs, in spite of having contractually transferred CERCLA liability to another party, will have a contractual claim for reimbursement from the other party. They also may have a claim for reimbursement based on the CERCLA contribution provisions.<sup>66</sup>

Because CERCLA allows parties to enter into agreements where they are indemnified or held harmless by another party, either DOD or the contractor may agree to assume the other party's hazardous waste cleanup costs. This may occur regardless of whether the party assuming liability has any liability under the provisions of CERCLA. In other words, DOD could agree to pay hazardous waste cleanup costs at a COCO facility, where it is unlikely DOD would have any liability under the provisions of CERCLA. DOD could also agree to pay all hazardous waste cleanup costs at a GOCO facility, even though the contractor would likely share liability under the provisions of CERCLA.

The possibility of allocating the amount of contribution between parties under the terms of the contract raises the question whether

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<sup>60</sup>*Id.* § 9613(f)(2).

<sup>61</sup>*Id.* § 9613(f)(3).

<sup>62</sup>42 U.S.C. § 9607(e) (1982).

<sup>63</sup>*Id.* § 9607(e).

<sup>64</sup>*Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J. 1988).

<sup>65</sup>*See Marden Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986) ("Contractual arrangements apportioning CERCLA liability between private 'responsible parties' are essentially tangential to the enforcement of CERCLA's liability provisions. Such agreements cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability.")

<sup>66</sup>*See supra* part II(E).

DOD should agree to pay hazardous waste cleanup costs incurred by DOD contractors, which is the focus of this article. If so, how can this best be accomplished under the terms of the contract? The answers to these questions may depend on the type of contract (cost-reimbursement or fixed-price) and whether CERCLA imposes liability on DOD. Accordingly, these issues will be discussed below in the context of four scenarios: 1) a cost-reimbursement contract in a factual setting where DOD shares liability with the contractor under the provisions of CERCLA; 2) a cost-reimbursement contract where DOD does not share liability with the contractor under the provisions of CERCLA; 3) a fixed-price contract where DOD shares liability with the contractor under the provisions of CERCLA; and 4) a fixed-price contract where DOD has no CERCLA liability and has not expressly assumed liability for cleanup operations under the terms of the contract.

#### **IV. SHARED LIABILITY AND THE TERMS OF THE CONTRACT**

There are several ways a contractor may try to pass hazardous waste cleanup costs to the government under the terms of the contract. In a cost-reimbursement contract, the contractor may seek reimbursement from the government for hazardous waste cleanup costs, arguing that these are "allowable costs." In a fixed-price contract, the contractor may simply raise his prices at the time of the bid to cover his actual or potential hazardous waste cleanup costs. Additionally, contractors may seek government indemnification provisions for hazardous waste cleanup costs in both cost-reimbursement and fixed-price contracts.

An alternative to either the contractor or the government paying for hazardous waste cleanup costs is to pass these costs on to an insurer. In fact, many government contracts require the contractor to furnish proof of comprehensive general liability insurance, which may cover some hazardous waste cleanup costs. Alternatively, the contractor may obtain "Environmental Impairment Liability" (EIL) insurance that would pay for some hazardous waste cleanup costs. The government may or may not agree to pay the contractor's insurance premiums in cost-reimbursement contracts.

These alternatives are addressed separately in the discussion below, although in some cases they may be used in combination to achieve the desired allocation of CERCLA response cost liability.

## A. ALLOWABLE COSTS IN COST-REIMBURSEMENT CONTRACTS

### 1. *The General Rule: Reasonable, Allocable, and Not Specifically Prohibited*

Cost-reimbursement type contracts have a number of unique characteristics. A cost-reimbursement contract may only be used if "[t]he contractor's accounting system is adequate for determining costs applicable to the contract, [and] [a]ppropriate government surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used."<sup>67</sup> Additionally, a determination and finding must be executed showing that a cost-reimbursement contract is likely to be less costly than any other type, or that it is impractical to obtain supplies or services of the kind or quality required without the use of a cost-reimbursement contract.<sup>68</sup>

In a cost-reimbursement contract, the contractor is paid for "allowable costs" but is not paid for "unallowable costs."<sup>69</sup> "These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at his own risk) without the approval of the contracting officer."<sup>70</sup> Thus, even if a cost is allowable, the limitations of cost clause may prevent the contractor from getting reimbursed.

Hazardous waste cleanup costs are not specifically addressed as an "allowable cost" in either the Federal Acquisition Regulation (FAR) or the Defense Federal Acquisition Regulation Supplement (DFARS). There are apparently no reported cases directly addressing environmental cleanup costs in government contracts. The general rule, however, is that allowable costs must be "reasonable," "allocable," and not specifically prohibited by regulation or the terms of the contract.<sup>71</sup>

The FAR provides that "[a] cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."<sup>72</sup> The regulation further provides that what is reasonable will depend on a variety of considerations and circumstances, including:

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<sup>67</sup>Fed. Acquisition Reg. 16.301-3 (1 Apr. 1984) (hereinafter FAR).

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

<sup>69</sup>FAR 16.301-1 & 31.201-1.

<sup>70</sup>FAR 16.301-1.

<sup>71</sup>FAR 31.201-2.

<sup>72</sup>FAR 31.201-3(a).



- (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
- (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;
- (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and
- (4) Any significant deviations from the contractor's established practices.<sup>73</sup>

The regulation also provides that "[a] cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship."<sup>74</sup> A cost is allocable to the government, subject to the foregoing, if it:

- (a) Is incurred specifically for the contract;
- (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
- (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.<sup>75</sup>

A few specific regulatory provisions concerning allowable costs are relevant to the issue of which, if any, hazardous waste cleanup costs are allowable:

1) Contingencies. Costs for contingencies are generally unallowable. Contingencies include possible future events or conditions arising from presently known or unknown causes, the outcome of which is indeterminable at the present time.<sup>76</sup>

2) Fines and penalties. Costs of fines and penalties incurred as a result of the contractor's violation of law or regulation are unallowable unless they were incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.<sup>77</sup>

3) Insurance and indemnification. Costs of insurance maintained

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<sup>73</sup>FAR 31.201-3(b).

<sup>74</sup>FAR 31.201-4.

<sup>75</sup>*Id.*

<sup>76</sup>FAR 31.205-7.

<sup>77</sup>FAR 31.205-15.

by the contractor as required by the contract are allowable. Actual losses are unallowable, except for the nominal deductible provisions of purchased insurance and minor losses, such as spoilage.<sup>78</sup>

4) Maintenance and repair costs. Normal maintenance and repair costs are allowable if they do not add to the permanent value of the property nor appreciably prolong its intended life. Expenditures for plant and equipment which should be capitalized and subject to depreciation are allowable only on a depreciation basis.<sup>79</sup>

5) Manufacturing and production engineering costs. Costs for developing and deploying new or improved materials, systems, processes, methods, equipment, tools and techniques for producing products and services are allowable.<sup>80</sup>

## 2. Are Hazardous Waste Cleanup Costs Allowable?

For purposes of this discussion, the types of costs the contractor may try to recover from the government on a cost-reimbursement contract fall into two broad categories:<sup>81</sup> 1) costs to avoid future pollution;<sup>82</sup> and 2) costs incurred to clean existing pollution. Cleanup costs may include repair or replacement of leaking containers, storage, confinement, neutralization of contaminants, perimeter protection, providing alternative water supplies, and even relocation of threatened residents, businesses, and community facilities.<sup>83</sup> These cleanup costs may result from willful noncompliance with laws, regulations, permits, and orders, from simple negligence, or may even result from innocent, non-negligent pollution.<sup>84</sup>

As long as they are allocable to the contract, reasonable costs incurred to avoid pollution should be allowable. This policy is consistent with the specific federal regulations providing that costs for maintenance and repair, and developing new or improved materials,

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<sup>78</sup>FAR 31.205-19.

<sup>79</sup>FAR 31.205-24.

<sup>80</sup>FAR 31.205-25.

<sup>81</sup>See Rohm, *Contaminants and Costs: Toxic Waste Concerns for the Contracts Attorney*, 10 Reporter 44, 45 (1981) (identifying five different areas common to most toxic tort cases: 1) expenses for upgrading a contractor's facilities to prevent future pollution; 2) costs incurred in cleaning up the alleged pollution; 3) legal fees incurred by the contractor in defense of environmental tort allegations; 4) fines and penalties; and 5) damages).

<sup>82</sup>Pollution avoidance costs are "cleanup costs" as defined in this article, *supra* note 12, because remedial actions and response costs under CERCLA include actions that may be necessary in the event of the threat of release of hazardous substances into the environment to prevent or to minimize the release. 42 U.S.C. §§ 9601(24), 9601(25) (1982 & Supp. IV 1986).

<sup>83</sup>42 U.S.C. §§ 9601(23), 9601(24) (1982 & Supp. IV 1986).

<sup>84</sup>Rohm, *supra* note 81, at 45.

systems, methods and equipment are generally allowable.<sup>85</sup> Because contractors are required to comply with environmental laws concerning pollution control and clean air and water,<sup>86</sup> the costs of compliance should be considered "ordinary and necessary for the conduct of the contractor's business or the contract performance."<sup>87</sup>

When the government will share any CERCLA liability with the contractor, reimbursing the contractor for pollution avoidance costs may ultimately save the government money by avoiding its own CERCLA cleanup costs. Pollution avoidance is usually much less expensive than the cost of cleaning up hazardous waste contamination.

Cleanup costs resulting from noncompliance with laws and regulations should not be allowable. Denying the contractor reimbursement for these costs is consistent with regulatory provisions specifying that fines and penalties are normally unallowable.<sup>88</sup> These costs are not reasonable because they cannot be considered to be consistent with "[g]enerally accepted sound business practices."<sup>89</sup> Although the government may still face CERCLA liability as a result of contractor noncompliance with environmental protection laws, government liability will not increase as a consequence of denying these costs. Denying these costs will also provide incentives for contractor compliance with environmental laws, which will protect the environment and save the government money.

The contractor may also request reimbursement for cleanup costs that were not incurred as a result of any negligence on the part of the contractor. This could arise, for example, if the hazardous nature of the waste was unknown at the time the contract was negotiated and performed. Under the strict liability standards of CERCLA, the contractor would be liable for cleanup costs even though its disposal practices were consistent with industry standards at the time. If the contractor seeks reimbursement from the government, are these allowable costs?

The answer is not clear, but cleanup costs incurred due to innocent non-negligent pollution should be allowable.<sup>90</sup> Such costs are reasonable because they are the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the

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<sup>85</sup>See *supra* notes 79, 80 and accompanying text.

<sup>86</sup>FAR Part 23.

<sup>87</sup>See *supra* note 73 and accompanying text.

<sup>88</sup>See *supra* note 77 and accompanying text.

<sup>89</sup>See *supra* note 73 and accompanying text.

<sup>90</sup>Rohm, *supra* note 81, at 45.

contract performance.<sup>91</sup> These costs are also consistent with the contractor's responsibilities to the government and the public at large under CERCLA.<sup>92</sup>

A more difficult policy question arises when the contractor seeks reimbursement for cleanup costs incurred as a result of contractor negligence. Paying contractors for these costs may encourage the contractor to be negligent. On the other hand, such costs may be considered "ordinary and necessary for the conduct of the contractor's business."<sup>93</sup> Most contractors expect to suffer some losses due to their negligence or due to the negligence of their agents, servants, or employees. Whether or not such costs should be allowable will depend heavily on the facts.<sup>94</sup> Allowability should turn on the degree of contractor culpability.<sup>95</sup>

The FAR encourages advance agreements concerning the allowability of costs where reasonableness and allocability may be difficult to determine.<sup>96</sup> Of course, such agreements may not treat costs inconsistently with the regulation.<sup>97</sup> Advance agreements should be used whenever possible to resolve the allowability of anticipated pollution avoidance and hazardous waste cleanup costs.

Even if a cost has been incurred unreasonably, the contractor may try to recover its costs under another provision in the contract, such as an indemnification clause or the "Insurance-Liability to Third Persons" clause.<sup>98</sup> In cases where the government shares liability with the contractor under the provisions of CERCLA, the contractor may also have a CERCLA claim for contribution from the government.<sup>99</sup>

### *3. Impact of Allowing/Disallowing Hazardous Waste Cleanup Costs in Cost-Reimbursement Contracts*

If the government does not reimburse the contractor for hazardous waste cleanup costs as allowable costs in a cost-reimbursement contract, and if the contractor is not otherwise reimbursed (through indemnification or insurance), these losses will cut into the contractor's profit margin. Because profit in a cost-reimbursement contract with the government is limited,<sup>100</sup> this may be a severe penalty. In fact, the

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<sup>91</sup>See *supra* note 73 and accompanying text.

<sup>92</sup>*Id.*

<sup>93</sup>See *supra* note 73 and accompanying text.

<sup>94</sup>Rohm, *supra* note 81, at 45 n.1.

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

<sup>96</sup>FAR 31.109.

<sup>97</sup>*Id.*

<sup>98</sup>Rohm, *supra* note 81, at 44. See *infra* part IV(D).

<sup>99</sup>See *supra* part II:E.

<sup>100</sup>FAR 15.903.

contract may no longer be profitable for the contractor. Recognizing that "[p]rofit, generally, is the basic motive of business enterprise,"<sup>101</sup> the government may have difficulty finding contractors to provide the goods and services it needs when the risk of unanticipated cleanup costs is great.

## **B. INCREASED PRICES IN FIXED-PRICE CONTRACTS**

In a fixed-price contract, contractors will most likely increase their prices commensurate with the amount of risk they bear for environmental cleanup.<sup>102</sup> This means that the government reimburses the contractor for cleanup costs in the form of higher prices. This is not inconsistent with the policy of negotiating prices that are "fair and reasonable, cost and other factors considered."<sup>103</sup>

Where the government has no CERCLA liability, the contractor alone bears the risk of unforeseen hazardous waste cleanup costs, unless the contract provides otherwise. The obvious benefit to the government of this risk allocation is illustrated by *Atlas Corp. v. United States*.<sup>104</sup> In that case the Atomic Energy Commission negotiated contracts for the production of uranium concentrate and thorium, agreeing to a fixed price per pound on the basis of core cost, estimated milling costs, plant amortization, and reasonable profit. The production process generated a waste known as mill tailings. At the time the contracts were negotiated and performed, the hazardous nature of the mill tailings was unknown; only later did it become clear that this pollution source required remedial action to protect the environment. When the contractors subsequently incurred significant costs to clean up this hazardous waste, they sought reformation of the contracts to add provisions authorizing compensation for their new costs. The court

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<sup>101</sup>Defense Fed. Acquisition Reg. Supp. 216.101 (1 Apr. 1984) [hereinafter DFARS].

<sup>102</sup>See *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2518 (1988) (government contractors held liable for design defects in military equipment "will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs"); *Chem. Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1265, 1291 (D. Pa. 1987) (owners and operators of hazardous waste disposal facilities will take the contractual shifting of CERCLA liability into account by charging waste generators a higher fee for hazardous waste disposal); Miller, *Liability and Relief of Government Contractors for Injuries to Service Members*, 104 Mil. L. Rev. 1, 47-48 (1982) (denying government contractors the traditional defense of sovereign immunity would result in their including contingencies in their prices to cover losses from liability).

<sup>103</sup>See FAR 31.102 (emphasis added).

<sup>104</sup>*Atlas Corp. v. United States*, No. 281-83C (Cl. Ct. 1988), 50 Fed. Cont. Rep. 852 (BNA) (Nov. 21, 1988).

held that there was no mutual mistake of fact because the hazardous nature of the mill tailings was "not knowable at the time of the negotiations."<sup>105</sup> Reformation was therefore denied, and the government did not have to reimburse the contractors for their cleanup costs.<sup>106</sup>

Another advantage to paying the contractor to assume the risk of hazardous waste cleanup costs is the incentive this creates for the contractor to minimize costs. This is particularly true when the government does not share liability with the contractor under the provisions of CERCLA, but remains true even if the government shares CERCLA liability. If the contractor has agreed under the terms of the contract to be exclusively responsible for cleanup costs, it will likely have to reimburse the government for CERCLA liability claims paid by the government. Because the contractor has the most control over its own operations, giving the contractor the greatest incentive for safe hazardous waste disposal may save the government money. This risk allocation also gives the contractor the greatest incentive to keep the environment clean.

Forcing contractors to bear the risk of hazardous waste cleanup may not always be advantageous for the government, however. Because cleanup costs may be difficult to predict,<sup>107</sup> contractors may overprice the contract, causing the government to pay more than reasonable cleanup costs and allowing contractors excess profit. Alternatively, the contractor may underprice the contract, as occurred in *Atlas Corp. v. United States*.<sup>108</sup> Initially, this may appear to be a windfall for the government. Unfortunately, contractors with excess cleanup costs may be forced out of business, and there may be no other contractors who can provide essential but exotic goods and services to the government.<sup>109</sup>

Where the government shares CERCLA liability with the contractor, paying the contractor to assume the risk of hazardous waste

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

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

<sup>107</sup> See United States General Accounting Office, Hazardous Waste: Issues Surrounding Insurance Availability 12 (1987) (insurers maintain that fortuity of occurrence and predictability of loss cannot be satisfied when dealing with pollution risks).

<sup>108</sup> See *supra* note 104.

<sup>109</sup> For example, in 1988 Avtex Fibers, Inc., announced that they would close their plant in Front Royal, Virginia, citing foreign competition and costs of correcting environmental problems. The plant is the sole supplier of the rayon fiber used in making rocket nozzles. Although Avtex officials subsequently announced the plant would reopen, citing a new three-year, \$38 million contract with NASA, had the plant remained closed NASA would have been unable to obtain critical supplies for the U.S. space program. *Avtex Agrees to Pay Fines, Cleanup Costs: State to Drop Suit, Allow Plant to Stay Oper.*, 19 *Env't Rep.* (BNA) No. 34, at 1668-69 (Dec. 16, 1988).

cleanup costs has another possible disadvantage. The government remains liable under the provisions of CERCLA, regardless of any agreement with the contractor to the contrary. In some circumstances, the government may ultimately pay twice for cleanup costs—once to the contractor in the form of higher prices, and again as a CERCLA PRP to governmental agencies or third parties who have incurred costs for cleanup. Although the government will then have a claim against the contractor for reimbursement of cleanup costs, there is a risk that the contractor may become insolvent.

### **C. INSURANCE FOR HAZARDOUS WASTE CLEANUP COSTS**

#### *I. FAR Provisions Concerning Insurance*

In certain circumstances, government contractors are required to obtain insurance. The FAR provides that “[i]nsurance is mandatory . . . when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government.”<sup>110</sup>

Normally, the contractor is not required to obtain insurance if it is performing a fixed-price contract.<sup>111</sup> The agency may specify insurance requirements under fixed-price contracts in special circumstances, which include situations where government property is used in contract performance, where the work is to be performed on a government installation, or when the government elects to assume risks for which the contractor ordinarily obtains commercial insurance.<sup>112</sup>

In cost-reimbursement contracts, the contractor is ordinarily required to obtain certain specified amounts of insurance for workers' compensation and employer's liability; general liability; automobile liability; aircraft public and passenger liability; and vessel liability.<sup>113</sup> Generally, when the government requires a contractor to obtain insurance, the premiums are allowable costs.<sup>114</sup>

The minimum amount of general liability insurance for comprehensive bodily injury liability coverage is \$500,000 per oc-

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<sup>110</sup>FAR 28.301.

<sup>111</sup>FAR 28.306(a).

<sup>112</sup>*Id.*

<sup>113</sup>FAR 28.307 & 28.307-2.

<sup>114</sup>FAR 31.205-19.

currence.<sup>115</sup> Property damage liability insurance is required only in special circumstances as determined by the agency.<sup>116</sup> For example, the Army provides that such insurance may be purchased "where the exposure under contract operations is such as to warrant obtaining the claims and investigating services of an insurance carrier, e.g., for contractors engaged in the handling of high explosives or in extra-hazardous research and development activities undertaken in populated areas."<sup>117</sup>

When the contractor is required only to "maintain" insurance, instead of purchasing insurance coverage, the contractor may be a self-insurer through an approved program.<sup>118</sup> To qualify, the contractor must demonstrate his ability to sustain the potential losses involved.<sup>119</sup>

The FAR specifically provides that agencies shall not approve programs for self-insurance for catastrophic risks.<sup>120</sup> Instead, the FAR provides that "[s]hould performance of Government contracts create the risk of catastrophic losses, the Government may, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased insurance, or both."<sup>121</sup>

To summarize, the government will usually not require the contractor to maintain any insurance in a fixed-price contract. In a cost-reimbursement contract, the government usually will not require the contractor to maintain comprehensive general liability (CGL) insurance for property damage. Therefore, unless the contractor elects to obtain insurance coverage on its own, or unless special provisions are included in the contract, there will be no insurance for costs and damages arising from releases of hazardous substances and hazardous waste into the environment.

The FAR makes clear, however, that the government has the authority to require the contractor to obtain appropriate insurance when

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<sup>115</sup>FAR 28.307-2(b).

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

<sup>117</sup>Army Fed. Acquisition Reg. Supp. 28.307-2(b)(91) (1 Dec. 1984).

<sup>118</sup>FAR 28.308.

<sup>119</sup>Factors the contracting officer must consider in making this determination include: 1) the soundness of the contractor's financial condition, including available lines of credit; 2) the geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely; 3) the history of previous losses, including frequency of occurrence and the financial impact of each loss; 4) the type and magnitude of risk, such as minor coverage for the deductible portion of purchased insurance or major coverage for hazardous risks; and 5) the contractor's compliance with federal and state laws and regulations. *Id.*

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

<sup>121</sup>*Id.*



circumstances warrant it.<sup>122</sup> Arguably, the risk of unforeseen hazardous waste cleanup costs warrants insurance in some cases. From the government's perspective, this may be especially true whenever the government has agreed to reimburse the contractor for the contractor's uninsured third party liabilities.<sup>123</sup> Insurance may also be advisable when the government shares CERCLA liability with the contractor, because the government will not have to pay CERCLA losses compensated by insurance.

## 2. *Comprehensive General Liability Insurance Coverage for Hazardous Waste Cleanup Costs*

As discussed above, the government ordinarily does not require the contractor to obtain comprehensive general liability insurance for property damage. It may, however, require such insurance in appropriate cases. This, in turn, requires an examination of whether CGL insurance covers hazardous waste cleanup claims.

In the wake of CERCLA, PRP's have often turned to their insurers for relief, arguing that hazardous waste cleanup costs are covered by their CGL insurance. The standard CGL policy<sup>124</sup> provides, in pertinent part, that the insurer

will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence, and [the insurer] shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage, even if any of the allegations of the suit are groundless, false or fraudulent.<sup>125</sup>

Insurers have attempted, with some success, to avoid liability for hazardous waste cleanup costs by arguing that cleanup costs: 1) are not "damages" under the policy; 2) are not "property damage" under the policy; 3) are not caused by an "occurrence" as defined by the policy; 4) are excluded from coverage under the policy by the "pollution exclusion clause;" and 5) are excluded from coverage under the policy by the

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<sup>122</sup>FAR 28.301

<sup>123</sup>See FAR 52.228-7.

<sup>124</sup>The "standard CGL policy" as used in this article will refer to the standard policy that the Insurance Services Office promulgates from time to time, reprinted in Alliance of American Insurers, *Policy Kit for Students of Insurance* 258-63, 277 (1985) [hereinafter *Policy Kit*].

<sup>125</sup>*Policy Kit*, supra note 124, at 263. See, e.g., *Mraz v. Can. Universal Ins. Co., Ltd.*, 804 F.2d 1325, 1327 (4th Cir. 1986).

"owned property" exclusion. If the insurer prevails on even one of these arguments, there is no obligation to indemnify the insured for cleanup costs.

The CGL policy covers a specified period of time and usually limits the amount of the insurer's liability for each occurrence. Therefore, insurers have sought to avoid indemnifying the insured by questioning when the alleged property damage occurred and whether the claim involves more than one occurrence. Each of these issues will be discussed below to determine whether insurers are likely to avoid paying for hazardous waste cleanup costs under the terms of the standard CGL policy.

#### a. Duty to Defend

In a standard CGL policy, the insurer has a duty to defend the insured in any suit seeking damages on account of property damage, "even if any of the allegations of the suit are groundless, false or fraudulent."<sup>126</sup> The duty to defend is broader than the duty to indemnify,<sup>127</sup> however, if no cause of action even potentially or arguably falls within the coverage of the policy, then the insurer is not obligated to defend.<sup>128</sup> The right to be defended is important, even if the insurer ultimately avoids reimbursing the insured for hazardous waste cleanup costs, because it saves the insured litigation costs. The insurer's duty to defend may therefore be a significant benefit.

#### b. Are Cleanup Costs "Damages"?

Under the terms of the standard CGL policy, the insurance company must pay, on behalf of the insured, sums which the latter is "legally obligated to pay as damages."<sup>129</sup> The courts are sharply divided on the issue of whether environmental cleanup costs are "damages" within the meaning of this provision.<sup>130</sup>

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<sup>126</sup>*Policy Kit*, *supra* note 124, at 263.

<sup>127</sup>*Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990, 995 (Law Div. 1982).

<sup>128</sup>*United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co.*, 693 F. Supp. 617, 622-23 (M.D. Tenn. 1988) (insurer had no duty to defend the insured in suit seeking hazardous waste cleanup costs because the policy's pollution exclusion clause clearly took the cause of action outside the scope of liability under the policy).

<sup>129</sup>*Policy Kit*, *supra* note 124, at 263 (emphasis added).

<sup>130</sup>*Compare, e.g., Continental Ins. v. N.E. Pharmaceutical & Chem. Co.*, 842 F.2d 977, 987 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 66 (1988); *Md. Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1354 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); *Travelers Ins. Co. v. Ross Elec. of Wash., Inc.*, 685 F. Supp. 742, 745 (W.D. Wash. 1988) (holding that environmental cleanup costs are not damages), *with, e.g., Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1193-94 (9th Cir. 1986); *New Castle County v.*

Most cases involve state or federal government claims against an insured PRP for reimbursement of the government's costs of hazardous waste cleanup. Some courts have held that these costs are claims for equitable relief rather than legal damages and therefore are not covered by CGL insurance.<sup>131</sup> Other courts, although agreeing that the government claims are for equitable relief, have held that the term "damages" in the standard CGL policy includes the cost of such relief.<sup>132</sup> Because state law governs the construction of standard-form CGL insurance policies,<sup>133</sup> the result in these disputes may hinge on which state's law is applied.

In *Continental Ins. Co. v. N.E. Pharmaceutical & Chem. Co. (NEPACCO)*, the Eighth Circuit held that an insurer was not obligated to indemnify an insured chemical company for the costs of cleaning up sites damaged by the chemical company's hazardous waste.<sup>134</sup> The court's holding that the cleanup costs were not "damages" was based on the following conclusions: 1) under Missouri law, the term "damages" is not ambiguous, and in the insurance context it refers to legal damages; 2) without this limited construction, the term "damages" would become mere surplusage, and any obligation of the insured to pay on any type of claim would be covered; and 3) limiting the meaning of the term "damages" to legal damages is consistent with the statutory scheme of CERCLA, which distinguishes between cleanup costs under section 107(a)(4)(A) & (B) and damages for loss or destruction of natural resources under section 107(a)(4)(C).<sup>135</sup>

According to the *NEPACCO* court, "the type of relief sought is critical to the insured and the insurer, because under the CGL policies the insurer is liable only for legal damages, not for equitable monetary

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Hartford Accident & Indem. Co. 673 F. Supp. 1359, 1365-66 (D. Del. 1987); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 160, 194 (W.D. Mo. 1986); *United States Aviox Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843 (App. Ct. 1983); *CPS Chem. Co. v. Continental Ins. Co.* 222 N.J. Super. 175, 536 A.2d 311, 318 (App. Div. 1988); *Broadwell Realty v. Fidelity & Casualty*, 218 N.J. Super. 516, 528 A.2d 76, 82 (App. Div. 1987) (holding that environmental cleanup costs are not damages covered by the standard CGL policy).

<sup>131</sup>*E.g.*, *Md. Casualty Co. v. Armco, Inc.*, 522 F.2d 1348, 1352-54 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

<sup>132</sup>*E.g.*, *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365-66 (D. Del. 1987).

<sup>133</sup>*See, e.g.*, *Continental Ins. Co. v. N.E. Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 66 (1988) [hereinafter *NEPACCO*].

<sup>134</sup>*Id.* at 987. This case involved claims by the government against the chemical company insured for recovery of cleanup costs under 42 U.S.C. § 9607(a)(4)(A). The *NEPACCO* court distinguished these claims from the claims of private individuals for personal injury and property damage under 42 U.S.C. § 9607(a)(4)(C).

<sup>135</sup>*Id.* at 985-86.

relief."<sup>136</sup> The court characterized the lawsuits by federal and state governments seeking recovery of cleanup costs under CERCLA section 107(a)(4)(A) as "essentially equitable actions for monetary relief in the form of restitution or reimbursement of costs."<sup>137</sup> Noting that the cost of cleaning up a hazardous waste site often exceeds its original value, the *NEPACCO* court rejected the argument that cleanup costs are simply a measure of damages to natural resources.<sup>138</sup>

This distinction between legal damages and equitable relief has been rejected by a number of other courts, however.<sup>139</sup> They disagree with the conclusion in *NEPACCO* that the type of relief sought should determine whether the insured is covered under the CGL policy. As one court stated,

[i]f the state were to sue in court to recover traditional "damages," including the state's costs incurred in cleaning up the contamination, for the injury to the groundwater, [the insurer's] obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either [the insured] or [the insurer] that the state has chosen to have [the insured] remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing [the insured] to recover those costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state.<sup>140</sup>

If cleanup costs are not "damages" within the meaning of the standard CGL policy, the insurer has no indemnification obligation. As the cases discussed above illustrate, the answer to this question often depends on which court is considering the issue. Even when the court decides that cleanup costs are "damages," however, the insurer may still avoid liability on any of several additional theories.

### c. Are Cleanup Costs "Property Damage"?

Under the provisions of the standard CGL policy, the insurer must pay sums which the insured is "obliged to pay as damages because of property damage."<sup>141</sup> "Property damage" is defined in the policy as:

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<sup>136</sup>*Id.* at 987.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.* at 986. See also *Md. Casualty Co. v. Arceo, Inc.*, 522 F.2d 1348, 1353 (4th Cir. 1987).

<sup>139</sup>See, e.g., *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365-66 (D. Del. 1987).

<sup>140</sup>*United States Aviox Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843 (App. Ct. 1983) (citations omitted).

<sup>141</sup>*Policy Kit, supra* note 124, at 263 (emphasis added).

(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.<sup>142</sup>

Closely related to the argument that cleanup costs are not "damages" is the argument that they are not "property damage" within the meaning of the policy. For example, in *Port of Portland v. Water Quality Ins. Syndicate* the defendant insurance company argued that oil pollution of water was not damage to tangible property.<sup>143</sup> The court rejected this argument and held that discharge of pollution into water causes damage to tangible property.<sup>144</sup> Thus, the cleanup costs were recoverable under a property damage liability clause.<sup>145</sup> Going one step further, the court in *Kipin Indus., Inc. v. American Universal Ins. Co.*<sup>146</sup> held that

"property" includes the interests of the federal and the state governments in the tangible environment and its safety. Thus, when the environment has been adversely affected by pollution to the extent of requiring governmental action or expenditure or both for the safety of the public, there is "property damage" whether or not the pollution affects any tangible property owned or possessed exclusively by the government.<sup>147</sup>

Not all courts have adopted this view. In *Mraz v. Canadian Universal Ins. Co., Ltd.*, the court held that the costs incurred by the United States and the State of Maryland in cleaning up hazardous waste generated by the insured were not "property damage" within the meaning of the CGL policy.<sup>148</sup> According to the *Mraz* court, "[o]ne cannot equate response costs with "injury to or destruction of tangible property."<sup>149</sup> Instead, the court characterized response costs as an economic loss.<sup>150</sup>

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<sup>142</sup>*Id.* at 259.

<sup>143</sup>796 F.2d 1188, 1193 (9th Cir. 1986).

<sup>144</sup>*Id.* at 1194.

<sup>145</sup>*Id.*

<sup>146</sup>41 Ohio App. 3d 228 (1987).

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

<sup>148</sup>804 F.2d 1325, 1329 (4th Cir. 1986).

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

<sup>150</sup>*Id.*

If the court finds that property damage has occurred, the insured need not allege that the underlying claim is for property damage.<sup>151</sup> Rather, the policy states that the insurer will pay sums the insured is "legally obliged to pay as damages *because of* property damage."<sup>152</sup> Thus, the insurer is required to pay the insured for all resulting damages that flow from the property damage, including cleanup costs, claims for diminished economic value, damages for compensation in relocating individuals, and damages based on harm to the economic activity of businesses in the polluted area.<sup>153</sup>

d. Do Cleanup Costs Represent Property Damage That Was Caused by an "Occurrence"?

The insurer is obligated to indemnify the insured only for damages that the insured must pay for property damage "caused by an *occurrence*."<sup>154</sup> An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured."<sup>155</sup> Therefore, if the insured either expected or intended the property damage, there is no coverage under the policy.

The definition of "occurrence" includes losses from continuing operations as well as a sudden event, as long as the loss was unexpected.<sup>156</sup> Whether the event is unexpected should be determined "from the standpoint of the insured."<sup>157</sup> Intentional acts may qualify as "occurrences," as long as the consequences are unexpected.<sup>158</sup> Cleanup costs, even those resulting from gradual pollution, may be considered property damage caused by an occurrence as long as the property damage was unexpected. If it is shown that the insured polluter knew or should have known of the ongoing pollution, however, coverage may be denied.<sup>159</sup>

e. Trigger of Coverage

In order to be covered by the standard CGL insurance policy, the property damage must have been "caused by an occurrence *during the*

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<sup>151</sup>New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1366 (D. Del. 1987).

<sup>152</sup>*Policy Kit*, *supra* note 124, at 263 (emphasis added).

<sup>153</sup>Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 654 F. Supp. 1334, 1359 (D.D.C. 1986).

<sup>154</sup>*Policy Kit*, *supra* note 124, at 263 (emphasis added).

<sup>155</sup>*Id.* at 259.

<sup>156</sup>City of Carter Lake v. Aetna, 604 F.2d 1052, 1056 (8th Cir. 1979).

<sup>157</sup>*Policy Kit*, *supra* note 124, at 259.

<sup>158</sup>Waste Management of Carolinas v. Peerless Ins., 315 N.C. App. 688, 340 S.E.2d 374, 379 (1986).

<sup>159</sup>Township of Gloucester v. Md. Casualty Co., 665 F. Supp. 394, 401 (D.N.J. 1987).

*policy period.*<sup>160</sup> In many hazardous waste cleanup cases, the damage occurs over a long period of time and may not have occurred or have been discovered until long after the disposing of the hazardous waste. Cleanup costs may not be assessed until some time thereafter. During the period in question, the insured may have had several different CGL insurers with different aggregate limits, deductibles, and exclusions. The determination of when the damage occurred for purposes of triggering an insurer's policy obligations thus becomes a critical question.

The courts have adopted several theories to determine the trigger of coverage in hazardous waste cleanup cases. Policy coverage may be triggered when the hazardous waste was dumped (the wrongful act), when the release occurred (exposure), when the environment was contaminated (injury-in-fact), when the damage was discovered (manifestation), or when cleanup costs were incurred.<sup>161</sup>

The general rule is that property damage occurs not at the time the wrongful act is committed but when the complaining party is actually damaged (the injury-in-fact theory).<sup>162</sup> Where the leakage of hazardous waste remains concealed for a period of time, determining exactly when damage begins can be difficult.<sup>163</sup> For this reason, the Fourth Circuit in *Mraz v. Can. Universal Ins. Co., Ltd.* held that in hazardous waste burial cases, the trigger of coverage is the time when the leakage and damage are first discovered.<sup>164</sup>

In a later case the Eighth Circuit adopted the view that environmental damage occurs at the moment hazardous wastes are improperly released (the exposure theory of coverage).<sup>165</sup> Under this theory a liability policy in effect at the time of release provides coverage for the subsequently incurred costs of cleaning up the wastes.<sup>166</sup> The court noted that this parallels the rule established in the analogous situation of insurance coverage for asbestos claims.<sup>167</sup>

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<sup>160</sup>*Policy Kit*, *supra* note 124, at 259.

<sup>161</sup>See generally *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 195-97 (W.D. Mo. 1986).

<sup>162</sup>See generally *Mraz v. Can. Universal Ins. Co., Ltd.*, 804 F.2d 1325, 1328 (4th Cir. 1986).

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

<sup>164</sup>*Id.* at 1328.

<sup>165</sup>*Continental Ins. v. N. E. Pharmaceutical & Chem. Co.*, 842 F.2d 977, 984 (adopting panel opinion at 811 F.2d 1180, 1189 (8th Cir. 1987)), *cert. denied*, 109 S. Ct. 66 (1988).

<sup>166</sup>*Id.*

<sup>167</sup>*Id.* at 1190. See also *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 76 (E.D. Mich. 1987) (citing cases).

Where it is difficult to determine when the improper release or damage occurred, a "continuous trigger," from the date of the first dumping until the discovery of the damage, may be the most appropriate theory. For example, the court in *Lac D'Amiante Du Quebec v. American Home Assurance Co.* adopted a continuous trigger of coverage theory where the injury to property caused by asbestos was continuous and progressive and not complete at the act of installation.<sup>168</sup> In this situation, more than one policy may be triggered.

These cases illustrate that an insurer's liability for cleanup costs may depend on which theory the court employs to determine when the injury or liability producing event occurs. In one jurisdiction the insurer may escape liability because the release was not discovered during the insurance policy coverage dates,<sup>169</sup> while he may be held liable in another jurisdiction if the release occurred during the policy period, regardless of when it was discovered.<sup>170</sup>

#### f. Number of Occurrences

CGL insurance policies usually limit the insurer's liability for bodily injury and property damage *per occurrence*, and they often provide aggregate limits as well. In a hazardous waste cleanup case, the damage may have occurred over a long period of time, arguably as the result of several "causes," and several people or pieces of property may be affected. The issue of how many occurrences can be said to have taken place is therefore a complicated one. The insurer will argue that all injury or damage occurring during the policy period caused by the same conditions or repeated exposure is one occurrence, while the insured would obviously like to characterize the damage as being caused by more than one occurrence. Where the policy provides for a liability limit per occurrence, and where the insurer's liability is not limited by the aggregate amount, the number of occurrences the court finds may dramatically effect the insurer's liability to indemnify the insured for hazardous waste cleanup costs.

In the non-pollution context, the majority view is that the number of occurrences is determined by the number of causes of the damage and not by the number of damages sustained (the cause rule).<sup>171</sup> Under this rule, if there are multiple causes, there may be multiple occurrences. The minority view is that the number of occurrences is the number of resulting damages (the effect rule).<sup>172</sup>

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<sup>168</sup>813 F. Supp. 1549, 1561 (D.N.J. 1985).

<sup>169</sup>See, e.g., *Mraz*, 804 F.2d at 1325.

<sup>170</sup>See, e.g., *Continental Ins.*, 842 F.2d at 984.

<sup>171</sup>Annotation, *Liability Insurance—Each Accident*, 55 A.L.R.2d 1300, 1303 (1957).

<sup>172</sup>*Id.*



One of the few hazardous waste cases to decide this issue applied both the cause and effect rule to determine that several occurrences had taken place. In *Township of Jackson v. American Home Assurance Co.*<sup>173</sup> hazardous wastes seeped from a landfill and contaminated the drinking water supply of nearby residents. The insured municipality sought recovery for its cleanup costs from its CGL insurer. The court found that "separate, independent causative events," including failure to manage incoming waste amounts, ignoring signs of contamination, permitting ponding to occur, failure to inspect tank trucks, and digging below the water table, had taken place. Each of these could be considered a separate occurrence.<sup>174</sup> The court noted multiple occurrences would also be the result of applying the effect rule, because several wells were contaminated.<sup>175</sup> Because the number of occurrences under either rule were enough to cover the entire amount sought by the insured, the court held the insurer liable for the entire amount without determining which rule should apply.<sup>176</sup>

#### g. Application of the Pollution Exclusion Clause

In the early 1970's many CGL policies added a clause that excludes coverage for certain kinds of pollution damage. That standard CGL pollution exclusion clause provided that insurance would not apply to

property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.<sup>177</sup>

With the incorporation of this limitation, insurers have sought to avoid indemnification for hazardous waste cleanup costs. Insured entities have argued, however, that the pollution was "sudden and accidental," and therefore covered. Most of the case law concerning the interpretation of this clause therefore focuses on the meaning of the phrase "sudden and accidental."<sup>178</sup>

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<sup>173</sup>No. L-29236-80 (N.J. Super. Ct. Aug. 31, 1984), *appeal filed*, No. A-20138427, reviewed by United States General Accounting Office, *Hazardous Waste: Issues Surrounding Insurance Availability* 62-63 (1987).

<sup>174</sup>*Id.*

<sup>175</sup>*Id.*

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

<sup>177</sup>*Policy Kit*, *supra* note 124, at 263.

<sup>178</sup>*See* *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 201-04 (W.D. Mo. 1986) (discussion of insured's and insurer's arguments concerning interpretation of the

Some courts have held that the term "sudden and accidental" is ambiguous in the context of the pollution exclusion clause, and therefore should be strictly construed against the insurer.<sup>179</sup> In so doing they reject the insurers' contention that the word sudden means an instantaneous happening.<sup>180</sup> The courts note that the term is not defined in the CGL policy itself, and the primary dictionary definition of the word "sudden" is "happening without previous notice" or "occurring unexpectedly."<sup>181</sup> Therefore, the pollution exclusion clause has been considered by some courts to merely clarify the definition of "occurrence."<sup>182</sup> Damages resulting from an unexpected discharge of pollutants are covered, regardless of whether the discharge is instantaneous.<sup>183</sup>

Not all courts adopted this interpretation. Some have concluded instead that the pollution exclusion clause provides coverage only if the damage was caused by a release of pollutants occurring both unexpectedly and relatively quickly in time.<sup>184</sup> For example, in holding that a CGL insurer had no duty to defend or to indemnify the insured in a suit arising out of a chemical company's disposal of hazardous wastes, the court in *United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co.* stated:

The proof in this case shows that Murray Ohio had its waste transported to and disposed of at the CCC site under contract for approximately six years. No breakdown in machinery, precipitous leak, or other "sudden" event occurred. The amended complaint . . . speaks of long periods of time over which the pollution occurred, as opposed to any instantaneous event or events which occurred over a brief period. Thus, applying the pollution exclusion clause's "sudden and accidental" exception to these facts leaves no room for ambiguity. Simply put, an event that occurs over the course of six years logically cannot be said to be "sudden."<sup>185</sup>

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pollution exclusion clause, citing cases: *See generally* Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 *Geo. L.J.* 1237 (1986).

<sup>179</sup>*E.g.*, *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1364 (D. Del. 1987); *Broadwell Realty v. Fidelity & Casualty*, 218 N.J. Super. 516, 526 A.2d 76, 80 (App. Div. 1987); *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., Inc.*, 17 Ohio App. 3d 127, 477 N.E. 2d 1227, 1234 (1984). *But see* *United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co.*, 693 F. Supp. 617, 621 (M.D. Tenn. 1988).

<sup>180</sup>*New Castle County*, 673 F. Supp. at 1364.

<sup>181</sup>*Id.* at 1362, citing *Webster's Third New International Dictionary* 2284 (1971).

<sup>182</sup>*Id.* at 1363.

<sup>183</sup>*See id.* at 1364; *Broadwell Realty*, 528 A.2d at 55-56.

<sup>184</sup>*E.g.*, *United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co.*, 693 F. Supp. 617, 621 (M.D. Tenn. 1988); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 685, 340 S.E.2d 743, 374 (1986).

<sup>185</sup>*Murray Ohio*, 693 F. Supp. at 622.

There has been some disagreement whether only the release, or the resulting damage, or both, must be "sudden and accidental" for the property damage to fall outside the pollution exclusion clause. In *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, the court stated that "[t]he decisive inquiry is not whether the policyholders anticipated property damage, or whether they regularly disposed of hazardous waste, but whether the pollutants entered the environment unexpectedly and unintentionally."<sup>186</sup> Other courts have held that even if the act was intentional, the resulting damage may be covered by the CGL policy if it was unexpected.<sup>187</sup> Some courts have held that both the release and the resulting damage must be accidental for coverage to exist.<sup>188</sup>

Judges will continue to address these issues in claims arising under the early version of the pollution exclusion clause. The Insurance Services Office developed a new standard clause in 1986, however, and this provision will likely result in more victories for insurers. It excludes coverage for "[a]ny loss, cost, or expense arising out of any governmental direction or request that [the insured] test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants."<sup>189</sup> The revised standard CGL policy also excludes injury or damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants."<sup>190</sup>

#### h. Application of the Owned-Property Exclusion

Insurers will often argue that cleanup costs are excluded from coverage under the standard CGL insurance policy because they result from damage to property owned by the insured. The standard CGL insurance policy does not cover property damage to:

- (1) property owned or occupied by or rented to the insured,
- (2) property used by the insured, or
- (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control.<sup>191</sup>

The rationale behind this exclusion is that it will encourage the policyholder to manage his own property in a responsible fashion.<sup>192</sup>

<sup>186</sup>662 F. Supp. 71, 75-76 (E.D. Mich. 1987).

<sup>187</sup>See, e.g., *Neu Castle County*, 673 F. Supp. at 1364.

<sup>188</sup>See, e.g., *Waste Management of Carolinas*, 340 S.E.2d at 374.

<sup>189</sup>United States General Accounting Office, *Hazardous Waste: Issues Surrounding Insurance Availability* 63 n.16 (1987) [hereinafter *GAO Report*].

<sup>190</sup>*Id.*

<sup>191</sup>*Policy Kit*, *supra* note 124, at 263. See, e.g., *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 199 (W.D. Mo. 1986).

<sup>192</sup>GAO Report, *supra* note 189, at 68.

The courts generally have held that remedies designed to prevent damage to property owned by third parties are not excluded from coverage on the basis of the owned-property exclusion, even if the remedy takes place on property owned by the insured.<sup>193</sup> For example, in *Township of Gloucester v. Md. Casualty Co.* the court saw no problem with the fact that expenditures would be made in part to repair property owned by the insured because the costs were inextricably linked to damage claims of a third party.<sup>194</sup> Similarly, in *United States Aviox Co. v. Travelers Ins. Co.* the court held that damage to the groundwater beneath the insured's property was not excluded from coverage by the owned-property exclusion because the insured did not own the groundwater.<sup>195</sup>

### 3. *Environmental Impairment Liability Insurance*

Environmental Impairment Liability (EIL) insurance was developed by the insurance industry in 1981 to provide coverage for gradual and sudden pollution.<sup>196</sup> The standard EIL policy provides coverage for property damage, bodily injury, and other economic losses caused by sudden or gradual pollution, and it covers cleanup costs as well.<sup>197</sup>

Unfortunately, EIL policies generally are not available.<sup>198</sup> As the General Accounting Office noted in its 1987 report to Congress concerning pollution insurance availability:

The supply of pollution insurance currently available to the hazardous substance industry is limited. Only one insurance industry source, [American International Group], is actively pursuing the pollution insurance market. A few other companies write pollution insurance for selected clients who carry coverage for other risks.

The remainder of the insurance industry, for the most part, regards pollution risks as uninsurable. These companies cite unfavorable legal trends and potentially enormous claim payments for their withdrawal from the market over the last few years and their reluctance to underwrite pollution risks. . . . [I]nsurers maintain that the combination of the inherent risk of insuring against pollution, uncertainty about judicial de-

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<sup>193</sup> See, e.g., *Township of Gloucester v. Md. Casualty Co.*, 668 F. Supp. 394, 400 (D.N.J. 1987); *Fireman's Fund Ins. Co. v. Ex-Cell-O*, 662 F. Supp. 71, 75 (E.D. Mich. 1987); *Bankers Trust Co. v. Hartford Accident and Indem. Co.*, 518 F. Supp. 371, 373 (S.D.N.Y. 1981).

<sup>194</sup> *Township of Gloucester*, 668 F. Supp. at 400.

<sup>195</sup> 125 Mich. App. 579, 336 N.W.2d 838, 843 (1983).

<sup>196</sup> GAO Report, *supra* note 189, at 69.

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

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

cisions regarding liability standards and insurance contract coverage for pollution incidents, and broad liability established by federal environmental law made it too difficult for them to write new pollution insurance at a profit. More importantly, insurers claim that these aspects of current pollution liability may prevent their future reentry into the pollution insurance market, even as the overall insurance industry recovers its financial position.<sup>199</sup>

### D. GOVERNMENT INDEMNIFICATION

CERCLA does not prohibit parties from entering into agreements to indemnify or hold harmless another party for liability arising from hazardous waste cleanup.<sup>200</sup> Therefore, two questions arise: *can* DOD enter into such agreements with defense contractors; and *should* it do so? The answer to both questions is yes, in limited circumstances.

#### 1. Statutory Limits: the Anti-Deficiency Act

The primary limitation on DOD's authority to enter into agreements to indemnify government contractors is the Anti-Deficiency Act (ADA). The ADA provides that the Federal Government may not: 1) make or authorize an expenditure or obligation of funds in excess of current appropriations; or 2) involve the government in a contract or obligation for the payment of money in advance of appropriations unless authorized by law.<sup>201</sup> The Comptroller General and the courts agree that the ADA ordinarily prohibits contractual indemnity agreements that might subject the government to unlimited liability.<sup>202</sup>

In spite of the limitations imposed by the ADA, however, there are two situations where an indemnity agreement is permissible in government contracts.<sup>203</sup> First, the ADA prohibition against obligations in advance of appropriations specifically excepts such obligations if "authorized by law." Therefore, if there is specific statutory authority to enter into an indemnity agreement, the agreement is not prohibited

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<sup>199</sup>*Id.* at 26.

<sup>200</sup>42 U.S.C. § 9607(e) (1982).

<sup>201</sup>31 U.S.C. § 1341(a)(1) (1982).

<sup>202</sup>*E.g.*, *Assumption by Government of Contractor Liability to Third Persons*, Comp. Gen. Dec. B-201072, 82-1 CPD ¶ 406 (May 2, 1982); 35 Comp. Gen. 85, 87 (1955); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 22 (1987) (holding that ADA barred officials of the Federal Government from entering into implied contracts to indemnify asbestos manufacturers for manufacturers' liability to shipyard workers exposed to asbestos while building, converting, or repairing ships for the government during World War II).

<sup>203</sup>*See, e.g.*, *Johns-Manville Corp.*, 12 Cl. Ct. at 25.

by the ADA.<sup>204</sup> Second, if the indemnity agreement limits government liability by establishing a cap, it will not violate the ADA unless government liability exceeds appropriations.<sup>205</sup>

## 2. *Insurance-Liability to Third Persons Clauses in Cost-Reimbursement Contracts*

In cost-reimbursement contracts, the government normally agrees to indemnify the contractor for certain uninsured third-party liabilities.<sup>206</sup> The "Insurance-Liability to Third Persons" clause used in most government cost-reimbursement contracts<sup>207</sup> provides that the contractor will be reimbursed for certain uninsured liabilities to third persons without regard to the limitation of cost or the limitation of funds clause of the contract. These liabilities are for property damage, death, or bodily injury arising out of the performance of the contract. Liabilities caused by the contractor's negligence are included, but liabilities that result from willful misconduct or lack of good faith on the part of the contractor are not.

Most cleanup costs incurred by the contractor in a cost-reimbursement contract that are not allowable costs under other FAR provisions<sup>208</sup> will be covered by the "Insurance-Liability to Third Persons" clause. Covered cleanup costs must be liabilities for loss of or damage to property arising out of the performance of the contract. Cleanup costs that are otherwise insured and cleanup costs that were incurred due to the willful misconduct or lack of good faith on the part of the contractor will not be covered.

In recognition of the ADA limitations, the "Insurance-Liability to Third Persons" clause specifically provides that the government's liability is subject to the availability of appropriated funds at the time the contingency occurs.<sup>209</sup> Further, the clause states that "[n]othing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies."<sup>210</sup> In view of this provision, the "Insurance-Liability to Third Persons" clause provides only limited protection to government contractors, because they may only be reimbursed to the extent of available funds.<sup>211</sup>

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<sup>204</sup>*Id.*

<sup>205</sup>*Id.*

<sup>206</sup>FAR 28.311-2.

<sup>207</sup>FAR 52.228-7.

<sup>208</sup>See *supra* part IV(A).

<sup>209</sup>FAR 52.228-7.

<sup>210</sup>*Id.*

<sup>211</sup>*Federal Procurement Liability Reform Act: Hearing on H.R. 2378 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 32 (1987); statement of Michael Monroney, Vice*

### 3. Statutory Authority

#### a. 10 U.S.C. § 2354: Research & Development

Specific statutory authority exists to indemnify contractors involved in research and development for a military department.<sup>212</sup> Pursuant to 10 U.S.C. section 2354, DOD may indemnify the contractor and subcontractor for uninsured losses that arise out of the direct performance of the contract and that result from a risk that the contract defines as "unusually hazardous."<sup>213</sup> Specifically excluded are losses that result from willful misconduct or lack of good faith on the part of the contractor or its agents.<sup>214</sup> Use of this indemnification provision must be authorized by the Secretary concerned or by his designee.<sup>215</sup>

Cleanup costs may be reimbursed pursuant to the authority of 10 U.S.C. section 2354 only in limited circumstances. All of the following conditions must be met: 1) the contract is for research and development; 2) the cleanup costs result from a risk that the contract defines as "unusually hazardous;" 3) the cleanup costs arise out of direct performance of the contract; 4) the cleanup costs are not compensated by insurance or otherwise; and 5) the cleanup costs are not a result of the contractor's willful misconduct or lack of good faith.

#### b. Public Law 85-804

Public Law 85-804, the National Defense Contracts Act,<sup>216</sup> provides much broader authority for DOD to indemnify contractors than that provided pursuant to 10 U.S.C. section 2354. Public Law 85-804 provides that

[t]he President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he

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President, TRW, Inc., on behalf of the Contractor Liability and Indemnification Alliance) (hereinafter *Hearings*).

<sup>212</sup>10 U.S.C. § 2354(a) (1976).

<sup>213</sup>DFARS 235.070.

<sup>214</sup>DFARS 252.235-7000 & 252.235-7001.

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

<sup>216</sup>50 U.S.C. § 1431-1435 (1976).

deems that such action would facilitate the national defense.<sup>217</sup>

This broad authority to enter into contracts "without regard to other provisions of law" has only one limitation as prescribed in the statute itself—the action must "facilitate national defense."<sup>218</sup> The statute does not limit authority to take such action to DOD. Indeed, the Executive Order implementing the statute names eleven civilian agencies that may take action pursuant to this authority.<sup>219</sup>

Although the statute itself does not mention indemnification of contractors, the legislative history of the Act makes it clear that Congress intended to provide such authority under the Act.<sup>220</sup>

[T]he departments authorized to use this authority have heretofore utilized it as the basis for the making of indemnity payments under certain contracts. The need for indemnity clauses in most cases arises from the advent of nuclear power and the use of highly volatile fuels in the missile program. The magnitude of the risks involved under procurement contracts in these areas have rendered commercial insurance either unavailable or limited in coverage. At the present time, military departments have specific authority to indemnify contractors who are engaged in hazardous research and development, but this authority does not extend to production contracts (10 U.S.C. 2354). Nevertheless, production contracts may involve items, the production of which may include a substantial element of risk, giving rise to the possibility of an enormous amount of claims. It is, therefore, the position of the military departments that to the extent

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<sup>217</sup>50 U.S.C. § 1431 (1976).

<sup>218</sup>The statute also provides that nothing in the statute shall be construed to constitute authorization for: 1) the use of the cost-plus-a-percentage-of-cost system of contracting; 2) any contract in violation of existing law relating to limitation of profits; 3) the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding; 4) the waiver of any bid, payment, performance, or other bond required by law; 5) the amendment of a contract negotiated under section 2304(a)(15) of Title 10 or under section 2521(c)(13) of Title 41, to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or 6) the formalization of an informal commitment, unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures. 50 U.S.C. § 1432 (1976).

<sup>219</sup>Exec. Order No. 10789, 23 C.F.R. 8897 (1958), as amended by Exec. Order No. 11051, 27 C.F.R. 9683 (1962); Exec. Order No. 11882, 32 C.F.R. 16247 (1967); Exec. Order No. 11610, 36 C.F.R. 13755 (1971); Exec. Order No. 12148, 44 C.F.R. 43239 (1979).

<sup>220</sup>See Miller, *Liability and Relief of Government Contractors for Injuries to Service Members*, 104 Mil. L. Rev. 1, 95 (1984).



that commercial insurance is unavailable, the risk of loss in such a case should be borne by the United States.<sup>221</sup>

The Executive Order implementing the statute limits contractor indemnification to claims or losses arising out of risks that the contract defines as unusually hazardous or nuclear in nature.<sup>222</sup> The Executive Order further provides that such a contractual provision shall be approved in advance by an official at a level not below that of the Secretary of a military department.<sup>223</sup> An indemnified contractor may be required to provide and maintain financial protection of such type and in such amounts as is determined to be appropriate by the approving official.<sup>224</sup> In deciding whether to provide indemnification, and in determining the amount of financial protection to be provided and maintained by the contractor, the Executive Order provides that the approving official shall take into account such factors as the availability, cost, and terms of private insurance, self-insurance, other proof of financial responsibility, and workmen's compensation insurance.<sup>225</sup> The Executive Order provides that contractual indemnification shall apply to losses not compensated by insurance, including: 1) claims by third persons, including employees of the contractor, for death, personal injury, or property damage; 2) damage or loss of use of the contractor's property; 3) damage or loss of use of government property; and 4) claims arising from indemnification agreements between the contractor and the subcontractor.<sup>226</sup> Not covered are claims by the United States (other than those arising through subrogation) against the contractor or subcontractor or losses affecting the property of the contractor or subcontractor, if such claims are caused by willful misconduct or lack of good faith on the part of the contractor's or subcontractor's directors or officers.<sup>227</sup>

The FAR provides that contractor requests for indemnification to cover unusually hazardous or nuclear risks shall be submitted to the contracting officer.<sup>228</sup> The contracting officer may deny the request or forward it through channels to the appropriate official for approval.<sup>229</sup> The contracting officer's recommendation for approval must include (among other things): 1) a definition of the unusually hazardous or

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<sup>221</sup>S. Rep. 2281, 85th Cong., 2d Sess. (1958).

<sup>222</sup>See Executive Orders cited *supra* note 219.

<sup>223</sup>*Id.*

<sup>224</sup>*Id.*

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

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

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

<sup>228</sup>FAR 50.403-1.

<sup>229</sup>FAR 50.403-2.

nuclear risks involved in the proposed contract with a statement that all parties have agreed to it; 2) a statement by responsible authority that the indemnification action would facilitate national defense;<sup>230</sup> and 3) a statement that the contract will involve unusually hazardous or nuclear risks that could impose liability upon the contractor in excess of financial protection reasonably available.<sup>231</sup>

The Executive Order does not define the term "unusually hazardous." It is therefore not clear whether the term refers only to activities and products that are themselves dangerous (such as explosives), or whether it also includes the risk of very large uninsurable claims.<sup>232</sup> In 1981 the Department of Transportation recognized that an "unusually hazardous risk" could include the risk of uninsured catastrophic loss when it authorized indemnification under Public Law 85-804 for contractors engaged in the upgrading of FAA's computer assisted air traffic control system.<sup>233</sup> While the secretary found that there was a low probability of a malfunction in the system,

[i]n the event that such a malfunction leads to an accident, the potential claimants would be quite numerous, and the severity of potential damage could be catastrophic. While the risk of a catastrophic accident may be remote, if it occurs, it could be far in excess of the insurance coverage that reliably and reasonably could be obtained by manufacturers in the marketplace for the life of the system.<sup>234</sup>

This interpretation is consistent with the purpose of the National Defense Contracts Act to have the government bear the risk of loss to the extent that commercial insurance is unavailable.

DOD has not formally defined the "unusually hazardous" risks for which the government should provide indemnification under Public Law 85-804. In testimony before a congressional subcommittee considering proposed legislation on government contractor indemnification, Ms. Eleanor R. Spector, Assistant Secretary of Defense for Procurement, stated:

The Department of Defense agrees that there is a need to provide indemnification to Government contractors in certain circumstances in which the Government requires work to be

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<sup>230</sup>Most DOD contracts "facilitate national defense."

<sup>231</sup>48 FAR 50.403-2.

<sup>232</sup>See generally Smith, *Government Indemnification of Contractors; How Far Can You Go Under Public Law 85-804?* 18 Nat. Cont. Mgt. J. 1 (1984).

<sup>233</sup>*Id.* at 9-10.

<sup>234</sup>*Id.* at 10 (citing 46 Fed. Reg. 62596, 62597 (Dec. 24, 1981)).

done for which the risks are great and for which insurance is not realistically obtainable. . . . By the authority of Public Law 85-804 as implemented, we can indemnify against unusually hazardous risk and nuclear risk. The determination of what risks under a contract are indeed unusually hazardous or nuclear so as to warrant the extraordinary measure of indemnification necessarily is with the military department writing the contract, for there rests the greatest expertise on the precise nature of the risks for the activity involved under the contract.<sup>235</sup>

The military department concerned therefore has great discretion in defining what risks under a contract are "unusually hazardous." The definition may include inherently dangerous activity as well as the risk of catastrophic loss.

The government may indemnify contractors for the risk of hazardous waste cleanup costs, pursuant to Public Law 85-804, when the contract involves a product or activity that is unusually hazardous by its very nature. Such activities might include, for example, a contract to dispose of leaking drums containing hazardous wastes.<sup>236</sup>

The government may also indemnify contractors pursuant to Public Law 85-804 when the product or activity itself is not unusually hazardous but it involves a remote risk of catastrophic loss to the contractor. For example, when the contractor manufactures a product for the government and the manufacturing process generates hazardous waste, the contractor may be liable for significant cleanup costs. The contractor may incur these costs in spite of its best efforts to safely dispose of the hazardous waste, and such losses are not likely to be covered by insurance. Although the risk of incurring cleanup costs may be remote, the severity of the potential damage could be catastrophic. The risk of loss in this situation is also "unusually hazardous," and the contractor should be eligible for indemnification under Public Law 85-804.

#### 4. DOD Experience with Contractor Indemnification

The indemnification authority provided by 10 U.S.C. section 2354 and Public Law 85-804 is used only in exceptional circumstances in DOD. According to the DOD "Summary Reports,"<sup>237</sup> provisions to

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<sup>235</sup>Hearings, *supra* note 211, at 32 (statement of Eleanor R. Spector, Assistant Secretary of Defense for Procurement).

<sup>236</sup>CERCLA also provides authority for government indemnification of "response action contractors" under 42 U.S.C. § 9619(c) (1982).

<sup>237</sup>Extraordinary Cont. Relief Rep. Current Materials 5143-49.

indemnify contractors against liabilities because of death or injury or property damage arising out of "unusually hazardous" risks have been used very sparingly:

<i>Calendar Year</i>	<i>Contracts Providing for Indemnification</i>
1983	53
1984	50
1985	56
1986	52
1987	30

To put these numbers in perspective, the Department of Defense awards over 15 million contracts each year.<sup>238</sup> Indemnification provisions are used in less than 1/1000 of 1% of those contract actions.

The DOD position is that the indemnity authority provided under 10 U.S.C. section 2354 and Public Law 85-804 is adequate for DOD's needs and that additional indemnification legislation is not needed.<sup>239</sup>

## V. CONCLUSIONS

Reasonable costs to avoid pollution should be paid by DOD as allowable costs in cost-reimbursement contracts because they are ordinary and necessary for the conduct of the contractor's business or for the contract performance. Similarly, cleanup costs incurred as a result of innocent, non-negligent pollution should be allowable costs. Cleanup costs that are incurred due to contractor negligence may be allowable, depending on the degree of contractor culpability. Cleanup costs resulting from noncompliance with laws and regulations are not allowable because they are not "reasonable."

Even when cleanup costs are allowable costs in cost-reimbursement contracts, the contractor's recovery of such costs from the government may be limited by the cost ceiling in the contract. Unless otherwise compensated, the contractor may suffer catastrophic loss. This may have an adverse impact on the ability of DOD to contract for essential goods and services.

In fixed-price contracts, contractors may not be able to cover the risk of hazardous waste cleanup costs by increasing their prices because of

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<sup>238</sup>*Hearings, supra* note 211, at 32 (statement of Eleanor R. Spector, Assistant Secretary of Defense for Procurement).

<sup>239</sup>*Id.*

the uncertainty of calculating the potential losses. Alternatively, the contractor may over price the contract. Either the government may pay more than its fair share of the risk of hazardous waste damage or the contractor may bear more than its fair share of cleanup costs. This may have an adverse impact on the government's ability to obtain essential goods and services at a reasonable price.

When DOD shares CERCLA liability with the contractor, even if DOD pays the contractor for cleanup costs in the form of higher prices, DOD may still have to pay cleanup costs to third parties. DOD may in some cases pay twice for cleanup costs.

Comprehensive General Liability insurance probably will not reimburse the contractor for hazardous waste cleanup costs. Even if the court considers these costs "damages" as defined by the policy, such losses will likely be excluded by the pollution exclusion clause. Although Environmental Impairment Liability insurance would cover cleanup costs, it is not likely to be available to the contractor.

The current "Insurance-Liability to Third Persons" clause in cost-reimbursement contracts is inadequate to reimburse the contractor for cleanup costs in light of the ADA limitations. The government may use 10 U.S.C. section 2354 to reimburse contractors for cleanup costs in research and development contracts if the cleanup costs result from a risk that the contract defines as "unusually hazardous." Similarly, Public Law 85-804 could be used to reimburse contractors for cleanup costs if the loss results from a risk that the contract defines as "unusually hazardous." For example, contracts that involve transporting or disposing of hazardous waste may be considered "unusually hazardous." Contracts where hazardous waste is merely a by-product of the production process may also be included in this definition if the contract involves the risk of uninsured catastrophic loss.

## VI. RECOMMENDATIONS

Reasonable costs to avoid pollution should be paid by DOD as allowable costs in cost-reimbursement contracts. This authorization may save the government money in the long run because pollution avoidance is usually much less expensive than cleaning up hazardous waste contamination.

To the extent that funds are available, the contractor performing a cost-reimbursement contract should also be reimbursed for cleanup costs resulting from innocent, non-negligent pollution, and in some limited circumstances, for costs associated with a release caused by contractor negligence.

Paying for hazardous waste cleanup costs in cost-reimbursement contracts is advantageous to DOD because contractors performing these contracts expect to be reimbursed for most of the costs of performance and to make a limited profit. If DOD requires the contractor to bear the risk of hazardous waste cleanup costs associated with contract performance, the contract may no longer be profitable. Contractors may eventually decline to contract with DOD, or they may be forced out of business by catastrophic losses due to hazardous waste cleanup liability.

DOD should not require the contractor to obtain CGL insurance to cover potential hazardous waste cleanup costs because the insurance will not cover the risks that the contractor and DOD face. DOD also should not reimburse the contractor for the cost of such insurance, unless DOD desires the contractor to maintain CGL insurance for other reasons, such as to cover losses other than cleanup costs.

DOD should investigate the availability of Environmental Impairment Liability insurance to cover the cost of hazardous waste cleanup. If available at a reasonable cost, DOD should consider requiring the contractor to obtain such insurance on a case-by-case basis. In cost-reimbursement contracts, DOD should reimburse the contractor for the cost of such insurance.

When Environmental Impairment Liability insurance is unavailable or too costly, DOD should indemnify contractors in cost-reimbursement contracts pursuant to 10 U.S.C. section 2354 or Public Law 85-804 for the risk of uninsured hazardous waste cleanup costs. This indemnification will cover most contractor losses for hazardous waste cleanup costs that would not otherwise be reimbursable because of funding limitations.

In fixed-price contracts, DOD should indemnify contractors pursuant to 10 U.S.C. section 2354 or Public Law 85-804 for the costs of hazardous waste cleanup if DOD shares CERCLA liability with the contractor. Otherwise, DOD may ultimately pay twice for cleanup costs.

To maximize the contractor's incentive to take cost-effective pollution avoidance measures, DOD usually should not indemnify the contractor in fixed-price contracts where DOD does not share liability with the contractor pursuant to CERCLA. This will mean, however, that DOD effectively will pay in the form of higher prices for the risk that cleanup costs will be incurred.

In the rare situation where no contractors are willing to assume the risk of hazardous waste cleanup costs, DOD should indemnify con-

tractors in fixed-price contracts even if DOD does not share liability with the contractor under the provisions of CERCLA. Indemnification is also appropriate if the facts and circumstances indicate that DOD is paying excess profit rather than a reasonable cost for the risk of hazardous waste damage.

Indemnification under Public Law 85-804 or under 10 U.S.C. section 2354 will ensure that DOD can obtain necessary goods and services, even if the risk of catastrophic loss due to hazardous waste cleanup liability is great. Although an indemnified contractor will have fewer incentives to minimize hazardous waste cleanup costs, indemnification under Public Law 85-804 or 10 U.S.C. section 2354 is not absolute. Excluded would be losses caused by willful misconduct or lack of good faith on the part of the contractor.

The standard indemnification clauses for Public Law 85-804<sup>240</sup> and 10 U.S.C. section 2354<sup>241</sup> provide that the indemnification applies only to the extent that the claim, loss, or damage arises from a risk defined in the contract as unusually hazardous or nuclear. To limit indemnification to hazardous waste cleanup costs, the contract should define the "unusually hazardous" risk as the risk of property damage arising out of actual, alleged or threatened discharge, dispersal, release or escape of pollutants, including any loss, cost, or expense arising out of any governmental direction or request that the contractor test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize pollutants.<sup>242</sup>

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<sup>240</sup>FAR 52.250-1.

<sup>241</sup>DFARS 252.235-7000 & 252.235-7001.

<sup>242</sup>See *supra* notes 189, 190 and accompanying text.





# THE JUSTICIABILITY OF CLAIMS BROUGHT BY NATIONAL GUARDSMEN UNDER THE CIVIL RIGHTS STATUTES FOR INJURIES SUFFERED IN THE COURSE OF MILITARY SERVICE

by Lieutenant Commander E. Roy Hawkens\*

## I. INTRODUCTION

The Supreme Court has not yet resolved whether a soldier in a state National Guard who is injured in the course of military service may sue his superior officer under the civil rights statutes.<sup>1</sup> Although the Supreme Court had the opportunity in *Chappell v. Wallace*<sup>2</sup> to resolve this issue, it declined to do so because the issue had not been adequately addressed by the court of appeals or by the parties.<sup>3</sup> The civil rights statutes are broad remedial statutes of general applicability. Literally read, they could be taken to permit suits by Guardsmen

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<sup>1</sup>When this article refers generally to "civil rights statutes," it is referring to 42 U.S.C. §§ 1981, 1983, 1985, and 1986 (1982). These statutes are set out in relevant part *infra* notes 65 (§ 1983), 73 (§ 1985), 85 (§ 1981) & 112 (§ 1986).

Although this article focuses on suits brought by Guardsmen under the civil rights statutes, its conclusion (i.e., that suits brought by Guardsmen under these statutes for service-related injuries are not justiciable) applies with equal force to suits brought by federal soldiers under the applicable civil rights statutes. *Cf., e.g., Miller v. Newbauer*, 862 F.2d 771 (9th Cir. 1988) (dismissing Air Force reservist's damage suit against his superior officer under 42 U.S.C. § 1985(3) (1982) for failure to exhaust administrative remedies, and stating that Supreme Court precedents "seemingly dictate that civilian courts should not interfere, by means of a section 1985(3) action, with the relationship established between a serviceman and his superior because that relationship 'is at the heart of the necessarily unique structure of the military establishment'"); *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986) (dismissing as non-justiciable federal service member's damage suit against her superior officer under 42 U.S.C. § 1985(3) (1982)).

<sup>2</sup>462 U.S. 296 (1983).

<sup>3</sup>*Id.* at 305 n.3.

for service-related injuries. On the other hand, the Supreme Court's rationale in *Feres v. United States*<sup>4</sup> and its progeny could be construed to proscribe such suits. The *Feres* doctrine generally bars soldiers' suits for service-related injuries absent an "express congressional command"<sup>5</sup> to the contrary. After *Feres*, it could be argued that claims brought by Guardsmen under the civil rights statutes for injuries incident to military service are not justiciable<sup>6</sup> because Congress did not expressly command that these statutes be used for this purpose.

Because suits by Guardsmen under the civil rights statutes are not an infrequent occurrence, the answer to whether such suits are justiciable is of substantial practical importance. Unfortunately, the courts of appeals have not provided a uniform answer to this question. Indeed, a sharp split exists among the circuits regarding the justiciability of such suits.<sup>7</sup> And even the courts that agree such suits may be reviewable disagree on the approach for determining justiciability.<sup>8</sup> This conflict poses a gross unfairness to litigants, because a Guardsman's claim under a civil rights statute may be found meritorious in one court, while an identical claim brought by a Guardsman in a different court may be immediately dismissed for failure to state a claim. The Supreme Court should eliminate this

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<sup>4</sup>340 U.S. 135 (1950).

<sup>5</sup>*Id.* at 146.

<sup>6</sup>The term "justiciability" in this article is generally interchangeable with the term "reviewability." It connotes limitations (of a constitutional, statutory, or prudential nature) on a court's power to review the merits of a plaintiff's claim. See *Penagaricano v. Llenza*, 747 F.2d 55, 59 n.5 (1st Cir. 1984). Cf. *Gilligan v. Morgan*, 413 U.S. 1, 9-10 (1973): "[J]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures."

<sup>7</sup>Compare, e.g., *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986) (dismissing claims brought by members of National Guard under 42 U.S.C. §§ 1983 and 1985(2) (1982) for failure to state a claim upon which relief could be granted) and *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984) (dismissing claim brought by member of National Guard under 42 U.S.C. § 1983 (1982) for failure to state a right of action), *cert. denied*, 471 U.S. 1135 (1985) with *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987) (holding that reviewability of action brought by member of National Guard under 42 U.S.C. §§ 1981 and 1983 (1982) is to be determined by application of *Mindes* test), *cert. denied*, 109 S. Ct. 402 (1988) and *Navas v. Gonzalez Vales*, 752 F.2d 765 (1st Cir. 1985) (same). For a discussion of these cases, see *infra* text accompanying notes 82-92.

<sup>8</sup>Compare, e.g., *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987) (reviewability of action brought by Guardsman under civil rights statutes is determined by *Mindes* test), *cert. denied*, 109 S. Ct. 402 (1988) with *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986) (reviewability of action brought by Guardsman under civil rights statutes is determined by standard justiciability test) with *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984) (reviewability of action brought by Guardsman under civil rights statutes is determined by a *Feres*-type test). For a discussion of these cases, see *infra* text accompanying notes 82-116.

conflict so that Guardsmen's claims under the civil rights statutes will be subject to a rule of law that is both predictable and uniform.

This article will examine the current state of the law and then suggest how the Supreme Court may ultimately resolve the issue. First, the article examines the National Guard, its unique status in our federal system, and its vital role in our national defense. Next, the article examines the rationale in *Feres v. United States*<sup>9</sup> and its progeny in an effort to glean instructive principles for resolving whether suits brought by Guardsmen under the civil rights statutes for injuries incident to military service are justiciable. The article then canvasses the various approaches taken by the courts of appeals that have considered the justiciability of such suits.<sup>10</sup> Finally, the article concludes that, applying the *Feres* rationale, suits by Guardsmen under the civil rights statutes for injuries incident to service are non-justiciable and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.<sup>11</sup>

<sup>9</sup>340 U.S. 135 (1950).

<sup>10</sup>This article limits its inquiry to the issue of whether suits by Guardsmen under the civil rights statutes for service-related injuries are justiciable. The appropriate method for determining whether a Guardsman's injury is service-related is beyond the scope of this article and, in any event, "cannot be reduced to a few bright-line rules; each case must be examined in light of . . . *Feres* and subsequent cases." *United States v. Shearer*, 473 U.S. 52, 57 (1985).

In some instances, determining whether a Guardsman's injury was incident to service may prove more nettlesome than determining whether a federal serviceman's injury was incident to service. This is so because Guardsmen, in their concurrent role as state militia-men, see *infra* note 18 and accompanying text, often perform duties at the state level that appear non-military in nature. Cf. *Johnson v. Orr*, 780 F.2d 386 (3d Cir. 1986) (involving suit by Air National Guard technician arising ostensibly from a non-military labor dispute), cert. denied, 479 U.S. 828 (1987). At bottom, however, determining whether a Guardsman's injury was service-related may simply involve the following inquiries: whether the Guardsman's "suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline." *United States v. Shearer*, 473 U.S. at 57 (citations omitted). If either inquiry is answered in the affirmative, precedent would suggest that the Guardsman's injury was incident to military service. Accord *United States v. Stanley*, 107 S. Ct. 3054, 3062-62 (1987).

<sup>11</sup>To say that such suits are not justiciable is not to say that Guardsmen are without recourse or remedy when, in the course of military service and at the hands of superior officers, they suffer wrongful injuries. As Chief Justice Warren exhorted: "[O]ur citizens may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962). The Supreme Court repeatedly has stated that soldiers may, in appropriate circumstances, seek "redress in civilian courts for constitutional wrongs suffered in the course of military service." *Chappell v. Wallace*, 462 U.S. at 304. See *infra* text accompanying notes 189-91. Moreover, Congress, ever solicitous of and responsive to the needs of service members, has created a comprehensive system for securing redress for injuries suffered incident to military service. See *infra* notes 172-91 and accompanying text.

## II. THE ROLE OF THE NATIONAL GUARD IN OUR FEDERAL SYSTEM

The militia, which is the military forebear of the National Guard, is expressly provided for in the Constitution: "A well regulated Militia . . . [is] necessary to the security of a free State . . ." <sup>12</sup> Each state is thus empowered to maintain a militia and each state in fact maintains a militia, the modern equivalent of which is the National Guard. <sup>13</sup> Control of the Guard is reserved to the states, except when the Guard is called into federal service, at which time the Guard becomes subject to exclusive federal control. <sup>14</sup>

Congress first provided for the "blending" of militia and federal military forces in the National Defense Act of 1916, through which Congress sought to avoid any constitutional questions regarding federal authority to send militias beyond continental borders consistent with the Militia Clause: <sup>15</sup>

The 1916 act was more than a recognition. It was a temporary absorption of the units that were taken. In order to avoid any possible constitutional question as to their use beyond continental borders, the act did not stop with recognition. It ripped the sack wide open, lifted the strands of the National Guard bodily and wove the component threads into the warp and woof of the Regular Army. For the period of such use they were no longer National Guard units, but an integral part of the Army of the United States. <sup>16</sup>

Under the 1916 Act, all members of the National Guard were required to take oaths to obey both the President and the governors of their states. This oath of dual allegiance enabled the President to

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<sup>12</sup>U.S. Const. amend. II. The second amendment provides in full: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The purpose of this amendment was to preserve State autonomy over the militia. See L. Tribe, *American Constitutional Law* 299 n.6 (2d ed. 1988).

<sup>13</sup>*Maryland v. United States*, 381 U.S. 41, 46-47, *vacated on other grounds*, 382 U.S. 159 (1965).

<sup>14</sup>"The President shall be Commander in Chief of the . . . Militia of the several States when called into actual Service of the United States . . ." U.S. Const., art. II, § 2. Congress is tasked with "governing such Part of [the militia] as may be employed in the Service of the United States." *Id.*, art. I, § 8, cl. 16. Congress is authorized to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.*, art. I, § 8, cl. 15.

<sup>15</sup>U.S. Const., art. I, § 8, cl. 15 (quoted in part *supra* note 14).

<sup>16</sup>*Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir. 1969) (quoting *Price v. United States*, 100 F. Supp. 310, 317 (Cl. Ct. 1951)).

draft Guardsman into federal service, at which time they were considered discharged from the militia.<sup>17</sup>

In 1933 Congress made the National Guard a permanent part of the federal military by creating a "dual-enlistment" system:

It did this by conferring a new status on the Guard, by constituting it a reserve component of the Army, to be known as the National Guard of the United States. In its militia capacity, the National Guard was organized and administered under the militia clause of the Constitution, and available only for limited duties. . . . [I]n its capacity as a reserve component of the Army, [the National Guard] was organized and was to be administered under the army clause.

In place of the former draft into federal service, as individuals, the Guard would be *ordered* into federal service as units. . . . Upon being relieved from federal service, all individuals and units would revert to their National Guard status. . . .

Accordingly, the National Guard has today a dual status, and every Guardsman is a reservist as well as a militiaman.<sup>18</sup>

<sup>17</sup>*Dukakas v. Department of Defense*, 686 F. Supp. 30, 34 (D. Mass.), *aff'd*, 859 F.2d 1066 (1st Cir. 1988). In 1918, in the Selective Draft Law Cases, 245 U.S. 366 (1918), the Supreme Court upheld Congress's power to compel federal military service by Guardsmen in the face of a claim that the Militia Clause limited Congress's power to draft militia-men under the Armies Clause. This holding was reaffirmed in *Cox v. Wood*, 247 U.S. 3 (1918), where the Court stated that Congress's power to compel federal military service by Guardsmen flowed from the following three propositions:

- (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to the use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.

247 U.S. at 6.

<sup>18</sup>*Dukakis v. Department of Defense*, 686 F. Supp. at 34 (quoting Weiner, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 208 (1940)). See also H.R. Rep. No. 141, 73d Cong., 1st Sess. 1-6 (1933). As a result of having constitutional moorings in both the Militia Clause and the Armies Clause, the Guard's role in our federal system is uniquely dualistic:

In 1970 the National Guard was incorporated into the Total Forces Concept, which determines the total number of military personnel needed for our national defense and military commitments.<sup>19</sup> Thus, the Guard plays a vital role in the nation's military readiness program. For example, in the event of war, the Army National Guard would provide, in whole or in part, 18 of 24 Army divisions.<sup>20</sup> The Air National Guard would provide 73 percent of the nation's air defense interceptor forces, 52 percent of tactical air reconnaissance, 34 percent of tactical airlift, 25 percent of tactical fighters, 17 percent of aerial refueling, 13 percent of air rescue and recovery forces, and 24 percent of tactical air support forces.<sup>21</sup>

Due to the Guard's vital role in the Total Forces Concept, the Federal Government must ensure the Guard maintains a constant state of military readiness. To this end, the Constitution empowers Congress to

provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.<sup>22</sup>

Pursuant to this authority, Congress has enacted legislation for equipping, training, and disciplining state Guard units so that Guardsmen are "an integral part of the first line defenses of the United States."<sup>23</sup> Congress also has created the National Guard Bureau, an

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This role does not fit neatly within the scope of either state or national concerns; historically the Guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.

*Johnson v. Orr*, 780 F.2d 386, 388 (3d Cir. 1986) (quoting *New Jersey Air National Guard v. Fed. Labor Rel. Auth.*, 877 F.2d 278, 278-79 (3d Cir. 1982)).

<sup>19</sup>See *Bruton v. Schnipke*, 370 F. Supp. 1157, 1163 (E.D. Mich. 1974).

<sup>20</sup>*Perpich v. Department of Defense*, 666 F. Supp. 1319, 1323 (D. Minn. 1987), *affirmed*, No. 87-5345 (8th Cir. June 28, 1989).

<sup>21</sup>666 F. Supp. at 1323. The Guard has long played an important role in national defense. In World War I, 433,000 Guardsmen were ordered to active duty. Between September 16, 1940, and October 6, 1941, over 300,000 Guardsmen were called up, thus doubling the strength in the active Army. When the Korean War began, more than 183,000 Guardsmen were called up. And during the 1961-1962 Berlin Crisis, over 45,000 Guardsmen were called up. See 1982 *National Guard Almanac* 56-59 (Uniformed Services Almanac, Inc., Washington, D.C.).

<sup>22</sup>U.S. Const., art. I, § 8, cl. 16.

<sup>23</sup>32 U.S.C. 102 (1982). Congress has provided that Guardsmen's training and disci-

adjunct of the Departments of the Army and the Air Force, to oversee state Guard units and to ensure compliance with federal statutory and regulatory requirements regarding military training, discipline, and readiness.<sup>24</sup> State Guard units that fail to comply are subject to forfeitures of federal funds and benefits.<sup>25</sup> Thus, the National Guard stands ready to provide "trained units and qualified persons . . . for active duty in the armed forces, in the time of war or national emergency and at such other times as the national security requires."<sup>26</sup>

### III. RELEVANT SUPREME COURT PRECEDENT: *FERES* AND ITS PROGENY

In *Feres v. United States*<sup>27</sup> the Supreme Court held that the government was not liable under the Federal Tort Claims Act (FTCA) for injuries to servicemen where the injuries "arise out of or are in the course of activity incident to service."<sup>28</sup> The Court in *Feres* was faced with claims by active duty service members who sustained injuries in the course of military service due to the negligence of other service members.<sup>29</sup> Notably, the FTCA was a broad remedial statute that contained no explicit exception for claims by service members seeking to recover for service-related injuries.<sup>30</sup> Moreover, the Court found

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pline must conform to that of their federal counterparts, see 32 U.S.C. § 501 (1982), and that Guardsmen are subject to the Uniform Code of Military Justice. See *id.* §§ 326-333. Additionally, Congress has authorized the President to issue regulations and orders necessary to organize, discipline, and govern the National Guard. See *id.* § 110. See also 10 § U.S.C. 105 (1982) (authorizing inspections of National Guards by Secretary of the Army and Secretary of the Air Force to ensure Guard units are properly organized, uniformed, armed, equipped, trained, and instructed).

<sup>24</sup>10 U.S.C. § 3040 (1982).

<sup>25</sup>Section 108 of Title 32 provides:

If, within a time to be fixed by the President, a state does not comply with or enforce a requirement of, or regulation prescribed under, this Title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

32 U.S.C. 108 (1982).

<sup>26</sup>10 U.S.C. § 262 (1982).

<sup>27</sup>340 U.S. 135 (1950).

<sup>28</sup>*Id.* at 146.

<sup>29</sup>The opinion in *Feres* consolidated claims by three service members. In the first case, a service member perished by fire in military barracks. His executrix alleged negligence in 1) quartering him in barracks that the Army knew, or should have known, to be unsafe due to a defective heating plant; and 2) failing to maintain an adequate fire watch. 340 U.S. at 137. In the second case, a service member alleged medical malpractice against an Army surgeon who, during the course of performing an abdominal operation, negligently left in the service member's stomach a towel that measured 30 inches long by 18 inches wide. *Id.* In the third case, the executrix of a deceased service member alleged that the service member died due to negligent medical treatment by Army surgeons. *Id.*

<sup>30</sup>340 U.S. at 139.

that several factors strongly suggested that Congress intended the FTCA to apply to such claims:

[The FTCA] does confer district court jurisdiction generally over claims for money damages against the United States founded on negligence. 28 U.S.C. § 1346(b). It does contemplate that the Government will sometimes respond for negligence of military personnel, for it defines "employee of the Government" to include "members of the military or naval forces of the United States," and provides that "acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty." 28 U.S.C. § 2671. Its exceptions might also imply inclusion of claims such as we have here. 28 U.S.C. § 2680(j) excepts "any claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, *during time of war*" (emphasis supplied), from which it is said we should infer allowance of claims arising from non-combat activities in peace. . . . These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.<sup>31</sup>

The Supreme Court nevertheless concluded that, although the FTCA literally and implicitly could be read to allow tort suits against the United States for injuries suffered by a soldier in service, Congress did not intend to subject the Government to such claims.

Significant to the Court's decision was the fact that "no American law . . . ever ha[d] permitted a soldier to recover for negligence, against either his superior officers or the Government he [was] serving."<sup>32</sup> Moreover, stated the Court, "claimants cite us no state, and we know of none, which has permitted members of its militia to maintain tort actions for injuries suffered in the service."<sup>33</sup> Given this background, the Court declined to "impute to Congress such a radical departure from established law in the absence of express congressional command."<sup>34</sup>

The Court further justified its holding on the following two grounds. First, alternative remedies were available to service members in the form of "enactments by Congress which provide systems of

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<sup>31</sup>*Id.* at 138-39.

<sup>32</sup>*Id.* at 141.

<sup>33</sup>*Id.* at 142.

<sup>34</sup>*Id.* at 146.



simple, certain, and uniform compensation for injuries or death of those in the armed services."<sup>35</sup> The existence of alternative remedies, and the failure by Congress to provide for an adjustment between alternative remedies and FTCA remedies, showed "there was no [congressional] awareness that the [FTCA] might be interpreted to permit recovery for injuries incident to military service."<sup>36</sup> Second, the relationship of military personnel to the government had theretofore been governed exclusively by federal law. The Court rejected the notion that Congress tacitly had altered the venerable principle of federal governance of federal soldiers by creating a cause of action for service-connected injuries that depended on the vagaries of local law: "It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value."<sup>37</sup> Absent an "express congressional command,"<sup>38</sup> the Court was unwilling to attribute to Congress an intent to disturb with state law perturbations the unique and "distinctively federal"<sup>39</sup> relationship between soldiers and their superior officers.<sup>40</sup>

Four years after *Feres*, in *United States v. Brown*,<sup>41</sup> the Supreme Court discussed another factor that buttressed the *Feres* decision and that ultimately provided the primary justification for the *Feres*

<sup>35</sup>*Id.* at 144.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 143.

<sup>38</sup>*Id.* at 146.

<sup>39</sup>*Id.* at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301 (1947)).

<sup>40</sup>The Court candidly acknowledged that, given the dearth of committee reports or floor debates addressing the particular issue raised in *Feres*, "no conclusion can be above challenge." 340 U.S. at 138. The Court found solace, however, in the knowledge that "if [it] misinterpret[s] the Act, at least Congress possesses a ready remedy." *Id.*

<sup>41</sup>348 U.S. 110 (1954). In *Brown* a discharged serviceman brought a medical malpractice suit under the FTCA for injuries he sustained as a civilian in a veterans' hospital. The Supreme Court held that suit was not barred by *Feres* because the injury did not arise out of or in the course of military duty. *See id.* at 112-13.

The decision in *Brown* was governed by *Brooks v. United States*, 337 U.S. 49 (1949), which preceded *Feres* by one year. In *Brooks*, servicemen on leave were injured on a public highway by a United States Army truck driven negligently by a civilian employee of the Army. The Court held that the servicemen could maintain a suit under the FTCA because the case "[dealt] with an accident which had nothing to do with the [servicemen's] army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." 337 U.S. at 52. The Court also held that compensation sought and paid under the Veterans Act did not bar recovery under the FTCA, because Congress had not provided for exclusiveness of either remedy. *Id.* at 53. However, the Court indicated that recovery under the FTCA should be reduced by the amounts paid by the United States as disability payments under the Veterans Act, *id.* at 53-54. *Accord* *United States v. Brown*, 348 U.S. at 111 n.\*.

doctrine.<sup>42</sup> Specifically, the Court stated that servicemen could not sue under the FTCA for injuries incident to service due to

[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suit on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.<sup>43</sup>

The *Feres* doctrine is alive and vital,<sup>44</sup> despite some criticism from jurists and academic commentators.<sup>45</sup> The Supreme Court not only

<sup>42</sup>See *infra* text accompanying notes 47-49.

<sup>43</sup>United States v. Brown, 348 U.S. at 112.

<sup>44</sup>For comprehensive listings of judicial decisions applying the *Feres* doctrine see, e.g., United States v. Johnson, 481 U.S. 681, 686 n.5, 687-88 n.8 (1987); *Flowers v. United States*, 764 F.2d 759, 762-63 (11th Cir. 1985); Zillman, *Intramilitary Tort Law: Incidence To Service Meets Constitutional Tort*, 60 N.C.L. Rev. 489, 538-41 (1982). See also *infra* note 46.

<sup>45</sup>In his dissent in *United States v. Johnson*, 481 U.S. 681 (1987), Justice Scalia provides a list of appellate decisions and academic articles that indicate "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Id.* at 700 (Scalia, J., dissenting, joined by Brennan, Marshall, Stevens, J.J.). In *Johnson* the Supreme Court extended the *Feres* doctrine to bar not only intramilitary suits under the FTCA arising from injuries incident to service, but to bar, as well, any suit by or on behalf of a service member injured incident to service, including those directed at civilian employees of the Federal Government. In his comprehensive dissent, Justice Scalia stated that the *Feres* Court erred in construing the FTCA, and that the *Feres* doctrine should not be extended beyond intramilitary suits.

Interestingly, notwithstanding his strong dissent in *Johnson*, Justice Scalia subsequently wrote the majority opinion in *United States v. Stanley*, 107 S. Ct. 3054 (1987), where the Court ratified and extended the *Feres* rationale expressed in *Chappell v. Wallace*, 462 U.S. 296 (1983):

We . . . reaffirm the reasoning of *Chappell* that the special factors counselling hesitation—the unique disciplinary structure of the Military Establishment and Congress' activity in the field—extend beyond the situation in which an officer-subordinate relationship exists, and require abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA established by *Feres* and *United States v. Johnson*. We hold that no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service.

107 S. Ct. at 3063. The discussion of "*Bivens* actions" refers to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), where the Supreme Court authorized suits for damages if federal officials violate an individual's constitutional rights, notwithstanding that Congress had not authorized such actions. See *Chappell*, 462 U.S. at 298.

Justice Scalia noted that his positions in *Johnson* and *Stanley* were easily reconciled because the former case involved statutory construction and he "saw no justification for adopting a military affairs exception to the FTCA." *Id.* at 3062 n.5. The latter case, on the other hand, involved whether to create a judicially inferred remedy that might disrupt military discipline and the command relationship. In view of Congress's explicit and plenary constitutional authority to govern the military, "an exception to *Bivens* liability is appropriate [for injuries incident to military service]. And if excep-

repeatedly has reaffirmed the *Feres* rule, it has broadened it to bar all claims of "the type . . . that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."<sup>46</sup> Interestingly, while the Court has fortified and expanded the reach of the *Feres* doctrine, it has suggested that two factors upon which the doctrine initially was grounded are "no longer controlling:"<sup>47</sup> 1) the existence of alternative remedies for service members and their dependents; and 2) the anomaly of having state law define the government's duty to supervise service members.<sup>48</sup> The *Feres* doctrine now is "best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the [deleterious] effects of the maintenance of suits on discipline.'" <sup>49</sup>

A noteworthy case representative of the strength and scope of the *Feres* doctrine, as well as its application outside the FTCA context, is *Chappell v. Wallace*,<sup>50</sup> where the Supreme Court held that "military personnel may not maintain a [*Bivens*-type] suit to recover damages from a superior officer for alleged constitutional violations."<sup>51</sup> The

tion is to be made, there is, as *Chappell* recognized, no reason for it to be narrower under *Bivens* than under the FTCA." *Id.* For a discussion of the *Chappell* decision, see *infra* text accompanying notes 50-56.

<sup>46</sup>*United States v. Shearer*, 473 U.S. at 59. Illustrative of the ever-widening scope given the *Feres* doctrine by the Supreme Court are: *United States v. Stanley*, 107 S. Ct. 3054 (1987) (holding that judicial abstention in inferring *Bivens*-type actions for injuries suffered by service members incident to service is as extensive as the exception to the FTCA established by *Feres* and its progeny); *United States v. Johnson*, 481 U.S. 681 (1987) (holding that *Feres* doctrine extends beyond intramilitary suits, and bars suits on behalf of service members killed during the course of military service where the complaint alleges negligence by civilian employees of the Federal Government); *Chappell v. Wallace*, 462 U.S. 296 (1983) (holding that service members may not bring *Bivens*-type actions against superior officers for alleged constitutional violations); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) (holding that the right of a third party to recover in an indemnity action against the United States is limited by the *Feres* rationale where the injured party is a service member).

<sup>47</sup>*United States v. Shearer*, 473 U.S. at 58 n.4.

<sup>48</sup>*See id.* Although the Supreme Court stated in *Shearer* that these two factors are "no longer controlling," it subsequently retreated from abandoning these factors as weighty rationales for the *Feres* doctrine. In *United States v. Johnson*, 481 U.S. 681 (1987), the Court "emphasized" that "the existence of . . . generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Id.* at 689 (emphasis added). The Court also reiterated that the relationship between the Government and its service members is "distinctly federal in character," and that, in light of this relationship, it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] service member." *Id.* (quoting *Feres v. United States*, 340 U.S. at 143, and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. at 672).

<sup>49</sup>*Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963), and *United States v. Brown*, 348 U.S. 110, 112 (1954)).

<sup>50</sup>462 U.S. 296 (1983).

<sup>51</sup>*Id.* at 305. *See supra* note 45 for a discussion of "*Bivens*-type" actions.

respondents in *Chappell* were black service members who alleged that their superior officers had impermissibly discriminated against them on the basis of race. The Ninth Circuit decided that the *Mindes* test should be applied to determine the reviewability of the service members' claims, and it remanded the case for the district court to apply that test.<sup>52</sup>

The Supreme Court reversed. Guided by *Feres*, the Court stated that two "special factors" made it inappropriate to create a *Bivens*-type remedy for military personnel against their superior officers. First, the existence of a unique disciplinary structure within the military establishment, and the concomitant existence of a unique system of military justice, counselled strongly against judicial intrusion.

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion. . . . [C]enturies of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.<sup>53</sup>

Second, the Constitution vests Congress with "plenary constitutional authority over the military."<sup>54</sup> The Supreme Court noted that Congress has established a comprehensive internal system of military justice for the review and remedy of constitutional complaints.<sup>55</sup> Congress has not, however, provided a damages remedy for military personnel who allege that their constitutional rights have been violated. In view of Congress's deliberate refusal to provide such a remedy, stated the Court, a judicially created *Bivens*-type remedy "would be plainly inconsistent with Congress' authority in this field."<sup>56</sup>

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<sup>52</sup>661 F.2d 729, 734, 738 (9th Cir. 1981). For a discussion of the *Mindes* test, see *infra* note 83 and text accompanying note 91.

<sup>53</sup>462 U.S. at 300.

<sup>54</sup>*Id.* at 302.

<sup>55</sup>*Id.* at 300-04.

<sup>56</sup>*Id.* at 304. In short, stated the Supreme Court, "the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military per-

#### IV. THE CONFLICT AMONG THE CIRCUITS

Before discussing the disparities among the courts of appeals in their treatment of Guardsmen's suits under the civil rights statutes, it is appropriate to mention one aspect of such suits on which the courts thus far agree: Guardsmen are barred from seeking damages under the civil rights statutes for injuries incident to service.<sup>57</sup> Lower courts generally have construed the Supreme Court's decisions in *Feres*<sup>58</sup> and in *Chappell*<sup>59</sup> as establishing a per se prohibition on suits by soldiers seeking damages for tortious<sup>60</sup> or constitutional<sup>61</sup> injuries suffered in the course of or incident to military service.

Notwithstanding this area of judicial agreement regarding the non-availability of damage claims under the civil rights statutes, the courts of appeals are sharply split regarding the availability *vel non* of in-

sonnel a *Bivens*-type remedy against their superior officers." *Id.*

Notably, the respondents in *Chappell* also sought damages flowing from an alleged conspiracy among petitioners in violation of 42 U.S.C. § 1985(3). The Supreme Court declined to resolve whether respondents could maintain this portion of their suit because the issue had not been adequately addressed by the court below or by the parties. See 462 U.S. at 305 n.3. As discussed *infra* text accompanying notes 57-61, however, appellate courts, thus far, uniformly have construed *Feres* and *Chappell* as proscribing damage actions under the civil rights statutes.

<sup>57</sup> See, e.g., *Jorden v. National Guard Bureau*, 799 F.2d 99, 107-08 (3d Cir. 1986). *But see id.* at 111-15 (Gibbons, J., dissenting). *Cf. infra* note 129 (cases dismissing damage actions by federal service members under civil rights statutes).

<sup>58</sup> *Feres v. United States*, 340 U.S. 135 (1950); *supra* text accompanying notes 27-40.

<sup>59</sup> *Chappell v. Wallace*, 462 U.S. 296 (1983); *supra* text accompanying notes 50-56.

<sup>60</sup> E.g., *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988) (*Feres* doctrine precludes common law tort suits for injuries incident to military service); *Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987) (same); *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986) (same). See Euler, *Personal Liability of Military Personnel for Action Taken in the Course of Duty*, 113 Mil. L. Rev. 137, 144-50 (1966). *But cf.* *United States v. Stanley*, 107 S. Ct. 3054, 3072-73 (1987) (Brennan, J., dissenting, joined by Marshall, J.) (qualified, rather than absolute, immunity should be the norm for all government officials, even in cases involving military matters).

<sup>61</sup> E.g., *Miller v. Newbauer*, 862 F.2d 771, 773 (9th Cir. 1988); *Jorden v. National Guard Bureau*, 799 F.2d 99, 107 (3d Cir. 1986) (citing cases), *cert. denied*, 108 S. Ct. 66 (1987); *Holdiness v. Stroud*, 808 F.2d at 426 n.46 (citing cases). See Copelan & Cruden, *Constitutional Torts and Official Immunity After Chappell v. Wallace*, 60 Fla. Bar J. 51, 53-55 (1986). *But cf.* *United States v. Stanley*, 107 S. Ct. at 3065 (O'Connor, J., dissenting in part) ("[C]onduct of the type alleged in this case [deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent, outside of any combat, combat training, or military exigency, and for no other reason than to gather information on the effect of LSD on human beings, is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission.]; *id.* at 3068 (Marshall, J., dissenting, joined by Brennan, J.) ("Serious violations of the constitutional rights of soldiers, must be exposed and punished. . . . The solution for Stanley and other soldiers, . . . lies in a *Bivens* action . . ."); Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 Iowa L. Rev. 93 (1985) (same); Note, *United States v. Stanley: Military Personnel and the Bivens Action*, 67 N.C.L. Rev. 233 (1988) (same).

junctive relief under the civil rights statutes for injuries incident to military service. Moreover, even among those courts that hold such suits may be actionable, a conflict exists regarding how to determine justiciability.

## A. COURTS FINDING GUARDSMEN'S SUITS NON-JUSTICIABLE

### 1. The Tenth Circuit

The Tenth Circuit found a claim to be non-justiciable in *Martelon v. Temple*.<sup>62</sup> Leo Martelon sought full-time civilian employment in 1974 as an administrative supply technician with the Colorado Army National Guard. A prerequisite to obtaining civilian employment as a Guard technician was prior enlistment for military service in the Guard. Martelon therefore enlisted in the Guard and was assigned to the 220th Military Police Company, where he worked full time as a civilian administrative supply technician.<sup>63</sup> About ten years later, Martelon was involuntarily reassigned to the 193rd Police Battalion. Because his new military assignment was incompatible with his continued employment as a civilian Guard technician for the 220th Military Police Company, and because the 193rd Police Battalion had no available billet for an administrative supply technician, the Guard terminated Martelon's civilian employment.<sup>64</sup>

Martelon brought an action in district court under 42 U.S.C. § 1983,<sup>65</sup> alleging that Colorado had violated his due process rights by not according him a hearing prior to his dismissal. He sought reinstatement as a Guard technician, compensatory damages, and punitive damages. The United States District Court for the District of Colorado entered summary judgment on behalf of the state.<sup>66</sup>

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<sup>62</sup>747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

<sup>63</sup>747 F.2d at 1349.

<sup>64</sup>*Id.*

<sup>65</sup>Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

<sup>66</sup>*Martelon v. Walker*, 568 F. Supp. 672 (D. Colo. 1983). The district court found that the Supreme Court's decision in *Gilligan v. Morgan*, 413 U.S. 1 (1973), barred Martelon's section 1983 claim: "Martelon's claim seeking relief for alleged violations of 42

The Tenth Circuit affirmed on the ground that Guardsmen do not have a right of action under section 1983 for injuries incident to service.<sup>67</sup> The court reached this conclusion by reference to *Feres v. United States*.<sup>68</sup>

In *Feres* the Court pointed out that no such liability existed before the Federal Tort Claims Act and that Congress never intended to create such liability.

Before the passage of § 1983, there was no liability on the part of military superiors for transgressions against the rights of other military personnel. By the passage of § 1983, Congress never intended to create such rights. See the Court's review of the legislative history of § 1983 found in *Allen v. McCurry*, 449 U.S. 90, 98-99. . . . [Martelon's] § 1983 claim has no merit.<sup>69</sup>

## 2. The Fifth Circuit

The Fifth Circuit reviewed this issue in *Crawford v. Texas Army National Guard*.<sup>70</sup> Richard Crawford and Bruce Olson sued the Texas Army National Guard and various state officials because they allegedly were dismissed from the Guard or put in the inactive reserve in retaliation for reporting criminal activity and the discrimination and mistreatment of blacks in the Guard.<sup>71</sup> Plaintiffs brought suit under 42 U.S.C. §§ 1983<sup>72</sup> and 1985(2),<sup>73</sup> seeking com-

U.S.C. § 1983 raises issues not appropriate for determination in this court. A federal trial judge is not competent to review decisions of Army National Guard officers in assigning personnel, at least in the circumstances here presented." 568 F. Supp. at 673.

<sup>67</sup>747 F.2d at 1350-51.

<sup>68</sup>340 U.S. 135 (1950); *supra* text accompanying notes 27-40.

<sup>69</sup>747 F.2d at 1351. The Tenth Circuit thus grounded the decision in *Martelon* on the fact that Congress, in enacting 42 U.S.C. § 1983, did not intend to confer a statutory right on Guardsmen to bring causes of actions against superior officers for service-related injuries. The practical effect of this decision will likely be that similar cases brought by Guardsmen under the civil rights statutes will be dismissed by district courts in the Tenth Circuit for failure to state a claim upon which relief can be granted.

<sup>70</sup>794 F.2d 1034 (5th Cir. 1986).

<sup>71</sup>*Id.* at 1035.

<sup>72</sup>See *supra* note 65.

<sup>73</sup>Section 1985 provides:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his persons or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties:

pensatory damages, punitive damages, reinstatement of their eligibility for all available retirement benefits, costs, attorney fees, and the removal of all false and adverse information from their personnel files.<sup>74</sup> The United States District Court for the Western District of Texas dismissed plaintiffs' suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.<sup>75</sup>

The Fifth Circuit affirmed. Guided by Supreme Court precedent, the court observed "there can be little doubt that the permissible range of lawsuits by present or former servicemen against their superior officers is, at the very least, narrowly circumscribed."<sup>76</sup> Because suits by Guardsmen under 42 U.S.C. §§ 1983 and 1985(2) would disrupt the effective accomplishment of the military mission and tend to duplicate other remedies provided to service members by Congress, the court held that such suits were barred.

[W]e perceive no basis upon which to distinguish . . . claims [brought by Guardsmen under the civil rights statutes] from those held impermissible by *Chappell*. Section 1983 and due process claims, like those predicated on *Bivens*, invite judicial second-guessing of military actions and tend to overlap the remedial structure created within each service, which, according to *Chappell*, provide an exclusive remedy subject to review only under the arbitrary and capricious

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(2) If two or more persons in any State or Territory conspire . . . for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws: . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1985 (1982).

<sup>74</sup>794 F.2d at 1035.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*



standard. Consequently, appellants' requests for money damages, to the extent they are based upon alleged constitutional violations and 42 U.S.C. § 1983, are precluded by *Chappell*.

We similarly reject the claims alleging a conspiracy violative of 42 U.S.C. § 1985(2). Inasmuch as the litigation of a claim under this statute would disserve the interests of proper military functioning to the same extent as a *Bivens* or an FTCA claim, the rationale of *Chappell* compels dismissal.<sup>77</sup>

Importantly, the court also rejected the Guardsmen's contention that *Chappell* did not bar them from seeking injunctive relief in the nature of reinstatement to the Texas Army National Guard. The court acknowledged that the Supreme Court has stated that "military personnel are [not] barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."<sup>78</sup> Nevertheless, stated the court, the Supreme Court has never authorized a suit for injunctive relief involving military personnel decisions. Rather, the Supreme Court has authorized only suits involving "challenges to the facial validity of military regulations and [that are] not tied to discrete personnel matters. The nature of the lawsuits, rather than the relief sought, render[s] them justiciable."<sup>79</sup> Because the Guardsmen's suit involved challenges to discreet personnel decisions rather than challenges to the facial validity of military regulations, the court found the suit non-justiciable.<sup>80</sup>

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<sup>77</sup>*Id.* at 1036.

<sup>78</sup>*Id.* (citing *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983)).

<sup>79</sup>794 F.2d at 1036.

<sup>80</sup>One year following its decision in *Crawford*, the Fifth Circuit in *Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987), affirmed a district court's dismissal of a Guardsman's suit under 42 U.S.C. § 1983 for failure to state a claim for which relief can be granted: "[W]e follow *Crawford* in applying the *Chappell* rule to Guard members and, using the tests in *Chappell* and *Mindes*, hold that the remedy sought by Holdiness [damages under section 1983] would be so disruptive to military service that the claim should not be entertained." 808 F.2d at 423. While the court's statement suggests that the *Mindes* analysis is applicable in determining the justiciability of a Guardsman's suit under section 1983, the court's action belies this conclusion. The court simply dismissed the Guardsman's claim without specifically considering the *Mindes* analysis or remanding to the district court for that purpose. Accordingly, the decision in *Holdiness* does not fairly stand for the proposition that the Fifth Circuit works through the *Mindes* test to determine the justiciability of suits brought by Guardsmen under the civil rights statutes. To the contrary, the Fifth Circuit's decision in *Crawford* indicates that the court's approach is to dismiss such suits *ab initio* for failure to state a claim upon which relief can be granted. Cf. *Stinson v. Hornsby*, 821 F.2d 1537, 1542 n.1, 1543 n.3 (11th Cir. 1987) (Henderson, J., concurring); *cert. denied*, 109 S. Ct. 402 (1985).

## B. THE THREE APPROACHES FOR FINDING JUSTICIABILITY

### I. The *Mindes* Approach Used By the First and Eleventh Circuits

The First Circuit<sup>81</sup> and the Eleventh Circuit<sup>82</sup> have held that claims by Guardsmen under the civil rights statutes must be tested for reviewability against the *Mindes* criteria.<sup>83</sup> The Eleventh Cir-

<sup>81</sup>Navas v. Gonzalez Vales, 752 F.2d 765 (1st Cir. 1985); Penagaricano v. Lienza, 747 F.2d 55 (1st Cir. 1984).

<sup>82</sup>Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 109 S. Ct. 402 (1988).

<sup>83</sup>The *Mindes* criteria, which are set out *infra* text accompanying note 91, are derived from *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), where the Fifth Circuit provided a multifarious test for determining "when internal military affairs should be subjected to court review." 453 F.2d at 199. A majority of courts have endorsed the *Mindes* approach. See, e.g., *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985); *Navas v. Gonzalez Vales*, 752 F.2d 765 (1st Cir. 1985); *Rucker v. Secretary of the Army*, 702 F.2d 966 (11th Cir. 1983); *Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981); *Wallace v. Chappell*, 611 F.2d 729 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983); *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980); *ber.Shalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980).

The Third Circuit constitutes a minority of one that has explicitly rejected the *Mindes* test on the ground that the test improperly mixes "the concept of justiciability with the standards to be applied to the merits." *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981). The Third Circuit therefore does not impose on military plaintiffs the burden of satisfying the *Mindes* test; rather, it simply applies traditional standards of justiciability. See *Jorden v. National Guard Bureau*, 799 F.2d at 110-11 & n.16; *infra* text accompanying notes 104-16.

Although the District of Columbia Circuit has not expressly rejected the *Mindes* test, several cases strongly suggest that it, like the Third Circuit, would apply traditional standards of justiciability to claims by service members. See, e.g., *Kreis v. Secretary of the Air Force*, 666 F.2d 1508, 1511-12 (D.C. Cir. 1989); *Emory v. Secretary of the Navy*, 819 F.2d 291, 293-94 (D.C. Cir. 1987); *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). The court has, however, favorably cited aspects of the *Mindes* decision, including the exhaustion requirement. See, e.g., *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986); *infra* note 188.

That so many courts have adopted the *Mindes* test is evidence of its wide-spread acceptance and utility, and suggests that it is an appropriate analytic tool for determining the justiciability of service members' claims. *But see Note, Judicial Review of Constitutional Claims Against the Military*, 84 Colum. L. Rev. 387 (1984) (arguing that the *Mindes* test should be abandoned and suggesting that the political question doctrine can act as an adequate filter to screen out non-justiciable claims). The Supreme Court has not yet had the opportunity to express its views on the *Mindes* test.

Importantly, and as discussed *infra* text accompanying notes 160-65, the fact that a court has endorsed the *Mindes* test does not mandate that the *Mindes* criteria be applied to Guardsmen's suits under the civil rights statutes to the exclusion of the critical justiciability consideration underlying the *Feres* rationale. Regardless of whether the *Mindes* test is ultimately applied in such suits, the critical justiciability issue that must first be considered is whether Congress "expressly] . . . commanded[]" that the civil rights statutes provide a cause of action for Guardsmen alleging injuries incident to military service. *Cf., e.g., Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th

cuit's recent decision in *Stinson v. Hornsby*<sup>84</sup> is representative of the approach taken by both courts. Stinson, a black Guardsman in the Alabama National Guard, sued the Guard and four superior officers in their individual and official capacities under 42 U.S.C. §§ 1981<sup>85</sup> and 1983<sup>86</sup> in the United States District Court for the Middle District of Alabama. He alleged that the Alabama Guard had engaged in racially discriminatory and retaliatory employment practices in refusing to advance him to a certain supervisory position and in terminating his employment.<sup>87</sup> He sought reinstatement and advancement, back pay, injunctive relief, and other relief that the court might consider appropriate. The district court dismissed Stinson's suit for failure to state a claim upon which relief could be granted. Guided by the Supreme Court's decision in *Chappell v. Wallace*,<sup>88</sup> the court determined that the unique disciplinary structure of the military service, combined with the fact that Congress had provided other avenues of relief for the injuries alleged by Stinson, constituted "special factors" militating against the maintenance of actions by soldiers in the National Guard under sections 1981 and 1983.<sup>89</sup>

The Eleventh Circuit reversed. The court first observed that, "in some situations at least, uniformed members of the armed services may assert that their constitutional and statutory rights have been violated by their superiors."<sup>90</sup> The court then held that full-time ser-

Cir. 1986) (Fifth Circuit, whence originated the *Mindes* criteria, affirms dismissal of Guardsman's suit under the civil rights statutes without applying *Mindes* criteria; see *supra* text accompanying notes 70-80).

<sup>84</sup>821 F.2d 1537 (11th Cir. 1987), cert. denied, 109 S. Ct. 402 (1988).

<sup>85</sup>Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

<sup>86</sup>See *supra* note 65.

<sup>87</sup>Prior to filing his complaint in district court, and prior to his discharge from the Guard, Stinson had filed an administrative complaint with the Department of the Army in which he alleged that the Alabama National Guard had impermissibly refused to select him for a supervisory position on the basis of race. Following a formal investigation, the Alabama Adjutant General filed a final agency decision in which he found that Stinson's allegation of discrimination lacked merit. The National Guard Bureau reviewed the decision and concurred with the State's finding of no discrimination. See 821 F.2d at 1538.

<sup>88</sup>482 U.S. 296 (1983).

<sup>89</sup>821 F.2d at 1539.

<sup>90</sup>*Id.* at 1540 (quoting *Gonzales v. Department of the Army*, 718 F.2d 926, 929 (9th Cir. 1983)).

vice members in the National Guard who bring actions for constitutional violations under section 1981 or 1983 must have the allegations in their complaints tested for reviewability pursuant to the *Mindes* test:

First, an internal military decision should not be reviewed unless the plaintiff asserts:

- (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and
- (b) exhaustion of available intraservice corrective measures.

Second, the reviewability of the claim must be examined by weighing the following four factors:

1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of value. . . .
2. The potential injury to the plaintiff if review is refused.
3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted. . . .
4. The extent to which the exercise of military expertise or discretion is involved.<sup>91</sup>

The court of appeals remanded to the district court with instructions to use the *Mindes* test to determine whether Stinson's claims under sections 1981 and 1983 were barred.<sup>92</sup>

## 2. *The Feres Approach Used By the Eighth Circuit*

The Eighth Circuit in *Brown v. United States*<sup>93</sup> held that a Guards-

<sup>91</sup>821 F.2d at 1540 (citations omitted) (quoting *Mindes*, 453 F.2d at 201).

<sup>92</sup>*Id.* at 1540-41. Judge Hill dissented on the ground that *Chappell* mandated dismissal of the Guardsman's claims. See *id.* at 1543 (Hill, J., dissenting).

Senior Judge Henderson wrote a lengthy concurrence stating that his agreement with the decision stemmed from "deference to the precedential weight of *Mindes*." *Id.* at 1541 (Henderson, J., concurring). He further said, however, that the *en banc* court should reexamine the applicability of *Mindes* in light of *Chappell* and consider whether Guardsmen's suits under the civil rights statutes for "discrete personnel matters" are justiciable. *Id.* at 1542 (Henderson, J., concurring). Senior Judge Henderson stated he would hold such claims non-justiciable. *Id.* at 1542-43 (Henderson, J., concurring); *infra* note 165.

<sup>93</sup>739 F.2d 362 (8th Cir. 1984).

man's claim under the civil rights statutes must be tested under a "flexible analysis to determine whether the facts in [the] case fall within the reasons given by the Supreme Court for its principle of military immunity in *Feres*."<sup>94</sup> In *Brown* a black Guardsman in the Nebraska National Guard alleged he was the victim of a racially motivated "mock lynching"<sup>95</sup> by his fellow Guardsmen during the course of military exercises at a weekend drinking party. As a result of the incident, stated the Guardsman, he entered into a deep mental depression that culminated in a suicide attempt, which left him severely and permanently injured.<sup>96</sup> The Guardsman brought claims under 42 U.S.C. §§ 1981<sup>97</sup> and 1983<sup>98</sup> against the participants in the hanging incident, as well as against his superior officers for failing to prevent the incident and for failing to properly investigate the incident. The United States District Court for the District of Nebraska, relying upon the doctrine of military immunity in *Feres*, entered summary judgment for the defendants.<sup>99</sup>

The Eighth Circuit reversed in part. The court first rejected the Guardsman's argument that the *Feres* doctrine does not apply to claims brought under the civil rights statutes:

[T]he Supreme Court in *Chappell* left open the question of whether the *Feres* doctrine applied to an action brought under a civil rights statute. We are unable to find, however, a reasoned distinction for the purposes of the *Feres* doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute. We cannot say that the policies supporting the civil rights statutes are any stronger than those supporting constitutional rights; nor can we say that military discipline will be any less affected by a civil rights claim than a constitutional claim. Hence, we reject [the Guardsman's] argument that the *Feres* doctrine can never be a bar to a suit brought under 42 U.S.C. §§ 1981 and 1983.<sup>100</sup>

The court of appeals thereupon formulated the following two-part analysis for determining the reviewability of the Guardsman's claims under the civil rights statutes: "(1) whether there is a relevant

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<sup>94</sup>*Id.* at 367.

<sup>95</sup>*Id.* at 364.

<sup>96</sup>*Id.* at 363, 364.

<sup>97</sup>See *supra* note 85.

<sup>98</sup>See *supra* note 65.

<sup>99</sup>739 F.2d at 363.

<sup>100</sup>*Id.* at 367.

relationship between the servicemember's activity and the military service, and (2) whether military discipline will be impeded if the challenged conduct is litigated in a civil action."<sup>101</sup> Applying this test, the court held that the *Feres* doctrine barred the Guardsman's claims against his superior officers for failing to prevent the incident and for failing to perform a proper investigation of the incident.<sup>102</sup> The court held, however, that the *Feres* doctrine did not bar the Guardsman's claims against the participants in the mock lynching because: 1) the claims did not involve the command relationship between the Guardsman and his superior officers; 2) the claims did not involve military decisionmaking implicating disciplinary matters; and 3) the activity giving rise to the claims bore no relationship to any military purpose.<sup>103</sup>

### 3. *The Standard Justiciability Approach Used By the Third Circuit*

The Third Circuit, which has expressly rejected the *Mindes* test,<sup>104</sup> held in *Jorden v. National Guard Bureau*<sup>105</sup> that Guardsmen are barred from bringing damage actions against their superior officers under the civil rights statutes. The court held, however, that Guardsmen are not barred from seeking injunctive relief under these statutes for the violation of constitutional rights. Jorden, the first black to enlist in the Pennsylvania Air National Guard, served for over twenty-five years without incident and advanced to the grade of master sergeant.<sup>106</sup> Thereafter, he lodged a series of complaints against his superiors, including allegations of discrimination and impermissible expenditure of Guard funds.<sup>107</sup> According to Jorden, his complaints sparked a campaign of retaliatory harassment culminating in an order by the Governor calling him to active duty for twenty-three days of "special training" to undergo psychiatric evaluation.<sup>108</sup> When Jorden refused to comply with the order, he was dismissed from the Guard.<sup>109</sup>

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<sup>101</sup>*Id.*

<sup>102</sup>*Id.* at 369.

<sup>103</sup>*Id.* at 368, 369. As discussed *infra* note 123, the *Feres*-type test applied by the Eighth Circuit in *Brown* appears substantially similar in practical effect to the approach taken by the Fifth and Tenth Circuits, see *supra* text accompanying notes 62-80, which dismiss suits by Guardsmen under the civil rights statutes for service-related injuries due to non-justiciability.

<sup>104</sup>*Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981). As discussed *supra* note 83, the Third Circuit is the only court of appeals that has expressly repudiated the *Mindes* approach.

<sup>105</sup>799 F.2d 99 (3d Cir. 1986).

<sup>106</sup>*Id.* at 101.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* at 101-02.

<sup>109</sup>*Id.* at 102.

Jorden brought claims under 42 U.S.C. §§ 1983,<sup>110</sup> 1985,<sup>111</sup> and 1986,<sup>112</sup> claiming that his superiors had engaged in a conspiracy to harass him and to discharge him on the basis of race and in retaliation for the exercise of his first amendment rights.<sup>113</sup> He sought damages from his superior officers, and he also sought injunctive relief in the form of reinstatement. The United States District Court for the Eastern District of Pennsylvania dismissed the case on the ground that Jorden's action was barred by the Supreme Court's decision in *Chappell*.<sup>114</sup>

The Third Circuit reversed in part. The court of appeals concluded that *Chappell* established a per se prohibition of all damage actions, including those brought under the civil rights statutes, against military officers for violations of constitutional rights.<sup>115</sup> The court held, however, that *Chappell* did not proscribe Guardsmen from seeking equitable relief under these statutes:

One of the concerns underlying *Chappell* is the need for military officers' uninhibited decisionmaking, and the threat to such decisionmaking if officers fear personal liability. The threat of personal liability for damages poses a unique deterrent to vigorous decisionmaking. See generally P. Schuck, *Suing Government* (1983). On the other hand, the possibility that an officer may be compelled by a court to cease applying a particular regulation in an arbitrary manner, or to reinstate an improperly discharged soldier, poses much less of a threat to vigorous decisionmaking. Indeed, it is for this reason that government officials are often immune from damages but susceptible to injunctions.<sup>116</sup>

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<sup>110</sup>See *supra* note 65.

<sup>111</sup>See *supra* note 73.

<sup>112</sup>Section 1986 provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. . . .

42 U.S.C. 1986 (1982).

<sup>113</sup>799 F.2d at 102.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at 107-08.

<sup>116</sup>*Id.* at 110.

#### IV. THE PROPER APPLICATION OF SUPREME COURT PRECEDENT

As shown above, the courts of appeals are not only sharply split regarding the reviewability *vel non* of Guardsmen's suits under the civil rights statutes, they are also split regarding how to determine the reviewability of such suits. On the one hand, the Fifth Circuit<sup>117</sup> and Tenth Circuit<sup>118</sup> dismiss such suits *ab initio* for failure to state claims upon which relief can be granted.<sup>119</sup> On the other hand, the First, Third, Eighth, and Eleventh Circuits resolve the merits of such suits if the Guardsmen's claims survive a threshold justiciability determination under either the *Mindes* test,<sup>120</sup> a *Feres*-type test,<sup>121</sup> or a standard justiciability test.<sup>122</sup> The reviewability of Guardsmen's suits under the civil rights statutes for injuries incident to service are thus not determined by a uniform rule of law, but rather by the fortuity of the forum.

That it is manifestly unfair to litigants for courts to treat identical suits differently needs no elaboration. In an effort to contribute toward remedying this situation, this article now suggests an approach, based on principles distilled from *Feres* and its progeny, for determining whether suits by Guardsmen under the civil rights statutes for injuries incident to military service are justiciable. The article concludes that such suits should be dismissed for failure to state a claim upon which relief can be granted.<sup>123</sup>

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<sup>117</sup>See *supra* text accompanying notes 70-80.

<sup>118</sup>See *supra* text accompanying notes 62-69.

<sup>119</sup>As discussed *supra* note 69, the Tenth Circuit framed its dismissal in terms of the Guardsman's failure to state a right of action under 42 U.S.C. § 1983. The practical effect of the court's holding, however, and the rule of decision that will likely evolve in district courts in the Tenth Circuit is that Guardsmen's suits under the civil rights statutes for injuries incident to military service will be dismissed for failure to state a claim upon which relief can be granted. After all, if Congress declined to confer on Guardsmen a statutory right under the civil rights statutes to seek redress against superior officers for service-related injuries, suits brought by Guardsmen grounded on those statutes fail to state a claim upon which the courts can grant relief. See Fed. R. Civ. P. 12(b)(6).

<sup>120</sup>The First Circuit, see *supra* note 81, and the Eleventh Circuit, see *supra* text accompanying notes 82-92, use the *Mindes* test for determining the justiciability of Guardsmen's suits under the civil rights statutes.

<sup>121</sup>The Eighth Circuit applies a *Feres*-type test to determine the justiciability of Guardsmen's claims under the civil rights statutes. See *supra* text accompanying notes 93-103.

<sup>122</sup>The Third Circuit applies a standard justiciability analysis for claims brought by Guardsmen under the civil rights statutes. See *supra* text accompanying notes 104-16.

<sup>123</sup>This approach, in addition to adhering to the *Feres* rationale, appears consistent with decisions by the Fifth and Tenth Circuits. See *supra* notes 117 & 118. Further, because a condition precedent for application of this analysis is that a Guardsman suffer an injury incident to service, the analysis appears consistent in practical effect



The question that must be asked at the outset is whether Congress intended Guardsmen to bring suits under the civil rights statutes for service-related injuries. That is, did Congress intend for Guardsmen to use these statutes to sue their superior officers or the government they serve for injuries suffered in the course of military service? An answer in the affirmative would, of course, end the matter, for it cannot seriously be disputed that Congress is constitutionally empowered to provide Guardsmen with such relief. Curiously, few courts have asked this question, much less attempted to resolve it.<sup>124</sup> Their failure in this regard may be due in part to the broad language of the civil rights statutes. Not only do these statutes speak in expansive terms, they provide no express exceptions barring servicemen from suing for service-related injuries.<sup>125</sup> Thus, by their literal terms, the civil rights statutes *could* be read to permit such suits.

That the civil rights statutes literally *could* be read to permit such suits, however, is not dispositive of congressional intent where important military concerns may be implicated. This is a linchpin principle of statutory construction developed in *Feres*, where conventional tools of statutory construction strongly supported a conclusion that Congress intended to provide soldiers with causes of action under the FTCA for service-related injuries.<sup>126</sup> The Supreme Court nevertheless held that congressional intent must appear in an explicit legislative mandate before courts may conclude that a remedial statute of general applicability applies to soldiers for service-related injuries. In other words, in the military context, conventional tools of statutory construction are subordinate to the imperative that, absent an "express congressional command,"<sup>127</sup> courts may not impute to Congress

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with the *Feres*-type analysis used by the Eighth Circuit. See *supra* note 121. The approach and its effect differ markedly, however, from the *Mindes* test applied by the First and Eleventh Circuits, see *supra* note 120, and the standard justiciability test used by the Third Circuit. See *supra* note 122.

<sup>124</sup>The Tenth Circuit did ask this question in response to a suit by a Guardsman under 42 U.S.C. § 1983, and it concluded that Congress did not intend to confer Guardsmen with a right of action under section 1983 for service-related injuries: "Before the passage of § 1983, there was no liability on the part of military superiors for transgressions against the rights of other military personnel. By the passage of § 1983, Congress never intended to create such rights." *Martelon v. Temple*, 747 F.2d 1348, 1351 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *supra* text accompanying notes 62-69.

<sup>125</sup>The civil rights statutes are set out in relevant part at *supra* notes 65 (§ 1983), 73 (§ 1985), 65 (§ 1981) & 112 (§ 1986). They are, of course, broad remedial statutes of general applicability and, but for the *Feres* rationale, persuasive arguments could be advanced that Guardsmen's claims for service-related injuries are embraced in the expansive statutory language.

<sup>126</sup>See *supra* text accompanying note 31.

<sup>127</sup>*Feres v. United States*, 340 U.S. at 146.

an intent to create a cause of action for servicemen that would require civilian courts to "second-guess military decisions . . . [or that] might impair essential military discipline."<sup>128</sup>

*Feres* itself represents a refusal to read statutes with their ordinary sweep. The unique setting of the military led the *Feres* Court to resist bringing the armed services within the coverage of a remedial statute in the absence of an express congressional command. Moreover, *Feres* principles were invoked by the Court in *Chappell* to foreclose assertion of constitutional rights. Taken together, *Feres* and *Chappell* powerfully suggest that the obvious adverse effects on military discipline, which animated the Court in both of those cases, counsel against an expansive interpretation of another remedial statute so as to encompass the military.<sup>129</sup>

Accordingly, the critical inquiry regarding the justiciability of Guardsmen's suits under the civil rights statutes for service-related injuries is whether an "express congressional command"<sup>130</sup> authorizes such suits. The answer to this inquiry is no. No affirmative evidence, in either the language or the legislative history of the civil rights statutes, reveals an express mandate by Congress directing that these statutes be remedial vehicles for soldiers who allege injury incident to service.<sup>131</sup> In the absence of clear and explicit evidence

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<sup>128</sup>United States v. Shearer, 473 U.S. at 57. Cases, in addition to *Feres* and its progeny, that are illustrative of this rule of statutory construction include decisions by the Eighth, Ninth, and Eleventh Circuits holding that service members are excluded from the broad coverage of Title VII. See *infra* note 132.

<sup>129</sup>*Bois v. Marsh*, 801 F.2d 462, 469 n.13 (D.C. Cir. 1986) (rejecting federal service member's claim under 42 U.S.C. § 1985(3) (1982) for service-related injuries); *Accord Alvarez v. Wilson*, 600 F. Supp. 706, 710-12 (N.D. Ill. 1985); *Cf. Miller v. Newbauer*, 862 F.2d 771 (9th Cir. 1988) (dismissing reservist's damage claim under 42 U.S.C. § 1985(3) (1982) for failure to exhaust administrative remedies, and observing in dicta that the rationale in *Feres* and *Chappell* appears, in any event, to bar such suits).

<sup>130</sup>*Feres v. United States*, 340 U.S. at 146.

<sup>131</sup>For informative discussions regarding the goals and purposes of the civil rights statutes, as well as their legislative histories, see *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (sections 1981 and 1983); *Burnett v. Grattan*, 468 U.S. 42 (1984) (section 1983); *United Broth. of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, Texas*, 463 U.S. 825 (1983) (section 1985); *Allen v. McCurry*, 449 U.S. 90 (1980) (section 1983); *Runyon v. McCrary*, 427 U.S. 160 (1976) (section 1981); *Tilman v. Wheaton-Haven*, 410 U.S. 431 (1973) (section 1981); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (section 1985); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (section 1983); *Snowden v. Hughes*, 321 U.S. 1 (1944) (sections 1983 and 1985); *Gibson v. Mississippi*, 162 U.S. 565 (1896) (section 1981); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (section 1981); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (section 1981); *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985) (section 1986); *Trerice v. Pedersen*, 769 F.2d 1398 (9th Cir. 1985) (section 1986); *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984) (section 1983); *Mollnow v. Carlton*, 716 F.2d 627 (9th Cir. 1983)

that Congress intended the civil rights statutes to be used in this manner, the rationale in *Feres* and its progeny indicates such suits must be dismissed for failure to state a claim upon which relief can be granted.<sup>132</sup>

This conclusion is consistent with the polestar principles underlying the *Feres* doctrine. The "peculiar and special relationship of the soldier to his superiors, [and] the [deleterious] effects of the maintenance of suits on discipline"<sup>133</sup> are compelling considerations that counsel against recognizing suits by soldiers against their superior officers or the government they serve. These principles apply to suits brought by Guardsmen under the civil rights statutes for injuries in-

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(section 1986), *cert. denied*, 465 U.S. 1100 (1984); *Kimble v. D.J. McDuffy*, 648 F.2d 840 (5th Cir. 1981) (section 1985); *Mahone v. Waddle*, 584 F.2d 1018 (3d Cir. 1977) (sections 1981 and 1983), *cert. denied*, 438 U.S. 904 (1978); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (section 1985).

See also Evren, *When Is A Race Not A Race?: Contemporary Issues Under The Civil Rights Act Of 1966*, 61 N.Y.U. L. Rev. 876 (1986); Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1966: A Legislative History in Light of Runyon v. McCrary* 98 Yale L.J. 565 (1989); Kaufman & Schwartz, *Civil Rights In Transition: Sections 1981 And 1982 Cover Discrimination On The Basis Of Ancestry And Ethnicity*, 4 Touro L. Rev. 183 (1988); Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C.L. Rev. 911 (1986); Sheehan & Rapp, *The Scope and Application of 42 U.S.C. Section 1985(c): Beyond the Fourteenth Amendment Question*, 2 Antioch L.J. 131 (1982); Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541 (1989); Note, *The Class-Based Animus Requirement of 42 U.S.C. Section 1985(c): A Suggested Approach*, 64 Minn. L. Rev. 635 (1980); Note, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402 (1979).

<sup>132</sup>In assessing Congress's intent regarding whether Guardsmen may bring suits under the civil rights statutes for injuries incident to service, it is not without significance that Congress exempted service members, including Guardsmen, from bringing suit under the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1982), for service-related injuries. As the Eighth Circuit stated in *Taylor v. Jones*:

We have previously held that "[n]either Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States." We do not see any significant distinction, for Title VII purposes, between a member of the Army or Air Force and a member of the reserve component of those forces, the National Guard. In neither case is the relationship between the government and the member that of employer-employee; military service differs materially from civilian employment, whether public or private, and is not appropriately governed by Title VII.

653 F.2d 1193, 1200 (8th Cir. 1981) (quoting *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978)). *Accord* *Stinson v. Hornsby*, 621 F.2d at 1539-40; *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983). *But cf.* *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986) (justiciability of Title VII claim by service member is determined by application of *Mindes* test); Note, *Making the Army Safe For Diversity: A Title VII Remedy For Discrimination in the Military*, 96 Yale L.J. 2082 (1987).

<sup>133</sup>*United States v. Brown*, 348 U.S. at 112. See *supra* text accompanying notes 43-56.

cident to military service. As discussed above,<sup>134</sup> Guardsmen are "an integral part of the first line defenses of the United States,"<sup>135</sup> and National Guard units are statutorily responsible for providing "qualified persons . . . for active duty in the armed forces, in the time of war or national emergency."<sup>136</sup> Because the command relationship among National Guard service members regarding military matters is identical to the command relationship among other federal service members, the *Feres* rationale cannot be deemed to be irrelevant in determining whether Guardsmen state claims under the civil rights statutes for injuries incident to service. To the contrary, the rationale underlying the *Feres* doctrine applies with equal force to such claims. After all, the *Feres* doctrine "has far more to do with the proper relation between the courts, Congress and the military than it has to do with individual defendants. . . . It is a judicial doctrine leaving matters incident to service to the military, in the absence of congressional direction to the contrary."<sup>137</sup> Following *Feres*, it is inappropriate, given the "special nature of military life,"<sup>138</sup> to *infer* that Congress intended to disrupt the critical command relationship in the National Guard by permitting Guardsmen to hale their superior officers into court under the civil rights statutes for alleged injuries incident to military service.

The practical considerations underlying *Feres* also apply with equal force to claims brought by Guardsmen under the civil rights statutes for service-related injuries. As a vital component of the Total Forces Concept,<sup>139</sup> a primary purpose of the National Guard is to fight wars, should the occasion arise. On the field of battle, Guardsmen must be prepared immediately to obey all orders, even when it appears that the consequence of such obedience poses a likelihood of injury or death.<sup>140</sup> To instill in Guardsmen the vital traits of reflexive obedience and self-sacrifice, the National Guard "must insist

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<sup>134</sup>*Supra* text accompanying notes 19-26.

<sup>135</sup>32 U.S.C. § 102 (1982).

<sup>136</sup>10 U.S.C. § 262 (1982).

<sup>137</sup>*Stanley v. Cline*, 837 F.2d 395, 399 (9th Cir. 1988); *Accord* *United States v. Stanley*, 107 S. Ct. at 3062-63. See Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177, 186-204 (1984); Zillman, *supra* note 44, at 513-17.

<sup>138</sup>*Chappel v. Wallace*, 462 U.S. at 303.

<sup>139</sup>See *supra* text accompanying notes 19-26.

<sup>140</sup>"The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Chappel v. Wallace*, 462 U.S. at 300. *Accord* *Parker v. Levy*, 417 U.S. 733, 744 (1974) ("An Army is not a deliberative body. It is the executive arm. Its law is that of obedience." (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)).

upon a respect for duty and discipline without counterpart in civilian life.<sup>141</sup> To maintain this extraordinary respect for duty and discipline, commanding officers in the Guard will necessarily and frequently make decisions and issue orders that subordinates, who perhaps are unaccustomed to the military's "specialized society . . . [with] laws and traditions of its own,"<sup>142</sup> may consider unjust. If, in these circumstances, a commanding officer must constantly consider the possibility that he will be haled into court to justify his actions, his ability to provide effective leadership will be seriously undermined. In short, "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel"<sup>143</sup> that justified the Supreme Court's creation in *Feres* of an implied exception to the FTCA for suits brought by service members alleging service-related injuries also justifies an implied exception to the civil rights statutes for suits brought by Guardsmen alleging service-related injuries.

Courts simply should not (and, after *Feres*, may not) assume that Congress *sub silentio* intended remedial statutes of general applicability to apply to service members alleging injuries incident to military service. No principled rationale supports an approach that, on the one hand, bars service members' FTCA and *Bivens*-type claims for service-related injuries but, on the other hand, would permit claims by Guardsmen under the civil rights statutes for service-related injuries:

We are unable to find . . . a reasoned distinction for the purposes of the *Feres* doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute. We cannot say that the policies supporting the civil rights statutes are any stronger than those supporting constitutional rights; nor can we say that military discipline will be any less affected by a civil rights claim than a constitutional claim.<sup>144</sup>

<sup>141</sup>*Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); (quoting *Toth v. Quarles*, 350 U.S. 11, 17 (1955)) (quotation marks omitted). See Hirschhorn, *supra* note 137, at 220-28; Zillman, *supra* note 44, at 615-17.

<sup>142</sup>It is well established that "the military is, by necessity, a specialized society separate from civilian society. . . . [T]he military has, again by necessity, developed laws and traditions of its own during its long history." *Parker v. Levy*, 417 U.S. at 743. These "laws and traditions. . . are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress." *Schlesinger v. Councilman*, 420 U.S. at 757.

<sup>143</sup>*Chappell v. Wallace*, 462 U.S. at 304.

<sup>144</sup>*Brown v. United States*, 739 F.2d at 367; *supra* text accompanying notes 93-103. See generally Copelan & Cruden, *supra* note 61, at 53-55; Hirschhorn, *supra* note 137, at 218-40; Note, *United States v. Stanley: Military Personnel and the Bivens Action*, 67 N.C.L. Rev. 233, 236-46 (1988).

It might be argued that intramilitary suits by Guardsmen under the civil rights statutes seeking merely injunctive relief should not be barred by *Feres* because they are less disruptive than suits seeking damages. This argument ignores the critical justiciability inquiry mandated by *Feres*, namely, whether Congress "express[ly] . . . command[ed]"<sup>145</sup> that the civil rights statutes be used by Guardsmen seeking injunctive relief for injuries incident to service. As discussed above,<sup>146</sup> this inquiry must be answered in the negative. Moreover, and in any event, it is questionable whether suits for injunctive relief are substantially less disruptive of the command relationship than suits for damages. Suits for injunctive relief under the civil rights statutes, like suits for damages under the FTCA or a *Bitens*-type claim, would impose both the threat and the burdens of litigation on Guardsmen. The actuality (or the threat) of suit will distract Guardsmen from their military duties and require Guardsmen to testify in court as to each other's actions. The officer whose orders are being attacked, or whose judgment is being challenged, will be inhibited in the performance of his discretionary military duties. And the officer's subordinates, seeing him hauled before the judiciary and forced to justify his actions, will have reason to pause before complying with his orders. The fundamental requirement "for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel,"<sup>147</sup> which is keystone to the command relationship, will thus be seriously hampered, in derogation of military effectiveness and in contravention of the *Feres* rationale.<sup>148</sup>

In addition to undermining the command relationship and impairing military discipline, Guardsmen's suits seeking injunctive relief under the civil rights statutes for service-related injuries would also require the judiciary to venture into a specialized area in which, the Supreme Court has admonished, judicial deference is at its apogee.<sup>149</sup>

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<sup>145</sup>*Feres v. United States*, 340 U.S. at 146.

<sup>146</sup>*Supra* notes 130-32 and accompanying text.

<sup>147</sup>*Chappell v. Wallace*, 462 U.S. at 304. *See supra* notes 140-43 and accompanying text; *infra* note 154.

<sup>148</sup>*See, e.g.*, *United States v. Stanley*, 107 S. Ct. at 3062-63; *United States v. Shearer*, 473 U.S. at 57-59; *Chappell v. United States*, 462 U.S. at 300-04; *Stencel Aero Engineering Corp. v. United States*, 431 U.S. at 673.

<sup>149</sup>*E.g.*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military . . . affairs"); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged").

"[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."<sup>150</sup> If the *Feres* rationale is to be applied on a principled basis, suits by Guardsmen seeking injunctive relief under the civil rights statutes for service-related injuries should be barred because such suits require the judiciary to second-guess "professional military judgments"<sup>151</sup> no less than suits seeking damages.

The *Feres* principle, after all, is not designed simply to bar intramilitary damage actions. The overriding goal of *Feres* and its progeny is to protect the integrity of the command relationship by avoiding judicial intrusion into the military structure absent an explicit congressional mandate. This goal is not served by a rule that makes the justiciability of a service member's cause of action under a civil rights statute dependent on the nature of relief requested. The *Feres* principle instructs that *any* unauthorized judicial intrusion into military structure, regardless of the requested relief, may impair military effectiveness. As the Fifth Circuit stated when it refused to create an injunctive-relief exception to *Chappell* for Guardsmen who brought *Bivens*-type claims against their superior officers:

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<sup>150</sup>Gilligan v. Morgan, 413 U.S. 1, 10 (1973). As Chief Justice Warren stated, deference to the professional military judgment of military authorities regarding military matters is necessary because "[civilian courts are] ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Warren, *supra* note 11, at 187 (quoted in Goldman v. Weinberger, 475 U.S. at 507; Chappell v. Wallace, 462 U.S. at 305).

<sup>151</sup>Gilligan v. Morgan, 413 U.S. at 10. See *supra* notes 149 & 150. One commentator suggests that judicial second-guessing of professional military judgments poses a unique and unacceptable risk to national security due to the inherent difficulty in timely and effectively measuring the impact of judicial decisions on military performance:

The primary function of a military organization is to wage war, and the only true measurement of its effectiveness is how well it performs in war. Anything else is an approximation: training and exercises cannot approach the actual danger, dislocation, fear, and uncertainty of war itself. Wars, particularly major ones against a relatively equal enemy, occur only infrequently. The activity of a rational military organization in peacetime is directed toward preparing for the uncertain outbreak of war, but all thinking in the interim about the effects of changes in doctrine, discipline, and equipment is speculation. Much of it will be grossly wrong. If judicial intervention does impair the effectiveness of military discipline, there is no way to determine and correct the mistake until it has produced the substantial and sometimes irreparable cost of failure.

Hirschhorn, *supra* note 137, at 240 (footnote omitted). See generally Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 Notre Dame Law. 396 (1976).

The injunctive-relief exception to *Chappell* advocated by plaintiffs could swallow *Chappell's* rule of deference. We therefore believe that suits for injunctive relief, like those for monetary damages, must be carefully regulated in order to prevent intrusion of the courts into the military structure.<sup>152</sup>

Similarly, suits by Guardsmen for injunctive relief under the civil rights statutes, like those for monetary damages, "must be carefully regulated in order to prevent intrusion of the courts into the military structure."<sup>153</sup> because it is the litigation process itself that disrupts discipline and the command relationship.<sup>154</sup> Because Congress did not expressly authorize Guardsmen to seek relief of *any kind* under the civil rights statutes for service-related injuries, the *Feres* doctrine proscribes such suits.

Another factor that counsels against allowing Guardsmen to seek "merely injunctive relief" under the civil rights statutes is that such suits can implicate justiciability concerns of a constitutional nature.<sup>155</sup> In *Gilligan v. Morgan*,<sup>156</sup> for example, the Supreme Court

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<sup>152</sup>*Crawford v. Texas Army National Guard*, 794 F.2d at 1036-37; *supra* text accompanying notes 70-80. *But see* *Jorden v. National Guard Bureau*, 799 F.2d at 110 (holding that Guardsmen may seek injunctive relief under the civil rights statutes because such claims do not pose the same "threat to vigorous decisionmaking" as claims for damages); *supra* text accompanying notes 105-16.

<sup>153</sup>*Crawford v. Texas Army National Guard*, 794 F.2d at 1037.

<sup>154</sup>*See* *United States v. Stanley*, 107 S. Ct. at 3062-63; *supra* text accompanying notes 139-48; *infra* text accompanying notes 163-65.

As the Supreme Court has recognized in the context of cases involving the qualified immunity of government employees, litigation imposes "social costs . . . which include the expenses of litigation [and] the diversion of official energy from pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). *See* *Hawkins, Comment, Griffen v. Griffins Air Force Base: Qualified Immunity and the Commander's Liability for Open Houses on Military Bases*, 117 Mil. L. Rev. 279 (1987). The Court has cautioned against the dangers of "compelled depositions and trial testimony by military officers concerning the details of their military commands." *United States v. Stanley*, 107 S. Ct. at 3063. Indeed, the decisions in *Stanley* and *Johnson*, *see supra* note 45, reveal that the mere pendency of a suit by a service member against the government he serves has an adverse impact on military discipline and effectiveness in the "broadest sense of the word." *United States v. Johnson*, 107 S. Ct. at 2069.

<sup>155</sup>The Supreme Court has indicated that the *Feres* doctrine stems not simply from practical considerations regarding the deleterious impact of judicial interference on the command relationship. The doctrine stems as well from considerations of constitutional significance. The Constitution vests Congress and the President, not the judiciary, with plenary constitutional authority over the military:

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, *see* U.S. Const., Art. I, § 8, cls. 12-14, and with the President. *See* U.S. Const., Art. II, § 2, cl. 1.



held that serious separation of powers concerns rendered a suit seeking injunctive relief against the National Guard non-justiciable:

[The Constitution] is explicit that Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States. Congress has enacted appropriate legislation pursuant to Art. I, § 8, cl. 16, and has also authorized the President—as the Commander in Chief of the Armed Forces—to prescribe regulations governing organization and discipline of the National Guard. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. . . . The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.<sup>157</sup>

*Rostker v. Goldberg*, 453 U.S. 57, 70-71 (1981) (citations omitted) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)). *Accord* *Chappell v. Wallace*, 462 U.S. at 302.

Profound separation of powers principles can be implicated when a Guardsman hales a superior officer into court and alleges that the officer has, intentionally or negligently, caused the Guardsman injury in the course of military service. Judicial respect for constitutional division of authority supports the principle of statutory construction arising from *Feres* that, absent an "express congressional command," courts will not assume that remedial statutes of general applicability create causes of action for service members alleging service-related injuries.

<sup>156</sup>413 U.S. 1 (1973).

<sup>157</sup>*Id.* at 7 (footnotes omitted): Judicial intervention into legitimate military matters is, as a matter of constitutional analysis, *sui generis*:

Because war is directed externally, against entities that have no legal relation to the United States government under the Constitution, no goal for which it is fought and no injury that is inflicted is inconsistent with the constitutional principles governing the relation of the United States to its own residents. Since the objects on which the armed forces act are outside the constitutional system, the effectiveness of the armed forces cannot be defined in terms of the system's higher purposes. In this [the armed services] differ from all other coercive organizations within the government.

It follows that the consequence of judicial intervention in the relation between the armed forces and its members is different in kind. Given that the policy the government pursues is itself permissible, a court that recognizes a claim of individual constitutional right limits the means by which the policy may be pursued to the extent necessary to protect a principle from collateral harm. . . .

. . . . A personnel practice that contributes to military efficiency fosters the attainment of the goals set by the political branches at the least human and material cost to the armed forces. A court may determine that the practice is inconsistent with constitutional principles as applied to civilian

Following *Feres*, and in view of the profound separation of powers problems that may be implicated in intramilitary suits against the National Guard seeking "mere injunctive relief," courts ought not blithely assume that Congress *sub silentio* intended that Guardsmen use the civil rights statutes to obtain equitable relief for service-related injuries. To the contrary, because no "express congressional command"<sup>158</sup> authorizes such suits, courts ought to decline Guardsmen's invitations to "entertain a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment."<sup>159</sup>

For largely the same reasons that the *Feres* rationale precludes injunctive relief to Guardsmen under the civil rights statutes for injuries incident to service, the *Feres* rationale also precludes applying the *Mindes* test<sup>160</sup> as the sole means for determining the justiciability of

authority—this is not unlikely in the light of the assumptions underlying military discipline. If there is an equally effective technique that does not infringe these principles, the court may protect individual rights without loss of military efficiency. If no such alternative exists, the court's intervention raises the cost in lives and material of reaching the government's goals. At some point, the increase will deprive the government of the will or the means to overcome the adversary. If the political branches realize the loss of efficiency, the judicial decision will deter them from pursuing ends they otherwise would. If the loss of efficiency goes unnoticed until war is undertaken, military failure, incomplete success, or success at a higher cost result. In either case, judicial preclusion of military personnel practices based on an incorrect belief that military efficiency will be unimpaired decreases the ability of the political branches to impose their will on another state. At the worst, it permits the imposition of the will of another state on the United States.

Hirschhorn, *supra* note 137, at 237-38 (footnotes omitted).

<sup>158</sup>*Feres v. United States*, 340 U.S. at 146.

<sup>159</sup>*Chappell v. Wallace*, 462 U.S. at 300. Courts (like the First, Third, and Eleventh Circuits, see *supra* text accompanying notes 81-92 & 103-16) that on the one hand bar Guardsmen's damage claims under the civil rights statutes for service-related injuries, but on the other hand permit Guardsmen's suits under these statutes for injunctive relief are not applying the *Feres* doctrine commensurate with its underlying principle. To the extent these courts permit injunctive claims under the civil rights statutes for injuries incident to service, they ignore that no "express congressional command" authorizes such claims. In the absence of an explicit legislative mandate authorizing such claims, a principled application of the *Feres* rationale requires their dismissal because 1) intramilitary suits alleging injuries incident to service can be devastatingly detrimental to the command relationship regardless of the relief sought by the plaintiff; see *supra* text accompanying notes 139-48; 2) intramilitary suits seeking injunctive relief for injuries incident to service require the judiciary to second-guess military judgments that, if not entirely discretionary, are at least entitled to the highest deference, see *supra* text accompanying notes 149-54; and 3) intramilitary suits seeking injunctive relief of service-related injuries can raise serious separation of powers concerns, see *supra* text accompanying notes 155-57.

<sup>160</sup>For a discussion of the *Mindes* test, see *supra* note 83 and text accompanying note 91.

such suits. First and foremost, applying the *Mindes* test, without more, disregards the *Feres* imperative that courts should not lightly assume that Congress intended remedial statutes of general applicability to apply to service members.<sup>161</sup> More specifically, because no "express congressional command"<sup>162</sup> authorizes Guardsmen to sue their superior officers under the civil rights statutes for service-related injuries, such suits are barred.

This is not to say that the *Mindes* test is not a useful screening mechanism for determining the justiciability of many military claims.<sup>163</sup> But the *Mindes* test should not substitute for the critical justiciability inquiry mandated by *Feres*. This is so because the *Mindes* test itself, which requires a court to examine the nature and strength of a service member's claim, the type and degree of interference with the military function involved in adjudicating the claim, and the extent to which military discretion or expertise is involved, can result in undesirable judicial interference that will disrupt the military regime.

A test for [justiciability] . . . that depends on the extent to which particular suits would call into question military discipline and decision-making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which becloud military decision-making), the mere process of arriving at correct conclusions would disrupt the military regime.<sup>164</sup>

The *Feres* rationale establishes that such judicial interference is inappropriate unless expressly sanctioned by Congress. Because Congress has not expressly sanctioned suits by Guardsmen under the civil rights statutes for service-related injuries, courts ought to follow the lead of the Fifth and Tenth Circuits and, without reference to the *Mindes* test, dismiss such suits for failure to state a claim upon which relief can be granted.<sup>165</sup>

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<sup>161</sup>See *supra* text accompanying notes 126-30.

<sup>162</sup>*Feres v. United States*, 340 U.S. at 146.

<sup>163</sup>See *supra* note 83.

<sup>164</sup>*United States v. Stanley*, 107 S. Ct. at 3063.

<sup>165</sup>See *supra* text accompanying notes 62-80 & 117-19. In his concurring opinion in *Stinson v. Hornsby*, 821 F.2d at 1541-43, Senior Judge Henderson correctly observed that the *Feres* rationale, as developed and applied in *Chappell*, barred *all* challenges

by Congress provides numerous avenues of relief, other than the civil rights statutes, for Guardsmen who allege unjust or unlawful injuries incident to military service. For example, the National Guard's regulations, which prohibit discriminatory treatment, provide procedures for formal investigations where a Guardsman claims to have suffered discrimination.<sup>173</sup> Pursuant to this intraservice procedure, Guardsmen can obtain substantive relief and compensation for incidents of discrimination.

Moreover, the National Guard Bureau, an adjunct of the United States Departments of the Army and the Air Force, is empowered to review investigations conducted by State National Guards regarding claims of discrimination.<sup>174</sup> Where the Bureau's "administrative review reveals deficiencies in compliance with law or regulation, the case will be returned to the State for appropriate corrective action."<sup>175</sup> Concededly, the Bureau's authority to *order* a State National Guard to implement a particular remedy (for example, reinstatement of a Guardsman the Bureau believes has been unlawfully discharged) may be limited by principles of federalism rooted in the Constitution.<sup>176</sup> The Bureau nevertheless can exert significant leverage on State National Guards to ensure full compliance with laws and regulations and

statutes (specifically 42 U.S.C. § 1983) are not available remedies to Guardsmen because "Congress has specifically designed a comprehensive system of remedies for them by which grievances can be pursued and . . . the termination of federal employment successfully challenged." *Id.* at 396 (Rosenn, J., dissenting). For a discussion of these remedies, see *infra* notes 173-91 and accompanying text.

<sup>173</sup>See National Guard Regulation 600-21. See also 32 U.S.C. § 709(e)(5) (1982): providing a right of appeal to the State adjutant general for National Guard technicians who are terminated from employment; National Guard Bureau Technician Personnel Manual 733 (describing appellate process that each State must afford Guard technicians who are subjected to adverse employment action); *Johnson v. Orr*, 780 F.2d at 400-03 (Rosenn, J., dissenting): discussing administrative remedies available to Guardsmen; *supra* note 171.

Article 138 of the Uniform Code of Military Justice also provides Guardsmen with an administrative procedure for asserting grievances and seeking redress for alleged injuries inflicted by superior officers:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of. . . .

Uniform Code of Military Justice art. 138, 10 U.S.C. § 938 (1982).

<sup>174</sup>See *supra* note 24.

<sup>175</sup>National Guard Reg. 600-21, appendix E, subsection (g).

<sup>176</sup>See *infra* notes 181-82 and accompanying text.



The *Feres* doctrine does not, of course, require civilian courts always to ignore service members' claims. To the contrary, service members may, under circumstances defined by Congress, seek "redress in civilian courts for . . . wrongs suffered in the course of military service."<sup>166</sup> Under the *Feres* rationale, however, courts must be careful not to supplement intraservice remedies in ways unintended by Congress.<sup>167</sup> "[T]he Legislative Branch ha[s] plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline . . ." <sup>168</sup> Pursuant to its "plenary constitutional authority over the military, [Congress] has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure."<sup>169</sup> In view of the "special nature of military life,"<sup>170</sup> the "need and justification for a special and exclusive system of military justice[] is too obvious to require extensive discussion."<sup>171</sup>

The "special and exclusive system of military justice"<sup>172</sup> established

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under the civil rights statutes for discrete personnel matters, and therefore obviated the need for applying the *Mindes* test:

Although the *Chappell* decision expressly left open the right of military personnel to bring constitutional grievances to court, there can be little doubt that such access does not extend to "discrete personnel matters." *Crawford*, 794 F.2d at 1036. Boldly stating this conclusion, as the Fifth Circuit has done, without requiring the district courts to address the *Mindes* test would bring this circuit closer in line with the Supreme Court on this issue and would perhaps be fairer to potential litigants.

*Id.* at 1542-43 (Henderson, J., concurring). For a discussion of the Eleventh Circuit's decision in *Stinson*, see *supra* text accompanying notes 82-92.

<sup>166</sup>*Chappell v. Wallace*, 462 U.S. at 304; *supra* note 11. For a discussion of circumstances when Guardsmen may seek redress in civilian courts, see *infra* text accompanying notes 187-91.

<sup>167</sup>*Chappell v. Wallace*, 462 U.S. at 304; *United States v. Stanley*, 107 S. Ct. at 3061; *supra* text accompanying notes 50-56.

<sup>168</sup>*Chappell v. Wallace*, 462 U.S. at 301.

<sup>169</sup>*Id.* at 302. See also *Orloff v. Willoughby*, 345 U.S. at 93-94.

<sup>170</sup>*Chappell v. Wallace*, 462 U.S. at 304.

<sup>171</sup>*Id.* at 300. For a listing and discussion of statutes that provide redress and relief for service members who suffer injuries incident to service, see Hitch, *The Federal Torts Claims Act and Military Personnel*, 8 Rutgers L. Rev. 316, 326-28 (1954); Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 Iowa L. Rev. 93, 126-29 (1985); Zillman, *supra* note 44, at 505 n.91, 513-15; Note, *Stencel Aero Engineering Corporation v. United States: An expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers*, 29 Hastings L.J. 1217, 1226-29 (1978); Note, *Torts—Rights of Servicemen Under Federal Tort Claims Act*, 45 N.C.L. Rev. 1129, 1136-39 (1967). See generally Sherman, *Military Justice Without Military Control*, 82 Yale L.J. 1396 (1973).

<sup>172</sup>*Chappell v. Wallace*, 462 U.S. at 300. In his dissent in *Johnson v. Orr*, 780 F.2d 386 (3d Cir. 1986), Judge Rosen advances a persuasive argument that the civil rights

by Congress provides numerous avenues of relief, other than the civil rights statutes, for Guardsmen who allege unjust or unlawful injuries incident to military service. For example, the National Guard's regulations, which prohibit discriminatory treatment, provide procedures for formal investigations where a Guardsman claims to have suffered discrimination.<sup>173</sup> Pursuant to this intraservice procedure, Guardsmen can obtain substantive relief and compensation for incidents of discrimination.

Moreover, the National Guard Bureau, an adjunct of the United States Departments of the Army and the Air Force, is empowered to review investigations conducted by State National Guards regarding claims of discrimination.<sup>174</sup> Where the Bureau's "administrative review reveals deficiencies in compliance with law or regulation, the case will be returned to the State for appropriate corrective action."<sup>175</sup> Concededly, the Bureau's authority to *order* a State National Guard to implement a particular remedy (for example, reinstatement of a Guardsman the Bureau believes has been unlawfully discharged) may be limited by principles of federalism rooted in the Constitution.<sup>176</sup> The Bureau nevertheless can exert significant leverage on State National Guards to ensure full compliance with laws and regulations and

statutes (specifically 42 U.S.C. § 1983) are not available remedies to Guardsmen because "Congress has specifically designed a comprehensive system of remedies for them by which grievances can be pursued and . . . the termination of federal employment successfully challenged." *Id.* at 396 (Rosenn, J., dissenting). For a discussion of these remedies, see *infra* notes 173-91 and accompanying text.

<sup>173</sup>See National Guard Regulation 600-21. See also 32 U.S.C. § 709(e)(5) (1982) (providing a right of appeal to the State adjutant general for National Guard technicians who are terminated from employment); National Guard Bureau Technician Personnel Manual 753 (describing appellate process that each State must afford Guard technicians who are subjected to adverse employment action); *Johnson v. Orr*, 780 F.2d at 400-03 (Rosenn, J., dissenting) (discussing administrative remedies available to Guardsmen); *supra* note 171.

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Uniform Code of Military Justice art. 138, 10 U.S.C. § 938 (1982).

<sup>174</sup>See *supra* note 24.

<sup>175</sup>National Guard Reg. 600-21, appendix E, subsection (g).

<sup>176</sup>See *infra* notes 181-82 and accompanying text.

to implement appropriate remedies through its capacity to influence the disbursement of federal funds and benefits.<sup>177</sup>

Guardsmen may also seek relief for alleged incidents of discrimination from the Board for Correction of Military Records (BCMR).<sup>178</sup> Each Secretary (Army or Air Force), acting through the BCMR, is vested with plenary power to "correct an error or remove an injustice."<sup>179</sup> In appropriate cases (for example, where a Guardsman has been wrongfully discharged from the Guard due to unlawful discrimination), the BCMR may order that a Guardsman be reinstated in comparable active federal reserve status and awarded retroactive promotion and back pay.<sup>180</sup>

Interestingly, because the Constitution "reserv[es] to the States . . . the Appointment of the [militia] Officers,"<sup>181</sup> it poses a fascinating and as yet unresolved question as to whether the BCMR could, consistent with notions of federalism, issue (or enforce) a mandate directing that a State National Guard reinstate a Guardsman.<sup>182</sup> Notwithstanding this potential constitutional limitation on the BCMR's authority to award relief, however, it is likely that such relief would be forthcoming where the relevant military Secretary, through the BCMR, found that a Guardsman's claim of discriminatory discharge was supported by the evidence. For example, in *Stinson v. Hornsby*,<sup>183</sup> the State of Alabama advised the United States Department of Justice that "reinstatement in the State National Guard would follow as a matter of course from a

<sup>177</sup> See *supra* notes 24-25 and accompanying text.

<sup>178</sup> 10 U.S.C. § 1552 (1982).

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

<sup>180</sup> See *Christoffersen v. Washington State Air National Guard*, 855 F.2d 1437, 1442 (9th Cir. 1988); *Williams v. Wilson*, 762 F.2d 357, 360 & n.6 (4th Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d 55, 57 (1st Cir. 1984).

<sup>181</sup> U.S. Const., art. I, § 8, cl. 16; *supra* text accompanying note 22.

<sup>182</sup> See *Williams v. Wilson*, 762 F.2d at 360 n.6; *Navas v. Gonzalez Vales*, 752 F.2d 765, 770 (1st Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d at 57, 62.

It could be argued that such mandates might be enforced without running afoul of federalism concerns:

The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. . . . "[The Thirteenth and Fourteenth Amendments] were intended to be, [and] really are, limitations of the powers of the States and enlargements of the power of Congress." . . . [T]he Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

*Richmond v. Croson Co.*, 109 S. Ct. 706, 719 (1989) (O'Connor, J., joined by Rehnquist, C.J., and White, J.) (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)).

<sup>183</sup> 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 402 (1988); *supra* text accompanying notes 82-92.



decision of the [BCMR] that Stinson had been improperly discharged."<sup>184</sup> Similarly, the First Circuit has observed that "it seems likely that the [National Guard] would initiate a reconsideration of [a Guardsman's] nonretention if the [BCMR] were to issue a definitive interpretation of Army regulations [in the Guardsman's favor]."<sup>185</sup> A contrary course of action by a State National Guard would disserve the state's interest by jeopardizing its receipt of federal funding and benefits.<sup>186</sup>

If a Guardsman is dissatisfied with the intraservice relief (or lack thereof) provided by the State National Guard, the National Guard Bureau, or the BCMR, he can still seek redress in federal court. BCMR decisions are subject to judicial review under the Administrative Procedure Act and can be set aside if they are arbitrary, capricious, or otherwise inconsistent with law.<sup>187</sup> Thus, Congress has provided Guardsmen with intraservice remedial procedures, which are subject to judicial review, through which Guardsmen can challenge treatment that is discriminatory, inequitable, or otherwise unlawful.<sup>188</sup>

<sup>184</sup>Brief For The United States As Amicus Curiae at 18, *Hornsby v. Stinson*, No. 87-1469 (Sup. Ct.).

<sup>185</sup>*Navas v. Gonzalez Vales*, 752 F.2d at 770. See also *Penagaricano v. Llenza*, 747 F.2d at 82 ("We 'indulge, until otherwise convinced, in the presumption that the military will be astute [enough] to afford to the plaintiff all of the rights and protections afforded him by the Constitution, the statutes, and its own regulations.'") (quoting *Horn v. Schlesinger*, 514 F.2d 549, 553 (8th Cir. 1975)).

<sup>186</sup>See *supra* note 25. In any event, in the unlikelihood that a State National Guard is willing to risk the loss of federal funding by disregarding a recommendation by the National Guard Bureau or BCMR to reinstate a Guardsman, the Guardsman is still not deprived of the availability of meaningful relief. As mentioned at *supra* note 180 and accompanying text, the BCMR can still order that the injured Guardsman be reinstated in comparable federal reserve status and awarded retroactive relief.

<sup>187</sup>5 U.S.C. §§ 551-559 (1982). See *Chappell v. Wallace*, 462 U.S. at 304 (citing *Grieg v. United States*, 640 F.2d 1261 (Ct. Cl. 1981), cert. denied, 455 U.S. 907 (1982); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979)). See also *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989) (citing cases); Note, *Judicial Review of Constitutional Claims Against the Military*, 84 Colum. L. Rev. 387, 421-23 (1984); Note, *Federal Judicial Review of Military Administrative Decisions*, 51 Geo. Wash. L. Rev. 612 (1983); *supra* note 83 (citing cases); *infra* note 191.

<sup>188</sup>It is, of course, axiomatic that a court ought generally to refrain from reviewing internal military affairs in the absence of a service member's exhaustion of intraservice corrective measures. See, e.g., *Bois v. Marsh*, 801 F.2d at 468 (discussing exhaustion doctrine and its exceptions, and citing cases); *supra* text accompanying note 91 (listing *Mindes* criteria, which include exhaustion requirement). Requiring Guardsmen to pursue intraservice remedies provided by Congress preserves the military chain of command. If an officer acts wrongfully toward a Guardsman, the officer is subject to discipline imposed by his military superiors, and the wronged Guardsman can obtain full relief. Additionally, requiring Guardsmen to exhaust available intraservice remedies may obviate the need for judicial intervention, and may thereby "vindicate the fundamental doctrine that courts should avoid passing on unnecessary constitutional questions." *Id.* at 468 n.11 (quoting *Sohn v. Fowler*, 365 F.2d 915, 919 (D.C. Cir. 1966)). Accord, e.g., *Schlesinger v. Councilman*, 420 U.S. at 757; *Williams v. Wilson*, 762 F.2d at 360; *Navas v. Gonzalez Vales*, 752 F.2d at 770-71 (citing cases); *Thornton v. Coffey*, 618 F.2d 686, 692 (10th Cir. 1980).

Additionally, the Supreme Court has indicated that Guardsmen can seek judicial review in cases involving attacks on the facial validity of statutes or regulations:

In *Brown v. Glines*, 444 U.S. 348 (1980), for example, the Court rejected the contention that an Air Force regulation requiring prior approval for soliciting signatures on a petition was unconstitutional. *Frontiero v. Richardson*, 411 U.S. 677 (1973), found sex discrimination against servicewomen on the basis of benefits provided to spousal dependents. *Goldman v. Weinberger* [475 U.S. 503 (1986)] refused to hold unconstitutional a regulation prohibiting the wearing of a yarmulke by an Orthodox Jewish soldier.<sup>189</sup>

That the Supreme Court has permitted judicial review of service members' claims in the above cases, however, does not compel a conclusion that Guardsmen may seek injunctive relief under the civil rights statutes for service-related injuries. The common characteristic of the cases reviewed by the Supreme Court is that "they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters. The nature of the lawsuits, rather than the relief sought, rendered them justiciable."<sup>190</sup> Judicial review is less objectionable in these *types* of cases because they generally do not require judicial intrusion into specific military judgments made in particular instances. Moreover, the availability of injunctive relief in such cases rests on the broad-based effects of statutes and regulations, coupled with the assertion of a violation of constitutional rights.<sup>191</sup>

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<sup>189</sup>*Crawford v. Texas Army National Guard*, 794 F.2d at 1036 (citations omitted); *supra* text accompanying notes 70-80. See also *Parker v. Levy*, 417 U.S. 733 (1974) (Supreme Court rejects "void for vagueness" challenge to provisions of the Uniform Code of Military Justice). Cf. *United States v. Stanley*, 107 S. Ct. 3054, 3063 (1987) (the Supreme Court's assurance that soldiers are not barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service referred to "redress to halt or prevent the constitutional violation rather than the award of money damages").

<sup>190</sup>*Crawford v. Texas Army National Guard*, 794 F.2d at 1036.

<sup>191</sup>It is important to recognize that a Guardsman (indeed, any service member) who claims he is the victim of wrongful discrimination is never denied ultimate access to federal court. Where a Guardsman alleges an isolated instance of discrimination, he may, after exhausting his administrative remedies, see *supra* note 188, bring suit under the Administrative Procedure Act. See *supra* note 187 and accompanying text. Where he alleges institutional discrimination by the National Guard, judicial redress pursuant to the cases cited at *supra* note 189 and accompanying text presumably would be available. The cause of action would not be under a civil rights statute, however, but pursuant to either 28 U.S.C. § 1331 or the Administrative Procedure Act.

Even in a case where a court determines it has jurisdiction over a Guardsman's claim, it may nevertheless find the claim to be non-justiciable where, for example, the challenged military action was not "clearly arbitrary and erroneous, with a harmful

By contrast, in an action under a civil rights statute, a Guardsman bearing no grievance other than dissatisfaction with a discrete military personnel decision may bypass available intramilitary remedies and immediately hale his superiors into court. Courts, acting at the behest of aggrieved or disgruntled Guardsmen, would be called upon to scrutinize and second-guess command decisions and discrete personnel decisions. These types of decisions are principal examples of the "complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force"<sup>192</sup> about which the Supreme Court has said "it is difficult to conceive of an area of governmental activity in which the courts have less competence."<sup>193</sup> Because no "express congressional command"<sup>194</sup> reveals that Congress intended to supplant the intraservice remedies available to Guardsmen with causes of action under the civil rights statutes for service-related injuries, the *Feres* doctrine proscribes such suits.

Suits under the civil rights statutes are simply not an appropriate method for resolving challenges to military decisions that touch on either the prerogatives of command or discrete personnel matters. As the Supreme Court explained in a case in which a serviceman challenged a military personnel decision:

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.<sup>195</sup>

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effect present at the time the dispute reaches the court." *Hill v. Berkman*, 635 F. Supp. 1228, 1241 (E.D.N.Y. 1986). Such deference "allow[s] the armed forces necessary flexibility to make changes and alter policy." *Id.*

On the other hand, courts ought never exercise such extreme deference that they abdicate (or are perceived as abdicating) their article III responsibility:

It is the function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Law.

*Winters v. United States*, 89 S. Ct. 57, 59-60 (Douglas, Circuit Justice 1968). See *supra* note 11.

<sup>192</sup>*Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (quoting *Gilligan v. Morgan*, 413 U.S. at 10) (quotation marks omitted).

<sup>193</sup>*Rostker v. Goldberg*, 453 U.S. at 65.

<sup>194</sup>*Feres v. United States*, 340 U.S. at 146.

<sup>195</sup>*Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

Because Congress has established administrative and judicial mechanisms other than the civil rights statutes "through which [Guardsmen's] grievances can be considered and fairly settled,"<sup>196</sup> because suits for service-related injuries would adversely affect discipline and the command relationship, and, most important, because no explicit legislative mandate authorizes Guardsmen to bring suits under the civil rights statutes for injuries incident to service, such suits should be barred by the *Feres* rationale.

## V. CONCLUSION

Although prominent jurists have expressed serious reservations about *Feres*,<sup>197</sup> the *Feres* doctrine, which is approaching half a century in age and whose scope has incrementally broadened since its inception, is indelibly imprinted in American jurisprudence.<sup>198</sup> Pursuant to the *Feres* rationale, courts should not assume, absent an "express congressional command,"<sup>199</sup> that Congress intended remedial statutes of general applicability to provide causes of action to service members alleging injuries incident to military service. This principle of statutory construction is justified not only by separation of powers concerns,<sup>200</sup> but by the adverse impact on discipline and on the command relationship of intramilitary suits involving service-related injuries.<sup>201</sup>

The correctness of the decision in *Feres*, and the validity of its doctrinal underpinnings, is demonstrated by Congress's refusal either to amend the FTCA or to enact other remedial legislation in response to *Feres* and its progeny.<sup>202</sup> Courts ought therefore to apply the *Feres* doctrine commensurate with its underlying principles. Courts that do so will, like the Fifth and Tenth Circuits,<sup>203</sup> dismiss suits brought

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<sup>196</sup>*Id.* at 94. See *supra* text accompanying notes 166-91.

<sup>197</sup>See *supra* note 45.

<sup>198</sup>See *supra* notes 44 & 46 and accompanying text; Euler, *supra* note 60, at 144-46; Zillman, *supra* note 44, at 502-17; Note, *Stencel Aero Engineering Corporation v. United States: An Expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers*, 29 *Hastings L.J.* 1217, 1236 (1978).

<sup>199</sup>*Feres v. United States*, 340 U.S. at 146; *supra* text accompanying notes 125-30.

<sup>200</sup>See *supra* text accompanying notes 54-56 & 155-59.

<sup>201</sup>See *supra* text accompanying notes 43, 53 & 133-54.

<sup>202</sup>See *United States v. Johnson*, 107 S. Ct. at 2068 n.9 ("the . . . argument for changing the interpretation of a congressional statute, when Congress has failed to do so for almost 40 years, is unconvincing"); *Feres v. United States*, 340 U.S. at 340 (if the *Feres* decision "misinterpret[ed] the [FTCA], at least Congress possesses a ready remedy").

<sup>203</sup>See *supra* notes 62-69 (Tenth Circuit), 70-80 (Fifth Circuit), 117-19 and accompanying text. *Cf.* notes 93-103, 121 & 123 and accompanying text (Eighth Circuit). *But cf.* notes 81-92 & 104-16 and accompanying text (First, Third, and Eleventh Circuits).

under the civil rights statutes by Guardsmen for service-related injuries pursuant to Federal Rule of Civil Procedure 12(b)(6), because no explicit legislative mandate authorizes such suits and because these types of suits implicate the concerns that underlie *Feres* and its progeny.



# THE PRESIDENT'S POWER TO PROMULGATE DEATH PENALTY STANDARDS

by Captain Annamary Sullivan\*

## I. INTRODUCTION

The Court of Military Appeals in *United States v. Matthews*<sup>1</sup> held that the system for assessing capital punishment in the military was defective because the sentencing procedures failed to require specific findings as to individualized aggravating circumstances. The court indicated that either Congress or the President, in the exercise of his responsibilities as Commander in Chief and of the powers that Congress delegated to him,<sup>2</sup> could take corrective action. The President, not Congress, acted to correct the defective sentencing procedures by promulgating Rule for Courts-Martial 1004.<sup>3</sup>

This article will explore the authority of the President to promulgate death penalty sentencing procedures. The areas to be explored will be those that the Court of Military Appeals suggested in *Matthews*: Congress's delegation to the President under Article 56, Uniform Code of Military Justice (UCMJ), to set maximum punishments;<sup>4</sup> Congress's delegation to the President under Article 36, UCMJ,<sup>5</sup> to prescribe

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<sup>1</sup>16 M.J. 354 (C.M.A. 1983).

<sup>2</sup>*Id.* at 380 (citing Article 36, Uniform Code of Military Justice, 10 U.S.C. § 836 (1982) [hereinafter UCMJ or Code]).

<sup>3</sup>Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004 [hereinafter MCM, 1984 or Manual, and R.C.M. or Rule, respectively].

<sup>4</sup>UCMJ art. 56, on maximum limits, provides that "the punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

<sup>5</sup>UCMJ art. 36 provides:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United

procedural court-martial rules; and the President's power as Commander in Chief of the armed forces.<sup>6</sup> The article concludes that the President's power to set maximum penalties and to prescribe court-martial procedures gives him the authority to promulgate death penalty sentencing procedures, but that his authority as Commander in Chief provides no additional support for that power.

## II. BACKGROUND

### A. SUPREME COURT PRECEDENTS

In 1972 the Supreme Court, in *Furman v. Georgia*,<sup>7</sup> invalidated the capital punishment statutes of Georgia and Florida. Although the Court was unable to muster a majority or even a plurality opinion,<sup>8</sup> it nevertheless established one basic ground rule: no capital punishment can be adjudged in a system that leaves the decision to the unguided discretion of the jury. As the Court subsequently explained, its holding in *Furman* was that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."<sup>9</sup> The Court continued by explaining that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited."<sup>10</sup> The sentencing authority must be given relevant information and standards with which to guide the use of that information.<sup>11</sup>

Several years later, in a flurry of decisions addressing the validity of statutes enacted in response to the *Furman* ruling, the Supreme Court elaborated on the constitutional requirements for capital punishment. The Court upheld three different capital sentencing schemes in *Gregg*

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States district courts, but which may not be contrary to or inconsistent with this chapter.

<sup>6</sup>b: All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

<sup>7</sup>Article II provides in part that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual Service of the United States." U.S. Const. art. II, § 2.

<sup>8</sup>408 U.S. 238 (1972).

The per curiam opinion of the court consisted of one paragraph, which held, without explanation, that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239-40. Each of the five Justices making up the majority wrote a separate opinion.

<sup>9</sup>*Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

<sup>10</sup>*Id.* at 189.

<sup>11</sup>*Id.* at 195.



*v. Georgia*,<sup>12</sup> *Proffitt v. Florida*<sup>13</sup> and *Jurek v. Texas*.<sup>14</sup> All three systems provided for a bifurcated trial, that is, a sentencing proceeding separate from the guilt phase of trial. They also included provisions for judicial review by either the state supreme court or by a court with statewide jurisdiction. The bifurcated procedure solved the evidentiary dilemma that existed when "information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."<sup>15</sup> The appellate review provision assured that the death penalty would not be imposed "on a capriciously selected group of convicted defendants."<sup>16</sup>

Each state dealt in a different way with the requirement that the sentencing authority be given standards to apply in making a decision on capital punishment. The Georgia statute considered in *Gregg* listed ten aggravating circumstances, at least one of which had to be found beyond a reasonable doubt before the death penalty could be adjudged; nonstatutory aggravating and mitigating circumstances had to be considered; and the jury determination on sentence was final.<sup>17</sup>

The Florida statute reviewed in *Proffitt* listed specific aggravating and mitigating circumstances, and the jury was directed to consider whether sufficient mitigating circumstances existed to outweigh the existing aggravating circumstances.<sup>18</sup> The jury's verdict was advisory only, but the standard for the sentencing judge to order death after a jury advised life in prison was that the facts should be so clear and convincing that "virtually no reasonable person could differ."<sup>19</sup>

Finally, the Texas statute in *Jurek*, which did not list aggravating factors, limited capital murder to five narrow categories<sup>20</sup> and required the jury, in the sentencing proceeding, to answer three ques-

<sup>12</sup>428 U.S. 153.

<sup>13</sup>428 U.S. 242 (1976).

<sup>14</sup>428 U.S. 262 (1976).

<sup>15</sup>*Gregg*, 428 U.S. at 190.

<sup>16</sup>*Id.* at 204. See also *Jurek*, 428 U.S. at 276 ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.");

<sup>17</sup>*Gregg*, 428 U.S. at 162-68.

<sup>18</sup>*Proffitt*, 428 U.S. at 248-49.

<sup>19</sup>*Id.* at 249 (quoting *Tedder v. Florida*, 322 So 2d 908, 910 (Fla. 1975)).

<sup>20</sup>The five categories were: murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim was a prison employee. *Jurek*, 428 U.S. at 268.

tions, including one on the future dangerousness of the defendant.<sup>21</sup> Only if all three questions were answered affirmatively could the death sentence be imposed.<sup>22</sup> The Court determined that the Texas action in narrowing the categories of capital murder served "much the same purpose" as statutory aggravating circumstances.<sup>23</sup>

Thus all three statutes required "the sentencing authority to focus on the particularized nature of the crime."<sup>24</sup> Further, Florida and Georgia expressly provided for the consideration of mitigating circumstances. Similarly, in answering the question on future dangerousness in the sentencing stage, the Texas jury "may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it."<sup>25</sup> Thus, because all three "capital-sentencing procedure[s] guide[ ] and focus[ ] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death,"<sup>26</sup> all three were found constitutionally sufficient.

The Court, at the same time that it found the capital punishment statutes of Georgia, Florida, and Texas constitutional, struck down other statutory schemes in *Woodson v. North Carolina*<sup>27</sup> and in *Roberts v. Louisiana*.<sup>28</sup> These two statutes mandated the death penalty for specified offenses. *Lockett v. Ohio*<sup>29</sup> made explicit the message that mitigating evidence must be a factor in the death penalty decision: the Constitution requires that "the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>30</sup>

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<sup>21</sup>The questions were: whether the conduct of the defendant that caused the death was committed deliberately and with the reasonable expectation that death would result; whether there is a probability that the defendant would commit criminal acts of violence that would constitute a threat to society; and whether the defendant's conduct in killing the victim was unreasonable in light of the provocation, if any, by the victim. *Id.* at 269.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 270.

<sup>24</sup>*Id.* at 271.

<sup>25</sup>*Id.* at 273-274.

<sup>26</sup>*Id.* at 274.

<sup>27</sup>428 U.S. 280 (1976).

<sup>28</sup>428 U.S. 325 (1976).

<sup>29</sup>436 U.S. 586 (1978).

<sup>30</sup>*Id.* at 604 (Burger, C.J., plurality opinion) (footnotes omitted) (emphasis in original).

## B. MILITARY PRECEDENT

In early 1979 Private First Class Wyatt L. Matthews brutally raped and murdered Phyllis Villanueva, an Army librarian in Germany.<sup>31</sup> He was charged with these offenses and convicted of them by a court-martial that, by unanimous vote, sentenced him to death.<sup>32</sup> On appeal he attacked the constitutionality of the military's capital punishment provisions.<sup>33</sup> The Court of Military Appeals determined that there was no military necessity for distinguishing between the murder and rape committed by Matthews and similar crimes tried in civilian courts: "we see no reason why Matthews should be executed for his murder and rape of Mrs. Villanueva if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts."<sup>34</sup> Accordingly, the court ruled that civilian precedent did apply to military capital sentencing.

Reviewing Supreme Court precedents, including those cases previously discussed, *Matthews* found that certain common features appeared in a constitutionally valid death penalty procedure: a bifurcated sentencing proceeding; specific aggravating circumstances identified to the sentencer; selection of and findings on the particular aggravating circumstances used by the sentencer to impose the death penalty; unrestricted opportunity for the defendant to present mitigating and extenuating evidence; and mandatory appellate review of the appropriateness of the sentence.<sup>35</sup>

The court then applied these principles to the military justice system. First, a bifurcated sentencing procedure is followed.<sup>36</sup> Second, "[c]ertain aggravating circumstances, such as premeditation, specific intent, and murder during commission of specified felonies, must be found by the court members. . . . These findings identify the instances in which an accused is eligible for the death penalty. After the findings, evidence may be submitted to identify other aggravating circumstances."<sup>37</sup> Third, the defendant has an unlimited opportunity to put on evidence in extenuation and mitigation.<sup>38</sup> Next, there is mandatory review of the facts, law, and sentence appropriateness in a comparative

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<sup>31</sup>*Matthews* 16 M.J. at 359, 361, 363.

<sup>32</sup>*Id.* at 361.

<sup>33</sup>*Id.* at 364.

<sup>34</sup>*Id.* at 368-69.

<sup>35</sup>*Id.* at 377.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 378 (citations omitted).

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

sense, both throughout the jurisdiction by the convening authority and throughout defendant's branch of service by the service court of military review. Thereafter, the Court of Military Appeals must review cases as to questions of law, while the President, who can take any lesser action on the sentence, must ultimately approve any death sentence.<sup>39</sup>

Based upon this analysis, the court held that most of the safeguards required by the Supreme Court were already in place in the military justice system. However, because court-martial members were not required to identify specifically the aggravating factors relied upon in assessing the death sentence, it was impossible for the appellate courts to determine whether they had made the necessary individualized sentencing determination based on the character of the defendant and the circumstances of the crime.<sup>40</sup> Additionally, the court rejected the government argument that a finding of premeditation narrowed the class of death-eligible offenses sufficiently to meet constitutional requirements, noting that the military premeditated murder scheme paralleled statutes struck down on constitutional grounds.<sup>41</sup> In summary, the Court of Military Appeals "held that the sentencing procedure in [the *Matthews*] case was defective because of the failure to require that the court members make specific findings as to individualized aggravating circumstances—findings which can, in turn, be reviewed factually and legally."<sup>42</sup>

The court noted that Congress "obviously" intended that in cases of premeditated murder, certain types of felony murder, and rape, the death sentence should be available and indicated that the necessary changes to the court-martial sentencing procedures could be provided by the President:

Congress can take action to remedy this defect that now exists in the sentencing procedure employed by courts-martial in capital cases. However, corrective action also can be taken by the President in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress. See Article 36, UCMJ, 10 U.S.C. § 836.

The congressional delegation of powers to the President has traditionally been quite broad in the field of military justice. Pursuant to Article 36 of the Uniform Code, the Presi-

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<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 379.

<sup>41</sup>*Id.* at 376.

<sup>42</sup>*Id.*

dent promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. However, as contemplated by Article 56 of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. . . .

The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases.<sup>43</sup>

### C. THE SOLUTION

Rule for Courts-Martial 1004, which had been circulated for public comment even prior to the *Matthews* decision,<sup>44</sup> attempted to rectify the deficiency by enumerating specific aggravating factors, at least one of which the court members must find in order to impose the death penalty. The rule also provides that the members must find that the aggravating circumstances outweigh the extenuating or mitigating circumstances before a death sentence can be adjudged. The President caused the 1984 Manual for Courts-Martial and its Rules for Courts-Martial to be issued "[b]y virtue of the authority vested in [him] as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code [Uniform Code of Military Justice]."<sup>45</sup> The issue is whether, in light of the unique nature of the death penalty, he had the authority to promulgate the capital punishment provisions of R.C.M. 1004. An analysis of the issue entails review of the powers that Congress granted to the President and the President's power as Commander in Chief of the armed forces.

## III. CONGRESSIONAL DELEGATION: ARTICLE 56

### A. INTRODUCTION

The first asserted basis for the President's promulgation of death penalty standards is the power that Congress granted to him under

<sup>43</sup>*Id.* at 360-61 (footnote omitted).

<sup>44</sup>Indeed, the *Matthews* court specifically noted the proposed rule. *See id.* at 380.

<sup>45</sup>Executive Order 12478, 3 C.F.R. 201 (1984), as amended by Executive Order 12484, 3 C.F.R. 217 (1984).

Article 56, UCMJ, to prescribe maximum punishments.<sup>46</sup> Congress has specified those offenses which may carry the death penalty.<sup>47</sup> Precedent, however, as discussed earlier, has established as constitutionally inadequate a capital sentencing scheme which authorizes the death penalty but leaves the decision to the sentencer's unfettered discretion. The Code scheme that Congress enacted suffers from this inadequacy: the death penalty is authorized, but the UCMJ lacks guidelines. The question is, can the President fill the gap?

The analysis under Article 56 is this: Congress has prescribed which offenses merit the death penalty but has otherwise authorized the Executive to set maximum punishments; the President has established lesser degrees within the capital offense categories and limited the punishment on those offenses to non-capital punishment.<sup>48</sup> To determine whether this is a valid analysis requires a review of the sentencing concerns in capital cases as well as a review of the limits on congressional delegation of authority.

## B. DELEGATION OF CONGRESSIONAL POWER

The question of the power of Congress to delegate its authority to another branch of government has been a thorny one in the history of the U.S. Constitution. The Constitution prescribes that there shall be three separate but coequal branches of government: the legislative, the executive, and the judicial.<sup>49</sup> "[T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."<sup>50</sup> By dividing the Federal Government into three branches, the Framers of the Con-

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<sup>46</sup>Although one commentator feels that the President's power to set maximum punishments is not "pertinent" to the issue of the propriety of the military's system for assessing the death sentence, see Wilson, *Defense Tactics Under the New Death Penalty Sentencing Procedure*, 15 *The Advocate* 300 (1983), nevertheless defendants are making the argument that R.C.M. 1004 is an unconstitutional intrusion into the exclusive legislative province of Congress in the sentencing arena on separation of power grounds. See Appellant's Assignment of Errors at Section VII, *United States v. Dock*, 26 M.J. 620 (A.C.M.R.), cert. for review filed, 26 M.J. 301 (C.M.A. 1988). Further the issue has been of concern to military appellate judges. See *United States v. Matthews*, 13 M.J. at 392 (Fletcher, J., concurring in the result; *United States v. Matthews*, 13 M.J. 501, 550 (A.C.M.R. 1982) (en banc) (O'Donnell, J., concurring in part and dissenting in part).

<sup>47</sup>See UCMJ arts. 85, c. 90, 94, 99, 100, 101, 102, 104, 106, 106a, 110, 113, 118, and 120.

<sup>48</sup>See Government Answer to Assignment of Errors, at 88-90, *United States v. Dock*, 26 M.J. 620 (A.C.M.R.), cert. for review filed, 26 M.J. 301 (C.M.A. 1988).

<sup>49</sup>U.S. Const. art. I, § 1, art. II, § 1, cl. 1; art. III, § 1.

<sup>50</sup>*The Federalist*, No. 48, at 343 (J. Madison) (B. Wright ed. 1961).

stitution sought to ensure that each branch would limit itself to its assigned area of responsibility.<sup>51</sup> The question is, to what extent can Congress defer arguably legislative judgments to the Executive?

The Supreme Court has often considered the extent to which Congress can delegate its powers but has failed to establish a bright-line:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>52</sup>

Historically, the judiciary has been deferential to delegations by Congress to the President. For example, in *The Brig Aurora*<sup>53</sup> the act of Congress which provided for revival of legislation by Presidential proclamation was upheld. Similarly, it was constitutional for Congress to provide for "the suspension of an act upon a contingency to be ascertained by the President, and made known by his proclamation."<sup>54</sup> The test eventually applied was an "intelligible principle" standard: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."<sup>55</sup>

The most heightened concern over the delegation of power to the Executive by Congress was expressed by the Supreme Court during the 1930's when a conservative Court was faced with an active, interventionist President and a Congress willing to delegate much authority to him in order to effectively deal with the problems of the Great Depression. In two cases, the Supreme Court struck down New Deal legislation in which Congress had granted the President broad powers.

The first legislation subjected to the Court's displeasure was the National Industrial Recovery Act.<sup>56</sup> Portions of the Act authorized the President to prescribe rules and regulations to control the

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<sup>51</sup>I.N.S. v. Chadha, 462 U.S. 919, 951 (1983). See generally The Federalist No. 47 (J. Madison).

<sup>52</sup>Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

<sup>53</sup>11 U.S. (7 Cranch) 382 (1813).

<sup>54</sup>Field v. Clark, 143 U.S. 649, 683 (1892).

<sup>55</sup>J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

<sup>56</sup>The National Industrial Recovery Act of June 16, 1933, 40 U.S.C. §§ 402-411a (repealed 1966).

transportation of petroleum and to issue a code of fair competition. The President exercised these powers, which were then challenged as unconstitutional delegations of legislative power.

The plaintiffs in *Panama Refining Co. v. Ryan*<sup>57</sup> challenged the power of the President to prescribe rules and regulations relating to the transportation and distribution of petroleum. The Supreme Court reviewed the challenged provision that "purport[ed] to authorize the President to pass a prohibitory law"<sup>58</sup> on the transportation of excess petroleum and petroleum products.

The question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.<sup>59</sup>

Applying these criteria, the Court found the challenged section wanting. Among its other failures, it failed to set forth criteria to guide the President's course of action, did not require any finding by the President as a condition of his action, and, in sum, failed to declare congressional policy on the transportation of excess petroleum.<sup>60</sup> "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."<sup>61</sup>

Examining the other sections of the Act for a declaration of policy or a standard of action that would limit or guide the President's action, the Court found none.<sup>62</sup> While the Act did contain a "general outline of policy," the Court determined that it did not limit or control the broad grant of authority to the Executive. "The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy."<sup>63</sup>

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<sup>57</sup>293 U.S. 388 (1935).

<sup>58</sup>*Id.* at 414.

<sup>59</sup>*Id.* at 415.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>*Id.* at 416-20.

<sup>63</sup>*Id.* at 417, 418-19.



The Court recognized that Congress can constitutionally confer upon officers of the executive branch the power to make regulations for the administration of laws, regulations that are binding rules "when found to be within the framework of the policy which the legislature has sufficiently defined."<sup>64</sup> The Court also recognized that delegations had generally been upheld but found that "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend" and declared that the challenged provision exceeded the constitutional limits.<sup>65</sup>

In its second New Deal confrontation, the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*<sup>66</sup> reviewed a "Live Poultry Code" promulgated by the President as a code of fair competition. The Code contained specific regulations over the poultry industry, including pay rates, hours in a work week, minimum age, minimum number of employees fixed by volume of sales, and prohibited trade practices.<sup>67</sup> The Court focused first on the unfair trade practices provision which authorized the President to approve a code, that is, a standard of fair practice, a violation of which was criminally punishable.

Concerned with the open-ended nature of a "code of fair competition," the Court looked to whether the President's discretion was limited. "[T]he purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which . . . the President would approve or prescribe . . . as wise and beneficent measures for the government of trades and industries, according to the general declaration of policy in section one."<sup>68</sup> The Court, stating that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry," examined the Act to find the limits to the President's discretion.<sup>69</sup> Finding few restrictions of any consequence, the Court determined that "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."<sup>70</sup>

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<sup>64</sup>*Id.* at 428-29.

<sup>65</sup>*Id.* at 430.

<sup>66</sup>295 U.S. 495 (1935).

<sup>67</sup>*Id.* at 523-26.

<sup>68</sup>*Id.* at 535.

<sup>69</sup>*Id.* at 537, 538.

<sup>70</sup>*Id.* at 538-41, 542.

Outraged over the Supreme Court's evisceration of his New Deal, President Roosevelt proposed his notorious court-packing scheme. He lost that battle but arguably won the war when, thereafter, in *Yakus v. United States*,<sup>71</sup> the Supreme Court upheld the Emergency Price Control Act.<sup>72</sup> The Price Control Act provided for a presidentially-appointed Price Administrator with the authority to fix fair commodity prices in order to prevent wartime speculation and profiteering.<sup>73</sup> The Court found the delegation of authority to be constitutional: "Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute."<sup>74</sup>

In fact, the "standards" found to be adequate were quite broad: the prices should effectuate the policies of the Act, they should be "fair and equitable," and the Administrator should give "due consideration" to prevailing prices.<sup>75</sup> Unmistakably, the Court had returned to a more relaxed approach to Congress's delegations to the Executive.

A fair reading of the case law thus suggests that the standard for review of delegation issues is a generous one: "Congress has stated the legislative objective, has prescribed the method of achieving that objective . . . , and has laid down standards to guide to the administrative determination."<sup>76</sup> In the post-New Deal era, so long as congressional delegations include intelligible standards and statements of purpose, they will pass constitutional muster.<sup>77</sup>

### C. DELEGATING SENTENCING AUTHORITY

What if the subject matter of the delegation is the power to set sentences? Recently courts, including the Supreme Court,<sup>78</sup> dealt with a spate of cases challenging the congressional delegation of sentencing power under the Sentencing Reform Act<sup>79</sup> to the U.S.

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<sup>71</sup>321 U.S. 414 (1944).

<sup>72</sup>The Emergency Price Control Act of January 30, 1942, 50 U.S.C. App. §§ 901-924, as amended by Inflation Control Act of October 2, 1942, 50 U.S.C. App. §§ 961-971 (1951).

<sup>73</sup>*Yakus*, 321 U.S. at 419-20.

<sup>74</sup>*Id.* at 423.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>*United States v. Richardson*, 655 F. Supp. 111, 113 (E.D.N.C. 1988).

<sup>78</sup>*Mistretta v. United States*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).

<sup>79</sup>Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-998 (Supp. II 1984).

Sentencing Commission. The Act established the Sentencing Commission as an independent department in the judiciary with seven members, three of whom must be federal judges, appointed and subject to removal by the President.<sup>80</sup> The Commission was empowered to establish sentencing "guidelines" which are, in fact, restrictions on the range of punishments that judges can assess.<sup>81</sup>

The district courts wrestled with a variety of challenges to the Commission and its guidelines, and most of the challenges provide no guidance on the issue of congressional delegation to the Executive of the power to determine punishment for federal crimes.<sup>82</sup> One argument advanced, the argument that Congress improperly delegated its legislative power to the judiciary, does, however, cast an interesting light on the argument over Article 56, UCMJ, and the extent to which Congress may delegate to the President the power to establish maximum punishments.

There is authority for the proposition that the establishment of penalties is a legislative function that cannot be delegated. "[W]ithin our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress."<sup>83</sup> Indeed, at least one court suggested that Congress, in establishing the Sentencing Commission, improperly attempted to give away its legislative responsibilities. "Simply said, Congress can [not] appoint an unelected commission to initiate, write and thereafter monitor the sentencing laws of this nation . . ."<sup>84</sup> Congress should not be permitted "to confer power which is 'legislative' in character to agencies or commissions."<sup>85</sup> Nevertheless, in spite of this concern that Congress was attempting to evade difficult legislative decisions, courts generally determined that, under the "intelligible principle" standard, the Sentencing Reform Act did not constitute an unconstitutional delegation by Congress.<sup>86</sup>

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<sup>80</sup>28 U.S.C. § 991(a) (Supp. II 1984).

<sup>81</sup>28 U.S.C. § 994 (Supp. II 1984).

<sup>82</sup>For example, an issue of much concern to the courts was whether locating the Commission in the judicial branch violated separation of powers concerns in that the Commission was performing Executive functions. See, e.g., *United States v. Frank*, 682 F. Supp. 815 (W.D. Pa. 1988); *United States v. Ruiz-Villanueva*, 680 F. Supp. 1411 (S.D. Cal. 1988); *United States v. Chambless*, 680 F. Supp. 793 (E.D. La. 1988); *United States v. Arnold*, 678 F. Supp. 1463 (S.D. Cal. 1988).

<sup>83</sup>*Whalen v. United States*, 445 U.S. 684, 689 (1980).

<sup>84</sup>*United States v. Tolbert*, 682 F. Supp. 1517, 1522 (D. Kan. 1988).

<sup>85</sup>*Id.*

<sup>86</sup>See *id.* at 1522-23; *United States v. Richardson*, 685 F. Supp. 111 (E.D.N.C. 1988). See also *United States v. Diaz*, 685 F. Supp. 1213, 1215 n.1 (S.D. Ala. 1988), and cases cited therein.

Reviewing and applying precedent on excessive delegation, the district courts found that the Sentencing Reform Act

contains clear directives and standards for the Commission to follow. The Commission is directed to punish in accordance with recognized tenets of criminal law, eliminate sentencing disparities and maintain judicial discretion. Congress further instructed the Commission to categorize the offenses and avoid discrimination on any basis. Our review of the Act compels us to conclude that Congress established adequate standards and intelligible principles for the Commission to follow and we hold that *Panama Refining* and *Schechter Poultry* are not controlling.<sup>87</sup>

The Supreme Court agreed with this analysis by the district courts and upheld the constitutionality of the commission and its guidelines.<sup>88</sup> The Court reasoned that the "nondelegation doctrine . . . do[es] not prevent Congress from obtaining the assistance of its coordinate branches. . . . 'In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.'"<sup>89</sup> The "intelligible principle" test has been applied with the recognition that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."<sup>90</sup>

The Supreme Court reviewed the history of its precedent on congressional delegation of authority and recognized that, apart from the two New Deal cases,<sup>91</sup> it has uniformly upheld congressional authority to delegate power under broad guidelines.<sup>92</sup> A delegation is constitutionally sound if "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."<sup>93</sup> Applying that test, in light of the detailed guidance provided by Congress to the Commission, the Court had no doubt that the delegation was constitutionally sufficient.<sup>94</sup>

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<sup>87</sup>United States v. Frank, 682 F. Supp. at 820 (citations omitted). *Accord* United States v. Tolbert, 682 F.Supp at 1522.

<sup>88</sup>Mistretta v. United States, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).

<sup>89</sup>*Id.* at 4105 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. at 394).

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

<sup>91</sup>See *supra* notes 57 and 66 and accompanying text.

<sup>92</sup>*Mistretta*, 57 U.S.L.W. at 4103.

<sup>93</sup>*Id.* (quoting *American Power and Light Co. v. SEC.* 329 U.S. 90, 105 (1946)).

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

Thus the "intelligible principle" test applies to delegations of sentencing authority as well as to delegations of other authority. How, then, does the military sentencing scheme fare under such a test?

### D. MILITARY SENTENCING

In reviewing the legislative delegation, it is important to recognize that Congress, in enacting the UCMJ, was not writing on a tabula rasa. Historically, much latitude has been granted military courts in assessing punishment. Until late in the nineteenth century, there were no maximum limits on sentences by courts-martial.<sup>95</sup> In 1890 Congress provided that, whenever the sentence was left to the discretion of the court-martial by the Articles of War, "the punishment shall not, in time of peace, be in excess of a limit which the President may prescribe."<sup>96</sup> Thus there is a long history of delegation of authority to the President to determine the punishment for non-capital offenses. The Articles of War did, however, speak specifically to the death penalty: "No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned."<sup>97</sup> For some offenses, capital punishment was mandated; for others, it was authorized in the discretion of the court.<sup>98</sup>

In viewing the legislative history of Article 56, the principal concern of Congress appears to have been that the President not exceed the statutory maximum in establishing punishment.<sup>99</sup> The thrust of the discussion on Article 56 is that Congress, and not the President, determines which offenses are capital:

Now, take a death case. In one or two instances it is mandatory. In several others it may be imposed or not. In all other cases it may not be imposed, even if the President says he would like to have it imposed. . . . Because it has not been specified, he could not provide for it.<sup>100</sup>

As the House Report noted, "the death penalty can be adjudged only

<sup>95</sup>W. Winthrop, *Military Law and Precedents* 395 (2d ed. 1920 reprint).

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*, Appendix XII, at 994, Art. 96, *The American Articles of War of 1874*.

<sup>98</sup>*Id.* at 417.

<sup>99</sup>*Uniform Code of Military Justice; Hearings on H.R. 2496 before a Subcomm. of the House Armed Services Committee, 81st Cong., 1st Sess. 565 (1949), reprinted in Index and Legislative History, Uniform Code of Military Justice, at 1087-89 (1950) [hereinafter *Hearings*].*

<sup>100</sup>*Id.* at 1088 (Statement of Mr. Larkin).

when specifically authorized for the violation of a specific punitive article.<sup>101</sup>

Article 18 of the Code deals with jurisdiction and includes the provision that general courts-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."<sup>102</sup> The language "including the penalty of death when specifically authorized by this chapter" was offered as a clarifying amendment to Article 18. "Now we provide under certain punitive articles that the penalty of death may be imposed. Unless it is so provided of course it cannot be imposed."<sup>103</sup>

Thus Congress established at least one clear limit on the President's power to affix punishments. Article 55 contains another limitation and standard for punishment. It prohibits "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment."<sup>104</sup> Also prohibited is the use of irons, except for safe custody purposes.<sup>105</sup> As stated by Mr. Larkin during the UCMJ hearings:

As we come to the punitive articles, starting with 77, you will see each one specifically says that the person found guilty can be sentenced as the court martial may direct. In a certain few a death penalty is provided on a mandatory basis, and in a certain additional number there is the death penalty or such other sentence. Except where it is spelled out that the death penalty can be imposed, it cannot be imposed. In no other case, the President to the contrary notwithstanding, can an offense draw a death penalty. Unless Congress provides it specifically in the article, no one else can provide it. . . . As to that, the President and everybody else is bound. He cannot raise any sentence to the death penalty, unless it is already provided in here. . . . Now, in setting maximum limits he can set whatever maximum limits, aside from the death penalty—20 years, 10 years, 30 years, or whatever it may be—and the court

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<sup>101</sup>H. Rep. No. 49, 81st Cong., 1st Sess., 1, 16 (1949).

<sup>102</sup>UCMJ art. 18 provides for the jurisdiction of general courts-martial. "General courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."

<sup>103</sup>*Hearings, supra* note 99, at 959-60 (Statement of Mr. Larkin).

<sup>104</sup>UCMJ art. 55.

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

martial may not exceed any of those maximums. However, there is no particular limit of the maximum except the death penalty.

When I say no limit to the maximum, I am talking about confinement, as distinguished from the death penalty.

The President cannot, in addition, prescribe any punishment which would be cruel or unusual or any punishment that would call for tattooing, marking, and others prohibited.<sup>106</sup>

Viewed as a whole, then, the Code has laid down adequate standards and intelligible principles for the delegation of sentencing authority to the President, particularly when viewed in the light of the historical role the President has always played in this area. "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear."<sup>107</sup> The issue then becomes whether capital punishment is of such a unique nature that it is insufficient for the legislature merely to specify the offenses which carry that potential sentence. Does the legislature alone have the power to distinguish between circumstances in which a particular offense merits the death sentence and circumstances in which it does not?

### E. CAPITAL SENTENCING

In *Gregg v. Georgia* the Supreme Court expounded on the limited role of the courts in reviewing a statutory death penalty scheme. It is worth quoting at length to catch the full flavor of the Court's emphasis on the legislative nature of defining capital offenses.

[W]hile we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators. "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. . . ." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional mea-

<sup>106</sup>Hearings, *supra* note 99, at 1088-89 (Statement of Mr. Larkin).

<sup>107</sup>*Lichter v. United States*, 334 U.S. 742, 785 (1948) (quoting *American Power and Light Co. v. S.E.C.*, 329 U.S. at 104).

sure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. . . .

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Furman v. Georgia*, . . . (Burger, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 386, 393 (1958).<sup>108</sup>

Thus, with this emphasis on the importance of the legislature in the capital punishment scheme, the question becomes whether the narrowing of an unconstitutionally broad death penalty scheme can be accomplished by other than legislative action.

The Ninth Circuit faced the issue in *United States v. Harper*.<sup>109</sup> James Harper was charged with violations of the Espionage Act<sup>110</sup> by obtaining and selling national defense information to an officer of the Polish Intelligence Service.<sup>111</sup> The Espionage Act provided for the death penalty or for imprisonment for life or for any term of years; however, it contained no guidelines for the sentencing authority's discretion in determining whether to adjudge the death penalty.<sup>112</sup> The district court recognized the difficulty with the lack of guidelines in the Espionage Act but read the statute as delegating to the courts the authority to formulate the necessary guidelines at the sentencing stage of the trial.<sup>113</sup> On appeal, the Ninth Circuit determined that the district court clearly erred in its conclusion.<sup>114</sup>

The circuit court reviewed *Gregg* and found it "replete with references to the peculiarly legislative character of sentencing determinations, and the particularly limited role of judges in this area."<sup>115</sup>

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<sup>108</sup>*Gregg v. Georgia*, 428 U.S. at 175-76.

<sup>109</sup>729 F.2d 1216 (9th Cir. 1984).

<sup>110</sup>18 U.S.C. §§ 791-799 (1982).

<sup>111</sup>*Harper*, 729 F.2d. at 1217-18.

<sup>112</sup>*Id.* at 1218.

<sup>113</sup>*Id.* at 1218-19, 1224-25.

<sup>114</sup>*Id.* at 1224.

<sup>115</sup>*Id.* at 1225.



While deference must be granted the congressional determination that the death penalty is appropriate for some acts of espionage, the principles enunciated in *Gregg* are "germane to the question of where the required guidelines must come from."<sup>116</sup>

If the "will and . . . moral values of the people" are particularly important in sentencing decisions, and if specification of punishments is therefore peculiarly a legislative function, then specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people.

. . . The Court has thus plainly required that guidelines be expressly articulated by the legislature in the statute authorizing the death penalty.<sup>117</sup>

The *Harper* court determined that "[t]he conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable."<sup>118</sup>

While the *Harper* court set forth a strict rule, other courts have developed a less rigid approach. One analysis looks beyond the statute to its legislative history to find necessary guidelines. Thus, for example, in *Carlos v. Superior Court of Los Angeles County*<sup>119</sup> the California Supreme Court read an intent to kill requirement as an aggravating circumstance for a felony murder conviction, a reading that had some support in the statute's somewhat ambiguous legislative history.<sup>120</sup>

Another approach is for the courts to look to the state's criminal code in its entirety. In *McKenzie v. Risley*<sup>121</sup> the petitioner cited *Harper* and argued that the death penalty statutes must contain the necessary procedural safeguards and statutory deficiencies cannot be cured by judicial construction.<sup>122</sup> The Ninth Circuit, in rejecting the argument, pointed out that, unlike the court in *Harper*, the Montana Supreme Court did not create the guidelines ad hoc but instead looked to other statutes to provide the necessary guidelines.<sup>123</sup>

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

<sup>117</sup>*Id.* (quoting *Gregg*, 428 U.S. at 175).

<sup>118</sup>*Harper*, 729 F.2d at 1225.

<sup>119</sup>672 P.2d 862 (Cal. 1983) (en banc).

<sup>120</sup>In fact, the provision in question resulted from a popular death penalty initiative and the court looked, not just at the wording of the initiative, but also to the ballot arguments, the purpose of the initiative as explained to the voters.

<sup>121</sup>601 F.2d 1519 (9th Cir. 1986).

<sup>122</sup>*Id.* at 1529.

<sup>123</sup>*Id.* at 1529-30.

State supreme courts will narrowly interpret otherwise overly broad statutes. In *State v. Bartholomew*,<sup>124</sup> the Washington Supreme Court reviewed a statute which limited capital murders to those committed with premeditation. The statute had a broad provision for aggravating circumstances, which the court limited: "if the legislature fails to provide sufficient guidance in defining aggravating circumstances, then the state's supreme court in reviewing the death sentence must supply the omission with an acceptably narrow interpretation."<sup>125</sup> Indeed, the Supreme Court, in upholding the death penalty statute in *Jurek*,<sup>126</sup> relied in part on the narrow construction applied by the state appellate court.

### F. CONCLUSION

Congress can delegate its power to set sentencing standards, so long as it provides "intelligible principles" for the establishment of punishments. It has generally done that through the interplay among Article 55, Article 56, and Article 18. As to capital sentencing, the degree to which the statute must within its four corners delineate the aggravating circumstances on which the death sentence may be based is open to debate. Clearly, as *Harper* indicates, the sentencing body cannot set the standards, and there should be some means of discerning the legislative intent as to the death penalty.

What makes the application of this analysis to the court-martial process interesting is that Congress has in fact not spoken on the subject of capital punishment in the military since *Furman*. Indeed Congress appears to be avoiding speaking in this area, at least to the extent that its actions could be read to question the Manual's capital sentencing provisions.<sup>127</sup> Thus, there is no legislative history to review

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<sup>124</sup>654 P.2d 1170 (Wash. 1982) (en banc), vacated and remanded on other grounds, 463 U.S. 1203 (1983) (for reconsideration in light of *Zant v. Stephens*, 462 U.S. 862 (1983)), on remand, 683 P.2d 1079 (Wash. 1984) (en banc).

<sup>125</sup>*Bartholomew*, 654 P.2d at 1180.

<sup>126</sup>428 U.S. at 272.

<sup>127</sup>Thus, in the debate over the enactment of the capital offense of peacetime espionage (UCMJ art. 106a), a major concern was that the enactment of specific statutory sentencing standards for the espionage offense could be construed as a comment on the Manual's capital sentencing provisions. In fact, the conference committee report explicitly denied any such construction: the proposed espionage legislation

was not intended to affect the validity of existing death penalty provisions in the UCMJ or the capital sentencing procedures promulgated by the President in the Manual for Courts-Martial, 1984. . . . The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

with respect to congressional intent on aggravating circumstances, at least as directed to the necessary narrowing of a constitutionally overbroad class of death-eligible offenders. Were we dealing with purely a statutory federal crime, this silence would most likely be constitutionally fatal.

There is, however, another wild card in the analysis: the capital offenses are military. The President has historically had extensive power to delineate less-than-capital punishment and, in R.C.M. 1004, he has arguably done just that: by defining aggravating circumstances, he has removed from the category of capital offenders those who do not fit the standards. The President is thus acting in an area in which he has much authority and in which the executive branch and the legislature have long worked cooperatively. While the concept of separation of powers is important, the Constitution does not "require[] that the three branches of the Government operate with absolute independence. . . . [W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."<sup>126</sup>

Further, Congress, in enacting the UCMJ, indicated those crimes for which it mandated the death penalty<sup>129</sup> and those crimes for which it merely authorized the death penalty. Certainly the argument can be made that the enactment of mandatory and discretionary capital sentences suggests that Congress wanted to deal fully with the death penalty issue, exclusive of Presidential action. What Congress actually did, however, was express its intention as to which offenses *must* receive the death sentence and which *may* receive the death sentence. It would be highly questionable at best if the President attempted to alter or limit a mandatory capital offense and he has not done so, even though some kind of action to save such an offense from being held unconstitutional appears to be necessary.<sup>130</sup> As to offenses for which the death penalty is discretionary, Congress

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131 Cong. Rec. H6490, H6637-38 (daily ed. July 29, 1985) (conference committee report on S. 1160, Department of Defense Authorization Act of 1986).

<sup>126</sup>Morrison v. Olson, 108 S. Ct. 2597, 2620 (1988) (quotations omitted) (citations omitted).

<sup>129</sup>See UCMJ art. 106.

<sup>130</sup>See *Lockett v. Ohio*, 438 U.S. 586 (1978). Simply stated, a mandatory capital sentence precludes the constitutionally required individualized determination of the appropriateness of the death penalty. *Sumner v. Schuman*, 107 S. Ct. 2716 (1987) (statute mandating the death penalty for murder committed by a prison inmate serving a life sentence without possibility of parole held unconstitutional).

has obviously left open the factors to be considered in making the sentencing decision and is apparently not distressed by the Manual's capital sentencing provisions.<sup>131</sup> Thus, for offenses which authorize but do not require the death sentence, Congress has neither expressly nor impliedly precluded presidential action to narrow the category of death-eligible offenders.

The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from the relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.<sup>132</sup>

In providing the constitutionally required aggravating circumstances, the President has made effective the legislative decision that the death penalty be a potential punishment for certain offenses. This action is consistent with his duty to execute the law. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of execution of the law."<sup>133</sup>

## IV. CONGRESSIONAL DELEGATION: ARTICLE 36

### A. INTRODUCTION

"Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating" that rulemaking authority.<sup>134</sup> In Article 36, UCMJ, Congress em-

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<sup>131</sup>In the discussion over the legislation proposing UCMJ art. 106a for peacetime espionage, Senator McCollum indicated his hope that the Manual's capital sentencing procedures would be found constitutional. 131 Cong. Rec. H5448 (daily ed. July 11, 1985) (statement of Sen. McCollum), while Senator Levin advocated not jeopardizing judicial review of the Manual procedures by enacting specific procedures for espionage which might "prejudice the Government's position that the executive branch, rather than the Congress, should establish procedures for capital offenses under the military code." 131 Cong. Rec. S10350 (daily ed. July 30, 1985) (statement of Sen. Levin).

<sup>132</sup>*Yakus*, 321 U.S. at 424-25.

<sup>133</sup>*Bowsher v. Synar*, 106 S. Ct. 3181, 3192 (1986).

<sup>134</sup>*Sibbach v. Wilson*, 312 U.S. 1, 9 (1941).

powered the President to establish procedures for courts-martial.<sup>135</sup> The purpose behind granting the President the power to promulgate procedures was to obtain a uniform system for all courts-martial, irrespective of branch of service.<sup>136</sup> The President was to establish evidentiary rules that followed as nearly as possible the generally established rule of law in order to assure standard protections to military accuseds.<sup>137</sup> In R.C.M. 1004, the President has set forth the procedures to be followed in capital sentencing proceedings. The question is, however, whether R.C.M. 1004 is truly procedural, in which case it is properly promulgated, or whether it is in fact substantive and thus beyond the President's rulemaking power.

### B. SUBSTANTIVE VS. PROCEDURAL

Whether sentencing criteria are substantive or procedural is an area in which the courts have been unable to draw a bright-line. As the Supreme Court has recently noted, the distinction can be elusive.<sup>138</sup> "The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."<sup>139</sup>

The argument is made that R.C.M. 1004 is in fact substantive and not procedural. The theory is that, in R.C.M. 1004, the President has created a distinction between different types of crimes.<sup>140</sup> Authorization to prescribe rules of procedure gives "no authority to modify, abridge or enlarge the substantive rights of litigants."<sup>141</sup> "When a rule of law is one which would affect a person's conduct prior to the onset of litigation and has no design to manage ongoing litigation, it is a rule of substance rather than procedure."<sup>142</sup>

Much of the useful discussion on what constitutes a procedural change arises in cases in which an ex post facto violation<sup>143</sup> is asserted. An ex post facto law is one "which punishes as a crime an

<sup>135</sup>See generally Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 Mil. L. Rptr. 6049 (1976).

<sup>136</sup>Hearings, *supra* note 99, at 1014-15.

<sup>137</sup>*Id.* at 1017.

<sup>138</sup>Miller v. Florida, 107 S. Ct. 2446, 2453 (1987).

<sup>139</sup>Sibbach, 312 U.S. at 14.

<sup>140</sup>Wilson, *supra* note 46, at 304-07. See also Appellant's Assignment of Errors at Section I, United States v. Murphy, ACFR 8702873 (A.C.M.R. filed Nov. 15, 1988).

<sup>141</sup>United States v. Sherwood, 312 U.S. 584, 590 (1941).

<sup>142</sup>Wilson, *supra* note 46, at 307 (quoting McCollum Aviation, Inc. v. CIM Associates, Inc., 438 F. Supp. 245, 248 (S.D. Fla. 1977)).

<sup>143</sup>See U.S. Const. art. I, § 10.

act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed."<sup>144</sup> The prohibition against *ex post facto* laws does not, however, apply to procedural changes,<sup>145</sup> which generates the case discussions on what constitutes procedural change.

### C. SENTENCING PROCEDURES IN GENERAL

The Supreme Court recently looked to changes in sentencing procedures in *Miller v. Florida*.<sup>146</sup> In 1983 Florida replaced its system of indeterminate sentencing with a statutory plan for sentencing guidelines intended to assure some consistency in the sentencing process.<sup>147</sup> At the time Miller was convicted of his offenses, the sentencing guideline provided for a presumptive sentence of three and one-half to four and one-half years.<sup>148</sup> At the time he was sentenced, however, the sentencing guidelines had been revised and his presumptive sentence jumped to five and one-half to seven years.<sup>149</sup> He was sentenced over his objection under the revised guidelines to seven years' confinement.<sup>150</sup>

In discussing Miller's challenge to his sentence, the Supreme Court recognized that "no *ex post facto* violation occurs if the change in the law is merely procedural and 'does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'"<sup>151</sup>

Although the distinction between substance and procedure might sometimes prove elusive, here the change at issue appears to have little about it that could be deemed procedural. The . . . increase in points for sexual offenses in no wise alters the method to be followed in determining the appropriate sentence; it simply inserts a larger number into the same equation. The comments of the Florida Supreme

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<sup>144</sup>*Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

<sup>145</sup>See, e.g., *Thompson v. Utah*, 170 U.S. 343 (1898); *Hopt v. Utah*, 110 U.S. 574 (1884).

<sup>146</sup>107 S. Ct. 2446 (1987).

<sup>147</sup>*Id.* at 2448.

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

<sup>149</sup>*Id.* at 2448-50.

<sup>150</sup>*Id.* at 2450.

<sup>151</sup>*Id.* at 2452-53 (quoting *Hopt v. Utah*, 110 at 590).

Court acknowledge that the sole reason for the increase was to punish sex offenders more heavily; the amendment was intended to, and did, increase the "quantum of punishment" . . .<sup>152</sup>

While the Supreme Court in *Miller* refused to accept an analogy to federal parole guidelines, changes to which have withstood ex post facto challenge, the Court's reasons do not relate to the issue of the procedural/substantive dichotomy.<sup>153</sup> In fact, the discussion of the distinction between substantive and procedural matters provided by the federal courts in parole and bail cases is enlightening.

In a case dealing with bail, *United States v. McCahill*,<sup>154</sup> the Ninth Circuit described the procedural/substantive dichotomy as "an attempt to reconcile the necessity for continuous legislative refinement of the criminal adjudication and corrections process with the constitutional requirement that substantial rights of a criminal defendant remain static from the time of the alleged criminal act."<sup>155</sup> Applying that distinction, the court found procedural a change in the standards for bail pending appeal.<sup>156</sup> Conversely, a change that eliminated the possibility of parole, probation, or suspension of sentence for a certain category of offenders did not "merely change the sentencing procedure, but alter[ed] the substantive sentence to be imposed."<sup>157</sup>

In *United States v. Crozier*<sup>158</sup> the petitioner challenged the application of new forfeiture rules to her. Wolke, who was an indicted co-conspirator of Crozier but who was not indicted for engaging in a continuing criminal enterprise with him, was placed under a restraining order that prevented her from disposing of her personal property.<sup>159</sup> Under old forfeiture rules, before obtaining a restraining order the government had to establish before trial the merits of its underlying case.<sup>160</sup> Under new rules, Wolke as a third party had to wait

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<sup>152</sup>*Id.* at 2453 (quotation omitted).

<sup>153</sup>*Id.* at 2453-54. The Court determined that the revised sentencing guidelines were laws for ex post facto purposes. were not flexible guideposts but significant hurdles for an accused, and directly and adversely affected sentences.

<sup>154</sup>765 F.2d 849 (9th Cir. 1985).

<sup>155</sup>*Id.* at 850.

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

<sup>157</sup>*Thompson v. Blackburn*, 776 F.2d 118, 121 (5th Cir. 1985).

<sup>158</sup>777 F.2d 1376 (9th Cir. 1985). The court did agree that the forfeiture provisions violated due process in that she was not granted a timely opportunity to contest her deprivation of property. That portion of the opinion has subsequently been limited to its facts. *United States v. Draine*, 637 F. Supp. 482, 485 (S.D. Ala. 1986).

<sup>159</sup>*Crozier*, 777 F.2d at 1379, 1382.

<sup>160</sup>*Id.* at 1383.

until after Crozier's trial was concluded before she could protect her property interests.<sup>161</sup> The Ninth Circuit determined that the new rules do not "change the fact of forfeiture as punishment but merely establish[] the procedure by which forfeiture will be carried out. Therefore, Wolke will not face any greater punishment as a result of the new law."<sup>162</sup>

Thus, where the fact and amount of punishment is already established, changes in how the actual punishment is assessed are procedural. Because the various articles of the UCMJ on the substantive offenses include delineation of those that carry the maximum sentence of death, R.C.M. 1004 thus would appear to be procedural. The issue then becomes, as it did when delegation of sentencing power was under review, whether the unique nature of the death penalty is such that this conclusion should not be drawn.

#### D. CAPITAL SENTENCING PROCEDURES

Time and again in its death penalty cases, the Supreme Court has stressed the need for constitutionally adequate procedures.<sup>163</sup> As the Court summarized in *California v. Ramos*,<sup>164</sup> "[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors."<sup>165</sup>

Precisely what is procedural to the Supreme Court in a death penalty case is an interesting question. In *Beck v. Alabama*<sup>166</sup> the Supreme Court reviewed Alabama's felony murder rule, which prohibited the judge from instructing the jury on lesser included offenses in a capital case.<sup>167</sup> The jury had two choices only: either acquit the accused of the capital offense; or convict and impose the death penalty. It was essentially an all-or-nothing judgment, with findings on lesser included offenses not being an option. The trial judge would then consider aggravating and mitigating factors and could refuse to impose the death sentence and instead sentence the defendant to life

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

<sup>162</sup>*Id.*

<sup>163</sup>See, e.g., *Zant v. Stephens*, 462 U.S. 862, 884 (1983); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980); *Lockett*, 436 U.S. at 601, 605; *Roberts*, 428 U.S. at 334; *Proffitt*, 428 U.S. at 251-53; *Gregg*, 428 U.S. at 188, 195, 196.

<sup>164</sup>463 U.S. 992 (1983).

<sup>165</sup>*Id.* at 999.

<sup>166</sup>447 U.S. 825 (1980).

<sup>167</sup>*Id.* at 628-29.



imprisonment.<sup>168</sup> The Supreme Court found this system constitutionally inadequate but, interestingly, regarded even a limitation on permissible findings to be procedural:

To insure that the death penalty is indeed imposed on the basis of "reason rather than emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.<sup>169</sup>

In *Dobbert v. Florida*<sup>170</sup> the petitioner mounted an attack on his sentence to death on the grounds that, among other things, the changes to the state capital punishment scheme violated the constitutional prohibition against ex post facto laws. Dobbert committed the first degree murder of his nine-year-old daughter in late 1971 and the second degree murder of his seven year old son in early 1972.<sup>171</sup> After a sentencing hearing before judge and jury in accordance with the then-current Florida death penalty statute, the jury weighed aggravating and mitigating circumstances and the majority recommended life imprisonment.<sup>172</sup> The trial judge overruled the jury's recommendation and ordered the death sentence.<sup>173</sup>

From Dobbert's point of view, a critical issue was the change in functions of judge and jury between the time when he committed the murder and when he was tried. In July 1972 the Florida Supreme Court found its death penalty statute inconsistent with *Furman* and, in late 1972, Florida enacted the new death penalty statute found constitutional in *Proffitt*.<sup>174</sup> Under the new death penalty statute in effect at the time of his trial the jury rendered an advisory verdict after hearing evidence on aggravating and mitigating circumstances, with the judge making the final sentencing decision.<sup>175</sup> Under the capital sentencing scheme in effect at the time of the murder, the death penalty was presumed unless the jury recommended mercy; however, a jury recommendation of life imprisonment was not subject to review by the trial judge.<sup>176</sup>

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<sup>165</sup>*Id.*

<sup>166</sup>*Id.* at 638 (quotation omitted) (footnote omitted).

<sup>170</sup>432 U.S. 282 (1977).

<sup>171</sup>*Id.* at 284, 288.

<sup>172</sup>*Id.* at 287.

<sup>173</sup>*Id.*

<sup>174</sup>*Id.* at 288.

<sup>175</sup>*Id.* at 292-95.

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

Reviewing *Dobbert's* assertions, the Supreme Court "conclude[d] that the changes in the law are procedural, and on the whole ameliorative, and there is no ex post facto violation."<sup>177</sup> The prohibition against ex post facto laws does not apply to procedural changes and, in *Dobbert's* case, "the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."<sup>178</sup>

In applying *Dobbert* to ex post facto challenges to new sentencing rules in capital cases, the courts have split. Some find new rules substantive and prejudicial; others find their sentencing changes to be procedural. The result in any given case appears to be somewhat arbitrary.

An interesting ex post facto case involving a change in aggravating circumstances is *State v. Correll*.<sup>179</sup> Correll was involved in multiple murders, and at his capital sentencing hearing, the prosecution, in addition to aggravating factors in the statute at the time of his crimes, used an additional aggravating circumstance that was added to the statutory scheme after his crimes: that he was convicted of one or more *other* homicides in connection with the offense on which he was being sentenced. The Arizona court concluded, albeit with virtually no discussion, that the new aggravating circumstance was a substantive rather than procedural change.<sup>180</sup>

The Louisiana Supreme Court came to a similar conclusion in *State v. Jordan*.<sup>181</sup> Jordan was convicted of first degree murder, and the jury recommended the death sentence when it found as an aggravating circumstance that he committed the murder while engaged in the perpetration or attempted perpetration of armed robbery or aggravated burglary.<sup>182</sup> On appeal his conviction was affirmed but his sentence set aside and remanded for a new sentencing hearing.<sup>183</sup> At his new sentencing hearing, Jordan sought by motion in limine to prevent the state from using in sentencing his prior record of criminal convictions, an aggravating circumstance added by the legislature after the date of the murder.<sup>184</sup> The supreme court determined that

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<sup>177</sup>*Id.* at 292 (footnote omitted).

<sup>178</sup>*Dobbert*, 432 U.S. at 293-94.

<sup>179</sup>715 P.2d 721 (Ariz. 1986) (en banc).

<sup>180</sup>*Id.*

<sup>181</sup>440 So.2d 716 (La. 1983).

<sup>182</sup>*Id.*

<sup>183</sup>*Id.* at 717-18.

<sup>184</sup>*Id.*

the statutory amendment, which provided the additional aggravating factor, was "a substantive change in the law" and ruled that "(t)o apply this enhancing amendment to the aggravating circumstances to the sentencing procedure of this defendant for this crime is an ex post facto application of the law."<sup>185</sup>

Other courts, however, have made a determination, often based on *Dobbert*, that changes in state sentencing provisions do not constitute ex post facto violations, on the ground that the changes are procedural and not substantive.

A case in point is *Jackson v. State*,<sup>186</sup> in which the state supreme court reviewed the Mississippi mandatory death penalty scheme. The court determined that the legislature had intended to enact a death penalty statute that would meet constitutional requirements. However, the decisions in *Gregg* and other cases subsequent to the legislation's passage made it clear that the mandatory death penalty provisions were unconstitutional. Reading the statute's mandatory capital punishment language as permissive, the court, "[i]n the exercise of [its] inherent power to prescribe rules of procedure," established a bifurcated sentencing proceeding and delineated the rules for admissibility of aggravating and mitigating evidence.<sup>187</sup> Presiding Judge Inzer in dissent agreed that the court had the inherent power to prescribe rules of procedure but disagreed that the court could "invade the legislative field and amend a statute under the guise of construing it, or prescribing Court procedure."<sup>188</sup>

In *Bell v. State*<sup>189</sup> the accused shot to death a convenience store manager in May 1976. He was convicted of capital murder in a bifurcated trial that followed the sentencing procedures established by *Jackson*, and his challenge to the application of *Jackson* to him was given short shrift by the Mississippi Supreme Court.<sup>190</sup> First, the law prior to *Jackson* mandated the death penalty and thus he benefited by the new rules.<sup>191</sup> "Moreover, the requirements of *Jackson* affect pro-

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

<sup>186</sup>337 So 2d 1242 (Miss. 1976).

<sup>187</sup>*Id.* at 1256. For a court that refused to take the steps followed by the *Jackson* court, see *People v. Smith*, 468 N.E.2d 879, 898 (N.Y. 1984), *cert. denied*, 469 U.S. 1227 (1985), in which the New York court, after throwing out a mandatory death penalty scheme, refused the government's invitation to establish other sentencing procedures. The *Jackson* procedures were subsequently found, however, to fail to sufficiently channel the sentencer's discretion. *Jordan v. Watkins*, 681 F.2d 1067, 1082-83 (5th Cir. 1982).

<sup>188</sup>*Jackson*, 337 So.2d at 1260 (Inzer, P.J., dissenting).

<sup>189</sup>353 So.2d 1141 (Miss. 1978).

<sup>190</sup>*Id.* at 1142-43.

<sup>191</sup>*Id.* at 1143.

cedure and not substance and on the whole are ameliorative. In such case, the appellant is not subjected to an ex post facto violation."<sup>192</sup>

The Fifth Circuit in *Jordan v. Watkins*<sup>193</sup> dealt with a challenge by an accused sentenced to death under the *Jackson* procedures. Jordan argued that the *Jackson* changes constituted an ex post facto violation as substantive changes that worked to his detriment. The circuit court recognized that the Mississippi Supreme Court "exercised its 'inherent power' to promulgate rules to prescribe what it considered to be the necessary procedures and guidelines for imposing the death sentence."<sup>194</sup> Reasoning that Jordan's ex post facto argument was "indistinguishable" from the petitioner's argument in *Dobbert*, the circuit court rejected Jordan's challenge and determined that the *Jackson* changes were procedural in nature.<sup>195</sup>

Subsequent to *Jackson* Mississippi enacted a statute that set forth different procedures as well as aggravating and mitigating circumstances. The state supreme court rejected a challenge to those provisions, again noting that the amendments "did not affect the substance of capital law but merely made changes in the procedures by which such cases were to be tried."<sup>196</sup> The court, in rejecting the ex post facto argument, applied the *Dobbert* "[f]inding that the statutory changes made between the time of the crime and the time of the trial were 'procedural, and on the whole ameliorative.'"<sup>197</sup>

The Montana Supreme Court addressed a similar issue in *State v. Coleman*.<sup>198</sup> Coleman was convicted of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, and he was sentenced to death.<sup>199</sup> On appeal, the state supreme court found the death penalty unconstitutional because it was pursuant to a mandatory capital punishment scheme. Coleman's sentence was set aside on appeal and his case was remanded for a new sentencing hearing.<sup>200</sup> The trial court applied new sentencing statutes enacted in the interlude between the commission of the capital offense and the resentencing.<sup>201</sup> The new statute provided a scheme

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

<sup>193</sup>681 F.2d 1067. As noted above, *supra* note 187, the court did agree that the *Jackson* guidelines failed to sufficiently channel the sentencer's discretion.

<sup>194</sup>*Jordan*, 681 F.2d at 1078.

<sup>195</sup>*Id.*

<sup>196</sup>*Irving v. State*, 441 So.2d 846, 852 (Miss. 1983), *cert. denied*, 470 U.S. 1059 (1985).

<sup>197</sup>*Id.* at 852 (quoting *Dobbert*, 432 U.S. at 292).

<sup>198</sup>605 P.2d 1000 (Mont. 1979), *cert. denied*, 446 U.S. 970 (1980).

<sup>199</sup>*Id.* at 1006.

<sup>200</sup>*Id.* at 1006, 1007.

<sup>201</sup>*Id.* at 1007, 1010.

for imposing the death penalty: separate sentencing hearing, consideration of aggravating and mitigating circumstances, written findings and conclusions, and expedited review.<sup>202</sup> The court noted that the crime of aggravated kidnapping had always been punishable by death or imprisonment and that the new rules "related *only* to the procedure the court must follow in imposing the sentence."<sup>203</sup> Further, because the law in effect at the time of the crime mandated death while the new statute allowed a discretionary sentence, the new sentencing scheme was less onerous and hence not *ex post facto*.<sup>204</sup>

The changes made by the 1977 enactments affected only the manner in which the penalty indicated by statute was to be determined and imposed. They did not deprive Coleman of any defense previously available nor affect the criminal quality of the act charged. Nor did they change the legal definition of the offense or the punishment to be meted out. They did not make an act criminal which was innocent when done; they did not increase the penalty for the crime. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remained the same. No substantial right or immunity possessed by Coleman at the time of the commission of the offense was taken away by the 1977 enactments.<sup>205</sup>

Reconciling the approaches taken by these various courts is difficult, if not impossible. However, there is one apparent but unarticulated distinction that applies to most, if not all of the cases. Where the aggravating circumstances were first established in a capital sentencing scheme that had no provision for aggravating factors, the new sentencing scheme was found procedural. Where, on the other hand, new aggravating factors were added to an already existing scheme of aggravating circumstances, they were found to be substantive. While such a distinction does not make much legal sense (a procedure should, after all, be a procedure whenever it is established), it does answer the instinctive reaction to an *ex post facto* challenge to a new aggravating circumstance. If the provisions for applying the aggravating circumstance did not exist at the time of the offense *and other aggravating circumstances did apply*, there is a

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<sup>202</sup>*Id.* at 1012.

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

<sup>204</sup>*Id.*

<sup>205</sup>*Id.* at 1015.

sense that the accused was not on notice that his offense warranted the death penalty. In comparison, if the statute at the time of the offense declared *all* such offenses capital, without reference to any aggravating factor, then the accused is on notice that the offense might warrant the death penalty.

It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; but the prescription of different modes of procedure . . . , leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, [is] not considered within the constitutional limitation.<sup>206</sup>

The issue then is whether and how this distinction applies to R.C.M. 1004.

### ***E. RULE FOR COURTS-MARTIAL 1004***

The challenge to R.C.M. 1004 is directed principally to section (c), which delineates the aggravating factors, at least one of which must be found before death may be adjudged. The argument is most cogent if viewed in layman's terms: when *Matthews* declared the military sentencing procedures deficient, the court "threw out" the military death penalty; thus, when the President issued R.C.M. 1004, he "reinstated" the death penalty. Under this analysis, it logically flows that the President had in fact altered the quantum of punishment by authorizing the death penalty where it could not previously be adjudged. The President has, in effect, created capital and non-capital cases, a substantive task he cannot assume.

While this argument has appeal, it is premised on error. The death penalty was never "thrown out." The court in *Matthews* found the court-martial sentencing procedures to be deficient. Rule for Courts-Martial 1004 does not change the punishment for the crime; the punishment is set forth in the Code. What R.C.M. 1004 establishes is the method which must be followed before court members can sentence an accused to death. Applying the analysis developed above, because there were no aggravating factors delineated for capital offenses prior

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<sup>206</sup>*Duncan v. Missouri*, 152 U.S. 377, 382 (1894).

to R.C.M. 1004, the Rule is procedural. However, now that R.C.M. 1004 has established aggravating factors, any addition to the list might, under the Louisiana<sup>207</sup> and Arizona<sup>208</sup> approaches, be substantive. Until that challenge is mounted, however, there is solid ground for the position that what has been established in R.C.M. 1004 is purely procedural, a method for determining sentences in capital cases, and not a substantive change to the quantum of punishment.

## V. THE PRESIDENT AS COMMANDER IN CHIEF

### A. INTRODUCTION

The final basis asserted for the Presidential promulgation of R.C.M. 1004 is the power he holds under the Constitution as Commander in Chief of the armed forces. The question is, however, just how far that power extends, particularly in a peacetime environment. The Constitution provides that Congress has the ultimate authority to "make Rules for the Government and Regulation of the land and naval Forces."<sup>209</sup> Nevertheless, the President as Commander in Chief also has the power to establish rules and regulations for the armed forces.<sup>210</sup> With respect to the administration of the nation's military forces, his power to establish rules and regulations is "undoubted."<sup>211</sup> He has the independent power "to deploy troops and assign duties as he deems necessary."<sup>212</sup> He can also control the quality of that force: the commissioning of officers, for example, "is a matter of discretion within the province of the President as Commander in Chief."<sup>213</sup> Just how far his power extends to control the armed forces in order to conduct or initiate an undeclared war is an open question,<sup>214</sup> but he clearly has abundant authority to conduct military operations. His power as Commander in Chief is "vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy;

<sup>207</sup>See *supra* note 181 and accompanying text.

<sup>208</sup>See *supra* note 179 and accompanying text.

<sup>209</sup>U.S. Const. art. 1, § 8.

<sup>210</sup>See *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885).

<sup>211</sup>*United States v. Ehason*, 41 U.S. (16 Pet.) 291, 301-02 (1842).

<sup>212</sup>*United States v. Ezell*, 6 M.J. 307, 317 (C.M.A. 1979).

<sup>213</sup>*Orloff v. Willoughby*, 345 U.S. 83, 90 (1953).

<sup>214</sup>For example, the Supreme Court refused to consider the President's authority as Commander in Chief to conduct the war in Vietnam. See, e.g., *DaCosta v. Laird*, 405 U.S. 979 (1972); *Massachusetts v. Laird*, 400 U.S. 886 (1970). See also the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1962).

he has the power to occupy the conquered territory and to punish those enemies who violated the law of war."<sup>215</sup>

## B. HISTORICAL BACKGROUND

Prior to the adoption of the Constitution, Congress exercised all governmental powers, although General Washington "was vested with full power and authority to act as he should think fit for the good and welfare of the services, and enjoined to cause strict discipline and order to be observed in the army."<sup>216</sup> The Constitution transferred to the President the executive power as well as the function of Commander in Chief, a function left undefined.<sup>217</sup>

To [the function of commander-in-chief] therefore were properly to be regarded as attached. (with such modifications as the new form of the government required,) the powers originally vested in Congress and delegated by it . . . to the commander-in-chief of its army, and which had been exercised by the latter up to this period. Among these powers was the authority, properly incident to chief command, of issuing to subordinates and the army at large such orders as a due consideration for military discipline might require, and, among these, orders directing officers to assemble and investigate cases of misconduct and recommend punishment therefor—in other words orders constituting courts-martial.<sup>218</sup>

In discussing the function of the Commander in Chief, Hamilton compared it to the role of the British monarch:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.<sup>219</sup>

<sup>215</sup>Hirota v. MacArthur, 338 U.S. 197, 208 (1948) (Douglas, J., concurring) (citing New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 394 (1874)); *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942); and *In Re Yamashita*, 327 U.S. 1, 10-11 (1946).

<sup>216</sup>W. Winthrop, *supra* note 95, at 59 (quotation omitted).

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

<sup>218</sup>*Id.* (emphasis omitted).

<sup>219</sup>The Federalist No. 69, *supra* note 50, at 446 (A. Hamilton).



The designation of the President as Commander in Chief was to assure that "the direction of war" would be conducted "by a single hand."<sup>220</sup> Thus, the Founding Fathers did not intend to give the Commander in Chief a blank check. Their intent, consistent with the concept of separation of powers, was to split authority over the armed forces. The President, as Commander in Chief, was tasked with operational control, while Congress had the broader authority over and responsibility for the nation's military force.

The extent of the President's operational control has not gone unchallenged. Typically cases dealing with the President's powers as Commander in Chief involve actions taken during hostilities, or, subsequent to hostilities, during occupation of enemy territory.<sup>221</sup> The outer limits of his authority were arguably tested in *Fleming v. Page*,<sup>222</sup> which turned on his power to extend national boundaries through conquest. The issue was whether goods shipped from the port of Tampico, Mexico, which had been taken and held by U.S. forces, should have duties levied on them as goods shipped from a foreign port. The Court, in reaching its decision, looked at the impact of the military operations: the port was in the possession of the United States and governed by military authorities, acting under the orders of the President.<sup>223</sup> Nevertheless, the extension of U.S. boundaries could only be accomplished by treaty or by legislation.

[It] is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.<sup>224</sup>

The Commander in Chief is empowered not only to fight foreign wars, but also to suppress internal insurrection. In the Prize Cases,<sup>225</sup> own-

<sup>220</sup>The Federal No. 74, *supra* note 50, at 473 (A. Hamilton).

<sup>221</sup>See, e.g., *Dooley v. United States*, 182 U.S. 222 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901).

<sup>222</sup>50 U.S. (9 How.) 603 (1850).

<sup>223</sup>*Id.* at 614.

<sup>224</sup>*Id.* at 615.

<sup>225</sup>The Brig Amy Warwick; the Schooner Crenshaw; the Barque Hiawatha; the Schooner Brilliance. 67 U.S. (2 Black) 635 (1862).

ers of ships seized as violators of President Lincoln's blockade of southern ports challenged the blockade, which had been ordered prior to any legislative recognition of a war. The Court rejected the challenge, noting the President's duty as Commander in Chief:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is not the less a war. . . .

Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. He must determine what degree of force the crisis demands.<sup>226</sup>

As to occupied territory, he is authorized "to exercise the belligerent rights of a conqueror, and to form a civil government of the conquered territory."<sup>227</sup> As the Supreme Court noted in *Madsen v. Kinsella*,<sup>228</sup> as Commander in Chief, the President in time of war may prescribe the jurisdiction and procedure for military commissions and like tribunals in occupied territory, a power that sometimes "survives cessation of hostilities. The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms."<sup>229</sup>

Further, with respect to captured territory, even when that territory is not "foreign," the Commander in Chief has the power to establish provisional courts. Thus, in *The Grapeshot*,<sup>230</sup> the Supreme Court found constitutionally proper the establishment of provisional courts in Louisiana during the Civil War. The duty of the national government in occupying formerly Confederate territory was to provide for the remainder of the war for the security of individuals and

<sup>226</sup>*Id.* at 668, 670 (emphasis in original; quotation omitted).

<sup>227</sup>*Cross v. Harrison*, 57 U.S. (1 How.) 164, 190 (1853).

<sup>228</sup>343 U.S. 341 (1952).

<sup>229</sup>*Id.* at 348 (footnotes omitted).

<sup>230</sup>76 U.S. (9 Wall.) 129 (1869).

property, and for the administration of justice, a duty typical of one belligerent occupying the territory of another: "It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held."<sup>231</sup> The power to create courts in occupied territory includes courts of both civil and criminal jurisdiction.<sup>232</sup>

Once the territory ceases to be hostile foreign territory, however, the President no longer holds unlimited power as Commander in Chief. For example, during the war with Spain, he had full authority over Puerto Rico, until the island was ceded to the United States by treaty.<sup>233</sup> Once Puerto Rico ceased to be hostile foreign territory, while the right to administer it continued until congressional action, that administrative authority was no longer absolute.<sup>234</sup>

Thus, both as to foreign war and internal insurrection, the President has all those powers consistent with the need of the military force to assure that territory held by it will be secured. The President can conduct operations, conquer territory, and administer it until Congress takes further action. He cannot, however, by conquest expand the national boundaries. In sum, while the President has extensive authority in conducting operations while wearing his "military hat," his actions as Commander in Chief may not extend beyond the military sphere and into the political arena, except as necessary to maintain the status quo until Congress takes action. So long as his actions are incident to his function as military leader, a broadly interpreted concept, his actions are proper.

Recently the Supreme Court has indicated another area in which the President as Commander in Chief has the power to act: the protection of national security information.

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.<sup>235</sup>

<sup>231</sup>*Id.* at 132.

<sup>232</sup>See *Mechanics' and Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276 (1874).

<sup>233</sup>*Dooley v. United States*, 182 U.S. 222 (1901). See also *DeLima v. Bidwell*, 182 U.S. 1 (1901).

<sup>234</sup>*Dooley*, 182 U.S. at 234-35. See *Sanchez v. United States*, 216 U.S. 167, 176 (1910).

<sup>235</sup>*Department of Navy v. Egan*, 108 S. Ct. 818, 824 (1988) (citations omitted).

This power, too, is consistent with the notion that the President is uniquely qualified and responsible for the military's operational control. Conceptually, there are significant similarities between assuring that information critical to national security is safeguarded and assuring that captured territory is secured: both are essential to effective military operations.

To summarize, the powers of the Commander in Chief generally flow, as they logically should, from the role envisioned for him by the Founding Fathers as "the single hand" tasked with "the direction of war" in all its various facets.

Even where the need to respond to a military crisis arises, however, the President's power as Commander in Chief is not unlimited. During the Korean war, fearing that an imminent nation-wide strike of steel workers would threaten the national defense, President Truman ordered the seizure of most of the nation's steel mills, an act subsequently found to be beyond the President's constitutional power.<sup>236</sup> The Supreme Court in *Youngstown Sheet and Tube Co. v. Sawyer* summarily rejected the government argument that the President as Commander in Chief properly exercised his military power in seizing the mills in light of the "broad powers in military commanders engaged in day-to-day fighting in a theater of war."<sup>237</sup> "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."<sup>238</sup>

Justice Jackson, in his concurring opinion, expounded on the powers of the President as "Commander in Chief of the Army and Navy of the United States:"

These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command.

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<sup>236</sup>*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>237</sup>*Id.* at 587.

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

.....  
 He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

.....  
 While broad claims under this rubric often have been made, advice to the President in specific matters usually has carried overtones that powers, even under this head, are measured by the command functions usual to the topmost officer of the army and navy. Even then, heed has been taken of any effort of Congress to negative his authority. . . .

His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.<sup>239</sup>

In sum, the function of Commander in Chief is precisely that which the title indicates: he is the "first General" of the nation's military forces, tasked with its operational control. That function grants much, although not undisputed or undivided, control over the armed forces, with the thrust of precedent indicating that its broadest reach is in the conduct of operations during time of war and in the control of conquered territory. The question now is how far that operational control extends over courts-martial.

### C. APPLICATION TO COURTS-MARTIAL

The difficulty in determining the scope of the Commander in Chief's powers, particularly with respect to courts-martial, lies in applying different and potentially inconsistent parts of the Constitution. As has been seen, the President is empowered to act as Commander in Chief of the nation's military forces. Yet, Congress has been granted the power to make rules and regulations for the armed forces. The question is where to draw the line between those two grants of authority.

In *United States v. Smith*<sup>240</sup> the Court of Military Appeals analyzed the distinction between the powers over the armed forces belonging to

<sup>239</sup>*Id.* at 641-46 (Jackson, J., concurring).

<sup>240</sup>32 C.M.R. 105 (C.M.A. 1962).

Congress and those belonging to the President as Commander in Chief. The court reviewed the history of the Constitution and concluded that the Founding Fathers were convinced that the Executive, unlike the British monarch, should not have the sole power of raising and regulating the nation's armed forces:

[I]n the military field, the powers attributed to the King by Blackstone were distributed to the President and to the Congress. The President succeeded the King, who commanded fleets and armies, and was made Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States. But the King's power to raise armies, provide a navy and to make rules for the government and regulation of the land and naval forces, was transferred from the Executive to the Legislative branch of government.

The language of the Constitution makes the President Commander-in-Chief of the Armed Forces and puts no limitation on his power in this capacity. Indeed, the paucity of the words exemplifies the totality of his authority in that respect. The identical situation exists in the provision granting the power to Congress "To make Rules for the Government and Regulation of the land and naval Forces." There is no limitation in the constitutional language giving this power to Congress.<sup>241</sup>

In *Reid v. Covert*<sup>242</sup> the Supreme Court noted that the power of the Commander in Chief over courts-martial was by no means a closed question: "it has not yet been definitely established to what extent the President, as commander-in-chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war."<sup>243</sup> Military courts have taken the position that, in general, the President cannot promulgate or change substantive military law: "[t]he President's power as Commander-in-Chief does not embody legislative authority to provide crimes and offenses."<sup>244</sup> He may only prescribe rules of evidence and procedure and establish maximum punishments.<sup>245</sup> That he can prescribe substantive rules in light of the constitutional iteration that Congress has the authority to make the rules for the government and regulation of the armed

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<sup>241</sup>*Id.* at 117.

<sup>242</sup>354 U.S. 1 (1957).

<sup>243</sup>*Id.* at 38 (footnote omitted).

<sup>244</sup>*United States v. McCormick*, 30 C.M.R. 26, 28 (C.M.A. 1960).

<sup>245</sup>*Id.*

forces is "questionable."<sup>246</sup> The designation as Commander in Chief is "consistent with his role as the chief *executive* officer of the Government, rather than an attempt to confer legislative authority on him."<sup>247</sup> Thus, for example, he cannot provide the standard for mental responsibility, which is a matter of "substantive law."<sup>248</sup> Where, however, Congress has defined offenses and provided for prosecution by courts-martial but has failed to specify all the necessary procedures, the President must formulate those procedural rules.<sup>249</sup>

While the President carries much power as Commander in Chief over the forces under his command, the military justice system is not a creature of his making:

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or navy service.<sup>250</sup>

That the court-martial system falls within the congressional realm of authority is confirmed by the fact that the President establishes court-martial procedures pursuant to authority that Congress delegated to him in Article 36, UCMJ.

Are the two lines of authority consistent: the one line based on Congress's power to make rules and regulations for the armed forces, the other line based on the Commander in Chief's "undoubted" power to establish rules and regulations for the administration of the nation's military? Analytically, it appears that the two can be reconciled, perhaps more on common sense grounds than on any pure legal theory.

The President has supreme command over the forces and can establish necessary rules and regulations of an administrative nature to protect his command. Congress, on the other hand, has broad power over the military forces, which includes of course its legislative functions. The delineation of substantive criminal offenses is within the ambit of Congress. Between the two distinct areas—

<sup>246</sup>*United States v. Jones*, 19 M.J. 961, 968 n.12 (A.C.M.R. 1965), *aff'd*, 26 M.J. 353 (C.M.A. 1988). *But see United States v. Lowery*, 21 M.J. 998, 1000 (A.C.M.R. 1986) (President as Commander in Chief can establish armed forces custom), *aff'd*, 24 M.J. 347 (C.M.A. 1987) (summary disposition).

<sup>247</sup>*United States v. Perry*, 22 M.J. 669, 670 n.2 (A.C.M.R. 1986).

<sup>248</sup>*United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977).

<sup>249</sup>*United States v. Newcomb*, 5 M.J. 4, 7 (C.M.A. 1978) (Cook, J., concurring).

<sup>250</sup>*Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

administrative measures incident to supreme command, and substantive law—lies the disputed territory of criminal law rulemaking. Although there is support for independent Presidential authority in this area,<sup>251</sup> it appears to be more of a legislative function. While Congress has chosen to delegate some of its rulemaking authority in the criminal area to the President, it has retained its substantive authority over the nation's military forces. Certainly some of the rules established pursuant to this delegation may impact in a substantial way on the military justice system, such as rules relating to admissibility of evidence. Nonetheless, they are procedural and not substantive.

### D. CONCLUSION

Interestingly, the Court of Military Appeals in *Matthews* applied civilian precedent to the military's death penalty scheme because there was no "military necessity" for distinguishing court-martial capital sentencing procedures from their civilian counterparts.<sup>252</sup> It would be ironic to see a constitutionally mandated civilian sentencing scheme engrafted on the military justice system through the operation of the President's military powers. Logic and precedent dictate that this should not be the result: should R.C.M. 1004 fail under the President's powers under Article 36 or Article 56, it should not be rescued by his powers as Commander in Chief. As Commander in Chief of the nation's military forces, he is empowered by the Constitution to conduct military operations and organize and direct the force as he deems militarily necessary. To adopt Justice Jackson's analysis in *Youngstown*, he has the power incident to command. He does not have the power to establish substantive law for the military justice system or to provide for capital punishment where the legislature has chosen not to do so.

## VI. SUMMARY

The President has the power under Articles 36 and 56 of the UCMJ to promulgate R.C.M. 1004. He has been properly delegated abundant authority to act in the areas of maximum punishments and court-martial procedures, particularly in view of the extensive his-

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<sup>251</sup>See *Swain v. United States*, 165 U.S. 553, 565 (1897). Other cases cited for independent presidential rulemaking power are *Ex parte Reed*, 100 U.S. 13 (1879), and *Smith v. Whitney*, 116 U.S. 167 (1886), although, in fact, the authority exercised in those cases was based on statute.

<sup>252</sup>*Matthews*, 16 M.J. at 369.



tory of Presidential action in these areas. In *Youngstown Justice Jackson* articulated three groupings of situations in which a President may attempt to exercise power. "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."<sup>253</sup> In promulgating R.C.M. 1004 based on Articles 36 and 56, the President has just such broad authority. However, promulgation grounded in his role as Commander in Chief would not rest on such extensive authority.

Justice Jackson continued, explaining the two other types of situations:

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.<sup>254</sup>

Because Congress has not displayed "inertia, indifference or quiescence" in establishing substantive law and capital offenses for the military, it seems clear that, absent the delegations of Articles 36 and 56, the President's power to act independently in these areas would be "at its lowest ebb." Yet his authority as Commander in Chief is essentially a function of command; it does not empower him to sit as some sort of super-legislature for the military. Only Congress is constitutionally authorized to act to provide substantive law for the nation's armed forces. Hence, were it not for Articles 36 and 56, the President could not properly promulgate R.C.M. 1004 based solely on his power as Commander in Chief.

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<sup>253</sup>*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring) (footnote omitted).

<sup>254</sup>*Id.* at 637 (Jackson, J., concurring) (footnotes omitted).



# A COMPREHENSIVE LOOK AT THE NORTH ATLANTIC TREATY ORGANIZATION MUTUAL SUPPORT ACT OF 1979

by Captain Fred T. Pribble\*

## I. INTRODUCTION

Beginning in the 1970's, Congress pressed the Department of Defense (DOD) to reduce the number of United States forces deployed in the European theater. DOD efforts to improve the logistics "tooth-to-tail" ratio resulted in significant reductions in the number of combat service support troops stationed in North Atlantic Treaty Organization (NATO) countries. This decrease in U.S. support capability resulted in a corresponding increase in reliance by U.S. forces on our NATO allies for logistic support.

During this same time frame, U.S. forces acquired and transferred support through the use of highly formalized procedures. Logistic support, supplies, and services were acquired, both from foreign government and commercial sources alike, by resort to commercial contracting methods and the application of U.S. domestic procurement laws and regulations. On the transfer side, provision of support by U.S. forces in response to allied requests required processing a formal Foreign Military Sales case under the Arms Export Control Act.

In practice, use of these formalized procedures resulted in some untenable situations for U.S. forces in training and on exercises with their NATO counterparts. For example, if an American unit on maneuvers needed a tank of gasoline from a Dutch unit, a formal contract was required. Conversely, if a Dutch unit was attached to an American battalion for a couple days training, a formal Foreign Military Sales case had to be processed to provide food and billeting to the Dutch.

As the frequency of U.S. requests grew, NATO countries began to object to the contracting format used by U.S. forces to acquire support. Their objections were based upon the inclusion of several "offen-

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sive" clauses in the contract documents and the U.S.'s rather dogmatic insistence on applying domestic procurement laws and regulations to transactions conducted in the European theater. As support was requested at the government-to-government level, the allies felt that agreements, not contracts, were the proper document format. Further, sovereignty considerations dictated that international agreements, not U.S. domestic law, should govern these transactions. Application of formal U.S. Foreign Military Sales procedures to Alliance requests for routine logistics support caused further friction. The situation deteriorated to the point that, in the months just prior to Return of Forces to Germany (REFORGER) 1980, the Netherlands, the Federal Republic of Germany, Belgium, Italy, and Norway indicated a refusal to provide support to U.S. forces if commercial contracting methods were to be used.

Faced with such widespread rejection to these traditional methods of acquiring and transferring support from our allies, DOD made several requests to Congress for legislative relief. Congress responded, and on August 4, 1980, President Carter signed into law The NATO Mutual Support Act of 1979 (hereinafter "NMSA" or "the Act").

The NMSA, as originally enacted, represented a specific grant of authority to DOD to acquire and transfer logistic support, supplies, and services for the benefit of U.S. forces in the European theater. In particular, Congress granted DOD special authority to acquire NATO host nation support without the need to resort to complex contracting procedures. In addition, it authorized DOD, after consultation with the Department of State, to enter into cross-servicing agreements with our allies for the reciprocal provision of support. This enabled U.S. forces to transfer routine logistic support outside Foreign Military Sales channels and, again, to acquire support without the need to resort to formal contracting procedures.

In passing the NMSA, Congress clearly authorized DOD to create a separate, two-tracked system for acquiring and transferring routine logistic support for European based forces. Congress envisioned that this would be a system parallel to, yet working in tandem with, existing formalized procurement and transfer procedures.

For reasons largely unknown, DOD failed to fully seize upon the initiatives provided by Congress through passage of the NMSA. Instead, DOD implementing regulations proved confusing and overly restrictive. Tragically, the NMSA authority was "wed" to existing acquisition and logistics principles and procedures. Service usage of

the NMSA, as a result, suffered greatly from this confusion and these unnecessary restrictions.

This article presents a three-part, in-depth examination of this most important piece of legislation. Starting with post-World War II Europe, the first section of the article concentrates on the changing relationship between the U.S. and its European allies and traces the events leading up to passage of the Act. The second part of the article focuses on the Act itself. All applicable DOD and Department of the Army (DA) implementing guidance is incorporated in an attempt to present a comprehensive yet workable picture of the Act for the field practitioner. The final section of the article is devoted to a critical analysis of the Act. This section focuses on the major problems created by the DOD implementing guidance and addresses some of the current problems encountered in service usage of the NMSA. Emphasis is on the problems and experiences of the U.S. Army Europe and Seventh Army (USAREUR), the primary service user of NMSA authority. Included, wherever appropriate, are suggestions for legislative, regulatory, or policy changes.

## II. HISTORICAL BACKGROUND

### A. POST-WORLD WAR II EUROPE

#### 1. *Offshore Procurement Agreements*

Between 1952 and 1955 the U.S. concluded a series of formal agreements with thirteen European countries (memo countries)<sup>1</sup> governing U.S. procurement of services, supplies, and construction within

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<sup>1</sup>See United States European Command Defense Acquisition Reg. Supp. 6-902.1(b) (Apr. 1965) [hereinafter EUDARS]. The countries involved and the dates of those agreements are as follows:

- 1) The Kingdom of Belgium, 3 September 1953;
- 2) The Government of Denmark, 8 June 1954;
- 3) The Republic of France, 12 June 1953;
- 4) The Federal Republic of Germany, 7 February 1957;
- 5) The Kingdom of Greece, 24 December 1952;
- 6) The Republic of Italy, 31 March 1954;
- 7) The Grand Duchy of Luxembourg, 17 April 1954;
- 8) The Kingdom of the Netherlands, 7 May 1954;
- 9) The Kingdom of Norway, 10 March 1954;
- 10) The Government of Spain, 30 July 1954;
- 11) The Republic of Turkey, 29 June 1955;
- 12) Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, 30 October 1952; and
- 13) The Federal People's Republic of Yugoslavia, 18 October 1954.

The full texts of these agreements are reprinted at EUDARS TABS 1-13.

their respective countries.<sup>2</sup> These agreements were executed with countries participating in the Military Assistance Program<sup>3</sup> and were part of the U.S. Offshore Acquisition Program.<sup>4</sup> They were designed to further foreign assistance and to provide direct support to U.S. forces either deployed or conducting exercises in these countries.<sup>5</sup>

These agreements are generally referred to as Offshore Procurement Agreements,<sup>6</sup> and were designed to "spell out the parameters of the host nations' consent under public international law to allow the United States to exercise its sovereignty, i.e., authority to contract, within the host nation's territorial jurisdiction."<sup>7</sup> Subject to any country-specific limitations, Offshore Procurement Agreements authorized the U.S. to acquire goods and services within those countries through reliance on U.S. domestic laws, regulations, and procedures.<sup>8</sup>

In addition to providing the legal authority to contract, these agreements were also an attempt by the U.S. to assist rebuilding nations after the Second World War.<sup>9</sup> In the early 1950's the European economies were in complete disarray. These countries were, for the most part, "actively seeking United States military procurement due to the poor economic situation existing in their own countries and desire for hard currency and aid under the Marshall Plan."<sup>10</sup>

Offshore Procurement Agreements differed in form and content from country to country.<sup>11</sup> Typically, however, they defined the extent to which the U.S. could exercise its power to contract.<sup>12</sup> The agreements covered areas such as applicable contracting law, standard contract terms and clauses, contract placement, parties, assistance and enforcement, customs and duties, and taxes.<sup>13</sup> Offshore Procurement Agreements typically provided two methods by which the U.S. could acquire goods, services, and construction: direct and indirect procurement. Direct procurement authorized the U.S. to contract directly with a host nation commercial firm or individual for the

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<sup>2</sup>See EUDARS 6-902.1(a).

<sup>3</sup>See EUDARS 6-902.1(b).

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>See Thrasher, *Offshore Procurement: Contracting Outside the Continental United States*, 29 A.F.L. Rev. 255, 256 (1988).

<sup>7</sup>*Id.*

<sup>8</sup>Roberts, *Private and Public International Law Aspects of Government Contracts*, 36 Mil. L. Rev. 1, 12 (1967).

<sup>9</sup>See S. Rep. No. 842, 96th Cong., 2d Sess. 12, reprinted in 1980 U.S. Code Cong. & Admin. News 2420, 2441 [hereinafter Senate Report].

<sup>10</sup>Roberts, *supra* note 8, at 12.

<sup>11</sup>Thrasher, *supra* note 6, at 256.

<sup>12</sup>*Id.*

<sup>13</sup>EUDARS 6-902.1(c).

support required.<sup>14</sup> Indirect procurement procedures required the U.S. to make a request for support with a host nation government. The host nation would then either provide the goods or services from its own inventories or resources or subcontract with a commercial firm on behalf of the U.S. Under the latter method, privity of contract generally remained with the host nation and the commercial contractor.<sup>15</sup>

In the case of indirect procurements, the Offshore Procurement Agreements, while providing the underlying legal authority for the U.S. to contract, did not operate as contractual instruments. Instead, the U.S. and the host nation country negotiated standardized contract documents known as "model contracts."<sup>16</sup> These documents contained contract provisions required by U.S. statutes and regulations and were used to contract with the memo countries for all indirect acquisitions.<sup>17</sup>

## 2. *Foreign Military Sales Procedures*

During this same period all transfers or sales of logistic support, supplies, and services by U.S. forces to NATO forces required full compliance with the formalized procedures for executing Foreign Military Sales contained in the Arms Export Control Act.<sup>18</sup> Under the Arms Export Control Act, military sales are construed to be an instrument of U.S. foreign policy.<sup>19</sup> For a country to be eligible for Foreign Military Sales, the following four conditions must be met: 1) the sale in question would strengthen U.S. security interests and promote world peace; 2) the President consents to the transfer; 3) the country receiving the item must agree to maintain the security of the item (so-called third party transfer concerns); and 4) the receiving country is otherwise eligible for transfer of the item.<sup>20</sup>

Procedurally, Foreign Military Sales occur through the negotiation and execution of formal government-to-government agreements that are quasi-contractual in nature. These agreements, embodied within the DD Form 1513, Letter of Offer and Acceptance, identify the items or services involved, the general and specific terms and conditions governing the sale, and the estimated price.<sup>21</sup> Of particular note is

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<sup>14</sup>Roberts, *supra* note 8, at 22.

<sup>15</sup>See *id.* at 13.

<sup>16</sup>See *id.* at 23.

<sup>17</sup>H.R. Rep. No. 612, Part 1, 96th Cong., 1st Sess. 5 (1979) [hereinafter House Report].

<sup>18</sup>22 U.S.C. §§ 2751-2796(c) (1982).

<sup>19</sup>See 22 U.S.C. § 2751 (1982).

<sup>20</sup>See 22 U.S.C. § 2753 (1982).

<sup>21</sup>Dept of Defense Form 1513, United States Department of Defense Offer and Acceptance (Mar. 1979) [hereinafter DD Form 1513].

the pricing requirement. A key element of DOD Foreign Military Sales policy is the requirement that the price represent the full cost to the U.S. Government of the sale.<sup>22</sup> Full cost within the meaning used here includes the actual cost of the military item and all defense services, to include all administrative costs as well as a proportionate share of nonrecurring research and development and production costs.<sup>23</sup>

The general conditions (or "boilerplate") set out in the DD Form 1513 contain several provisions required by U.S. law that reserve certain rights to the U.S. Taken in the aggregate, these reservations necessitate characterizing the relationship created as quasi-contractual.<sup>24</sup> For example, on its part, the U.S. only agrees to exert its "best efforts" to comply with the terms of the agreement regarding costs, payment schedules, and delivery dates.<sup>25</sup> In addition, the U.S. reserves the right to unilaterally terminate the sale in the event of unusual or compelling circumstances.<sup>26</sup> Finally, the prices listed in the agreement are only estimates. The receiving country, on the other hand, agrees to open-ended liability, that is, to compensate the U.S. for all costs associated with processing of its Foreign Military Sales case.<sup>27</sup>

The Arms Export Control Act required the U.S. to open a Foreign Military Sales case in each instance supplies or services from U.S. forces was requested. Of particular concern to both U.S. and allied forces was the requirement for full compliance with Foreign Military Sales procedures during the conduct of NATO training exercises.<sup>28</sup> For example, the provision of routine support requirements, such as food, billeting, or medical care, to German or Dutch troops during a combined field training exercise required full compliance with Foreign Military Sales procedures outlined above.

## B. THE PERIOD 1970 TO 1980

### 1. A Shift in Emphasis from "Tail-to-Teeth"

Prior to the 1970's U.S. forces stationed in Europe had little need for host nation support.<sup>29</sup> The logistic "tail" of the U.S. force structure

<sup>22</sup>See DD Form 1513, General Conditions A.5. B.1.

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

<sup>24</sup>See DD Form 1513, General Conditions.

<sup>25</sup>DD Form 1513, General Condition A.5b.

<sup>26</sup>DD Form 1513, General Condition A.6.

<sup>27</sup>DD Form 1513, General Conditions A.5. B.1.

<sup>28</sup>See House Report, *supra* note 17, at 5.

<sup>29</sup>See NATO Mutual Support Act of 1979; Hearings on H.R. 4623 and H.R. 5580 Before the Special Subcomm. on NATO Standardization, Interoperability and Readiness of the House Comm. on Armed Services, 96th Cong., 1st Sess. 25 (1979) [hereinaf-



provided the bulk of supplies and services. This situation changed dramatically in the 1970's as congressional pressure to improve the "tooth-to-tail" ratio in the European theater resulted in serious reductions in the numbers of U.S. support troops committed to NATO.<sup>30</sup> As a result, U.S. reliance on host nation support increased as its own support capacity diminished.<sup>31</sup> In addition to reductions in deployed forces, the 1970's saw an increased emphasis on the need for greater allied cooperation within the Alliance and a corresponding emphasis on the development of more efficient ways for NATO forces to achieve interoperability.<sup>32</sup>

The increase in U.S. support requirements resulted in greater use and reliance on the Offshore Procurement Agreements and the model contract formats.<sup>33</sup> Problems began to surface involving use of these documents, "which could seriously impact U.S. force readiness."<sup>34</sup> NATO countries voiced strong objections to U.S. use of commercial contracting methods for the acquisition of supplies and services and to U.S. insistence on formal Foreign Military Sales procedures under the Arms Export Control Act for sales or transfers of like items.<sup>35</sup> The U.S. soon learned that, to satisfy the increased support requirements, it could not expand the use of nor otherwise continue to rely on Offshore Procurement Agreements and the model contract formats established in the 1950's.<sup>36</sup>

## 2. NATO Country Objections

As post-World War II Europe was rebuilt, the European NATO member nations recovered both economically and politically. These recoveries were characterized by intense feelings of nationalism.<sup>37</sup>

NATO country objections and their combined resistance to the use of Offshore Procurement Agreement contracting methods grew during this time of increased U.S. need for host nation support.<sup>38</sup> Objections were voiced for a variety of reasons. As a central point, there

ter Hearings] (statement of Gen. James R. Allen, Deputy Commander in Chief, U.S. Army European Command).

<sup>30</sup>See House Report, *supra* note 17, at 5.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

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

<sup>35</sup>See Hearings, *supra* note 29, at 51 (statement of Gen. James R. Allen, Deputy Commander in Chief, U.S. Army European Command).

<sup>36</sup>*Id.*

<sup>37</sup>See generally Thrasher, *supra* note 6, at 256; see also Hearings, *supra* note 29, at 66 (statement of Benjamin Forman, Office of the General Counsel, Dept of Defense).

<sup>38</sup>See 125 Cong. Rec. 34,365 (1979) [hereinafter Record] (statement of Rep. Daniel).

was a universally held belief by the NATO nations involved that political, economic, and military conditions that obtained in the 1950's were no longer valid.<sup>39</sup> The Alliance countries viewed the Offshore Procurement Agreements as holdovers from the post World War II recovery era, a time when their economies were in too poor a condition to object to the methods that the U.S. used to acquire support, supplies, and services.<sup>40</sup>

At the heart of these objections were, of course, dramatically improved economies and restored feelings of nationalistic pride, country independence, and sovereignty.<sup>41</sup> NATO countries asserted that model contract types were intended for use in strictly commercial relationships. As between sovereigns, they were viewed as objectionable per se.<sup>42</sup> The general feeling was that sovereigns should sign agreements, not contracts.<sup>43</sup> Moreover, it was particularly offensive for a sovereign nation to be made subject to U.S. domestic procurement law, which dictated terms and conditions to the host nation.<sup>44</sup> It was also widely felt among our allies that incorporation of domestic statutory and regulatory provisions included in the model contract format unilaterally favored the U.S.<sup>45</sup> Of particular interest, both the Federal Republic of Germany and the Kingdom of the Netherlands went so far as to refuse to accept even the terms "contract" and "contracting officer" because of their increased feelings of nationalism and their objections to the concept of contracting between sovereign nations.<sup>46</sup>

Some discussion of the nature and content of the contract provisions found so objectionable by our NATO allies is appropriate. The clauses contained in these model contracts were drafted for use with American commercial firms in the highly competitive U.S. markets.<sup>47</sup> Out of necessity, these clauses were drafted with the intention of protecting U.S. Government interests and, to a large degree, insulated the government from the rigors of those same markets. The legislative history of the NMSA correctly characterized U.S. adherence to commercial contracting methods as "arrogant."<sup>48</sup>

<sup>39</sup>See *NATO Support Agreements: Hearing on H.R. 5580 Before the Subcomm. on Procurement Policy and Reprogramming of the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 12 (1980) [hereinafter Senate Hearing].

<sup>40</sup>See Senate Report, *supra* note 9, at 12.

<sup>41</sup>See generally Thrasher, *supra* note 6, at 256; see also Hearings, *supra* note 29, at 60 (statement of Thomas S. Hahn, Special Subcomm. Counsel).

<sup>42</sup>See Record, *supra* note 38, at 34,366 (statement of Rep. Dickinson).

<sup>43</sup>See Senate Hearing, *supra* note 39, at 13.

<sup>44</sup>See *id.* at 34,365.

<sup>45</sup>See generally *id.*

<sup>46</sup>See Hearings, *supra* note 29, at 46 (statement of Brig. Gen. Wayne Alley, Judge Advocate, U.S. Army, Europe).

<sup>47</sup>See Senate Report, *supra* note 9, at 2.

<sup>48</sup>Record, *supra* note 38, at 34,366-67 (statement of Rep. Dickinson).

Of those clauses required by U.S. procurement law to be included in the model contract format, three proved to be the most troublesome: United States Officials Not to Benefit; Covenant Against Contingent Fees; and Gratuities.<sup>49</sup>

Title 41, United States Code, section 22, requires the inclusion in every government contract of a clause stating that no member of the U.S. Congress shall benefit from the contract.<sup>50</sup> In addition to the obvious negative reflection on the integrity of the host nation officials involved, European countries simply failed to see the relevance of this provision.<sup>51</sup> From their perspective, members of the U.S. Congress simply did "not have the leverage to influence European national procurements."<sup>52</sup>

Title 10, United States Code, section 2306(b), requires that all government contracts include a clause in which the contractor warrants that a commission has not been paid to an agent hired for the specific purpose of securing the contract award.<sup>53</sup> NATO host nations objected to making these warranties on the grounds that "in dealings between nations such warranties imply that the nation making the warranty is inferior to the other and that dealings between them are not based on a concept of equality."<sup>54</sup>

Title 10, United States Code, section 2207, directs that DOD put in all contracts, except those contracts for personal services, a clause permitting the U.S. Government to terminate the contract if it is found that gratuities were offered to U.S. employees involved in the contracting process.<sup>55</sup> Again, the Alliance countries generally felt the clause impugned their integrity and that it was designed for commercial contracts, not for support agreements at the government-to-government level.<sup>56</sup>

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<sup>49</sup>Senate Hearing, *supra* note 39, at 11 (statement of Lt. Gen. Richard H. Groves, U.S. Army, Office of the Secretary of Defense, Deputy Advisor on NATO Affairs).

<sup>50</sup>See generally, Fed. Acquisition Reg. 3.102 (1 Apr. 1984) [hereinafter FAR].

<sup>51</sup>See *NATO Mutual Support Act of 1979: Hearings and Markup on H.R. 5580 Before the Subcomm. on International Security and Scientific Affairs, the Subcomm. on Europe and the Middle East, and the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 8 (1979)* [hereinafter Hearing] (statement of Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff for Logistics, U.S. Army).

<sup>52</sup>Record, *supra* note 38, at 34,365 (statement of Rep. Daniel).

<sup>53</sup>See generally FAR 3.4.

<sup>54</sup>Record, *supra* note 38, at 34,365 (statement of Rep. Daniel).

<sup>55</sup>See generally FAR 3.2.

<sup>56</sup>See Hearing, *supra* note 51, at 8 (statement of Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff for Logistics, U.S. Army).

Some of these restrictive clauses had been subject to waiver, but only on a case-by-case basis. Each request for waiver and supporting documentation had to be forwarded through channels from Europe to Washington for approval.<sup>57</sup> In light of the ever increasing reliance on host nation support, this process was generally considered impractical, time consuming, cumbersome, and nonresponsive to field commanders' needs.<sup>58</sup>

Particularly vexing to our NATO allies was the fact that NATO had developed and implemented its own system for the acquisition and transfer of logistic support, supplies, and services.<sup>59</sup> NATO Standardized Agreements (STANAG's) permitted member forces to provide and to acquire logistic support through use of a simplified requisition/voucher system.<sup>60</sup> At this time, the U.S., a principal member of NATO, rather incongruously continued to use commercial contracting methods and formal Foreign Military Sales procedures, while espousing the increased need for greater cooperation and interoperability between Alliance forces.<sup>61</sup>

As a final note, the provision of logistic support, supplies, or services to U.S. forces is a discretionary act on the part of the host nation involved. It was and remains today unrealistic to require each NATO country to become familiar with and be able to employ different procedures for each sending state.<sup>62</sup> An all-too-common complaint from host nation officials was their inability to efficiently satisfy these requirements, largely because of unfamiliarity with unique U.S. procedures.<sup>63</sup> Unfamiliarity with U.S. procedures also resulted in higher administrative costs to the U.S.<sup>64</sup>

### 3. Congressional Response to European Forces Concerns

Return of Forces to Germany (REFORGER) 1976 provided the first real incident where allies objected to offshore procurement contract-

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<sup>57</sup>Hearings, *supra* note 29, at 34-35 (statement of Brig. Gen. Wayne Alley, Judge Advocate, U.S. Army, Europe).

<sup>58</sup>Senate Report, *supra* note 9, at 12-13.

<sup>59</sup>See Hearing, *supra* note 51, at 5 (statement of Hon. Robert W. Komer, Under Secretary of Defense for Policy, Dept of Defense).

<sup>60</sup>See Senate Report, *supra* note 9, at 12; see generally U.S. Army Europe Reg. 12-16, Mutual Logistic Support Between the United States Army and Other North Atlantic Treaty Organization Forces, app. H (31 July 1985) [hereinafter USAREUR Reg. 12-16].

<sup>61</sup>See Senate Report, *supra* note 9, at 12-13.

<sup>62</sup>See Hearings, *supra* note 29, at 38 (statement of Gen. James R. Allen, Deputy Commander in Chief, U.S. Army European Command).

<sup>63</sup>*Id.*

<sup>64</sup>House Report, *supra* note 17, at 5.

ing methods.<sup>65</sup> The problems arose when the U.S. attempted to exercise its BENELUX<sup>66</sup> Line of Communication agreements.<sup>67</sup> "NATO Allies balked at accepting required U.S. clauses and threatened future refusal unless the United States ceased its insistence on using specific objectionable clauses."<sup>68</sup>

Subsequent annual REFORGER exercises presented similar problems.<sup>69</sup> The situation degenerated to the point that, for REFORGER 1980, the governments of the Netherlands, the Federal Republic of Germany, Belgium, Italy, and Norway indicated that, unless formal contract requirements were waived, no logistic support would be forthcoming.<sup>70</sup>

In August 1980 Congress responded to repeated requests for legislative relief by U.S. forces in Europe by passing The North Atlantic Treaty Organization Mutual Support Act of 1979.<sup>71</sup> The Act responded to the concerns of NATO countries and European-based U.S. forces by authorizing the acquisition of NATO host nation logistic support, supplies, and services without the need to resort to complex contracting procedures.<sup>72</sup> The NMSA also allows our allies to acquire similar support without having to apply for Foreign Military Sales and without having to comply with those formalized procedures.<sup>73</sup>

Through passage of the NMSA, Congress intended to provide DOD with sufficient authority to facilitate the exchange of logistics support between U.S. and allied military forces in training and exercises, thereby fostering NATO readiness.<sup>74</sup> In addition, the authority provided in the NMSA was drafted in such a manner as to promote more and better use of host nation resources in support of U.S. forces stationed in the European theater.<sup>75</sup>

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<sup>65</sup>Hearing, *supra* note 51, at 8 (statement of Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff for Logistics, U.S. Army).

<sup>66</sup>An acronym for the countries of Belgium, Netherlands and Luxembourg.

<sup>67</sup>Hearing, *supra* note 51, at 8 (statement of Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff for Logistics, U.S. Army).

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

<sup>69</sup>See Hearings, *supra* note 29, at 25 (statement of Gen. James R. Allen, Deputy Commander in Chief, U.S. Army European Command).

<sup>70</sup>See S. Rep. No. 795, 96th Cong., 1st Sess. 3, reprinted in 1980 U.S. Code Cong. & Admin. News 2420, 2422 (hereinafter Senate Report).

<sup>71</sup>10 U.S.C. §§ 2341-2350 (Supp. V 1987).

<sup>72</sup>Record, *supra* note 38, at 34,368 (statement of Rep. Broomfield).

<sup>73</sup>H.R. Rep. No. 612 Part 2, 96th Cong., 1st Sess. 2 (1979) (hereinafter House Report).

<sup>74</sup>See Record, *supra* note 38, at 34,366 (statement of Rep. Dickinson).

<sup>75</sup>Senate Report, *supra* note 9, at 3.

### III. THE NORTH ATLANTIC TREATY ORGANIZATION MUTUAL SUPPORT ACT OF 1979 (NMSA)

#### A. OVERVIEW

Simply stated, the NMSA is a unique grant of authority by Congress to the Secretary of Defense. The Act provides for the simplified acquisition and transfer of routine logistic support, supplies, and services between the armed forces of the U.S. and the armed forces of the governments of NATO countries, NATO subsidiary body organizations, and the armed forces of the governments of other NMSA-eligible countries.<sup>76</sup>

The congressional grant of authority contained within the NMSA is, in fact, three distinct, although not entirely separate, legal authorities. The first authority, termed "acquisition only" authority (or 2341 authority), empowers U.S. forces to acquire logistic support directly from certain foreign governments and international organizations.<sup>77</sup>

The second grant of authority is cross-servicing authority (or 2342 authority).<sup>78</sup> It authorizes the Secretary of Defense, after consultation with the Secretary of State, to enter into agreements with the armed forces of the governments of NATO countries, NATO subsidiary body organizations, and the armed forces of the governments of other NMSA-eligible countries for the reciprocal provision of logistic support.<sup>79</sup> It is therefore authority for U.S. forces to both acquire and to transfer logistic support, supplies, and services. It authorizes U.S. forces to conduct transfers of military supplies and services outside of the Foreign Military Sales arena and outside the requirements of the Arms Export Control Act.<sup>80</sup> As a precondition to its use, however, cross-servicing authority requires the existence of a mutual support agreement (also called a cross-servicing or umbrella agreement) between the U.S. and the intended supplying or receiving country.<sup>81</sup>

The third and final legislative grant of authority contained within the Act is waiver authority (or 2343 authority).<sup>82</sup> This grant of au-

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<sup>76</sup>Senate Report, *supra* note 70, at 1.

<sup>77</sup>10 U.S.C. § 2341 (Supp. V 1987).

<sup>78</sup>10 U.S.C. § 2342 (Supp. V 1987).

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

<sup>80</sup>Senate Report, *supra* note 9, at 1.

<sup>81</sup>Dept of Defense Directive 2010.9, Mutual Logistic Support Between the United States and Governments of Eligible Countries and NATO Subsidiary Bodies, para. D 2(b) (Sep. 30 1985), hereinafter DOD Dir. 2010.9.

<sup>82</sup>10 U.S.C. § 2343 (Supp V 1987).

thority provides for the waiver of nine specific statutory provisions relating to the acquisition and transfer of logistic support, supplies, and services.<sup>83</sup> Waiver authority is normally used in conjunction with acquisition only or cross-servicing authority. It provides the legal basis necessary to conclude acquisition and cross-servicing agreements free from these statutory and regulatory requirements, which have proven so troublesome to our allies in the past.<sup>84</sup>

In addition to the three authorities cited above, the NMSA establishes pricing and reimbursement procedures that govern the acquisition and transfer of goods and services.<sup>85</sup> The Act prohibits the increase in inventories and supplies of U.S. forces for the purpose of transferring support to a qualifying country or NATO subsidiary body<sup>86</sup> and prescribes annual ceilings on reimbursable credits and liabilities that may be accrued by the U.S.<sup>87</sup> The Act also establishes annual reporting requirements to Congress for agreements and transactions made under the Act's authority.<sup>88</sup>

As originally enacted, the NMSA was limited in its geographical application to "Europe and adjacent waters."<sup>89</sup> In 1986 Congress expanded the NMSA's application to military forces of non-NATO qualifying countries outside the European theater (NMSA-eligible countries).<sup>90</sup> These 1986 amendments also provided for application of the NMSA to the armed forces of NATO countries, NATO subsidiary body organizations, and the armed forces of NMSA-eligible countries while they are stationed in, conducting training in, or are otherwise performing exercises in North America.<sup>91</sup>

## B. DEFINITION OF TERMS

A basic understanding of the terms used in NMSA transactions is critical to a mastery of the area. As will be discussed in later sections of this article, many problems in NMSA usage have been generated by inconsistent application and inartful use of the terminology in this specialized area of acquisition law.<sup>92</sup>

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

<sup>84</sup>See DOD Dir. 2010.9, para. D.6.

<sup>85</sup>10 U.S.C. § 2344 (Supp. V 1987).

<sup>86</sup>10 U.S.C. § 2348 (Supp. V 1987).

<sup>87</sup>10 U.S.C. § 2347 (Supp. V 1987).

<sup>88</sup>10 U.S.C. § 2349 (Supp. V 1987).

<sup>89</sup>DOD Dir. 2010.9, para. D.1.

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

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

<sup>92</sup>See *infra* notes 339-59 and accompanying text.

Transactions under the NMSA may take one of two basic forms: acquisitions or transfers. An "acquisition" is defined as the U.S. obtaining logistic support, supplies, or services from a NATO country, NATO subsidiary body organization, or other NMSA-eligible country.<sup>93</sup> Acquisitions occur under either an acquisition agreement made pursuant to the acquisition only authority<sup>94</sup> or under the terms of a mutual support agreement concluded under the cross-servicing authority.<sup>95</sup> An acquisition may involve either the purchase, rental, or lease of the desired logistic support, supplies, or services.<sup>96</sup>

The term "transfer" denotes the provision of logistic supplies, support, or services by U.S. forces to a NATO country, NATO subsidiary body organization, or other NMSA-eligible country.<sup>97</sup> Under the NMSA, transfers may only be made using cross-servicing authority, subject to the terms and conditions of the relevant mutual support agreement.<sup>98</sup>

The Act provides that compensation for an acquisition or transfer may be made on either a reimbursable or a nonreimbursable basis.<sup>99</sup> A reimbursable transaction is one where cash payment is made in the currency of the supplying country.<sup>100</sup> A nonreimbursable transaction may take one of two forms: 1) replacement-in-kind—replacement by the receiving nation of supplies or services of an identical nature to those received; or 2) exchange—replacement of supplies or services of a substantially identical nature. Exchanges require a determination by the issuing or receiving U.S. organization that the replacement supplies or services have the same "form, fit or function" as those originally supplied.<sup>101</sup>

### C. PURPOSE

The NMSA has two primary peacetime purposes. The first, is training- and exercise-related. In this regard, NMSA was passed to facilitate the interchange of logistic support, supplies, and services be-

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<sup>93</sup>DOD Dir. 2010.9, encl. 3-1.

<sup>94</sup>See *infra* notes 172-76 and accompanying text.

<sup>95</sup>See *infra* notes 208-31 and accompanying text.

<sup>96</sup>See generally Dept. of Defense Instruction 2010.10, Mutual Logistics Support Among the United States, Governments of Other NATO Countries, NATO Subsidiary Bodies, and Other Eligible Foreign Countries—Financial Policy (Oct. 30, 1987) [hereinafter DOD Instr. 2010.10].

<sup>97</sup>DOD Dir. 2010.9, encl. 3-2.

<sup>98</sup>*Id.* at para. D.2.b.

<sup>99</sup>10 U.S.C. § 2344(a) (Supp. V 1987).

<sup>100</sup>DOD Instr. 2010.10, para. D.1.a.

<sup>101</sup>*Id.* at para. D.1.b.



tween U.S. military forces in training and exercises with allied countries, thereby promoting common readiness in the event of war.<sup>102</sup>

The second purpose relates to the increased reliance by U.S. forces on host nations for combat support services. NMSA permits better use of host nation resources for logistic support, supplies, and services by providing U.S. forces the ability to acquire supplies and services without the need to resort to "complex contracting procedures."<sup>103</sup>

Congress also passed the NMSA as part of a larger plan to strengthen the NATO Alliance.<sup>104</sup> As such, NMSA provides DOD with a measure to improve standardization and cooperation within the NATO alliance.<sup>105</sup> Further, the Act operates as a readiness enhancing measure by facilitating mutual planning, interoperability training, the conduct of multinational exercises, and the overall NATO deterrent posture.<sup>106</sup> The Act also provides DOD with the authority needed to fully implement NATO STANAG's, thereby facilitating mutual logistic support within the NATO alliance.<sup>107</sup> Finally, the Act also gives DOD a clear-cut replacement-in-kind authority that it previously lacked.<sup>108</sup>

In summary, the NMSA was originally enacted to alleviate the various problems that U.S. forces were experiencing in acquiring NATO host nation logistic support by simplifying acquisition procedures.<sup>109</sup> The 1986 amendments expanded the geographical application of the NMSA beyond "Europe and adjacent waters" by specifically providing for U.S. support to NATO countries, NATO subsidiary body organizations, and other NMSA-eligible countries stationed in, performing exercises, or otherwise training in North America.<sup>110</sup> This amendment is indicative of a clear congressional intent to provide the authority for meaningful reciprocal provision of logistic support, supplies, and services to allied countries and NATO organizations.<sup>111</sup>

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<sup>102</sup>See Senate Report, *supra* note 9, at 3.

<sup>103</sup>See Record, *supra* note 38, at 34,368 (statement of Rep. Broomfield).

<sup>104</sup>See *id.* at 34,366.

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

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

<sup>107</sup>K. Allen, Early Difficulties in Implementing the NATO Mutual Support Act of 1979 (unpublished manuscript from GAO, European Office, to Major David Zucker, HQ, USAREUR).

<sup>108</sup>See 10 U.S.C. § 2344(a) (Supp. V 1987).

<sup>109</sup>See *supra* notes 37-64 and accompanying text.

<sup>110</sup>10 U.S.C. § 2342(a)(3)(B) (Supp. V 1987).

<sup>111</sup>See generally DOD Dir. 2010.9., para. D.

## D. CONGRESSIONAL SAFEGUARDS

### 1. Generally

The legislative history indicates that Congress had serious reservations about the extent of the authority DOD was requesting in two earlier versions of proposed legislation that DOD submitted for congressional consideration.<sup>112</sup> Congress responded to both versions with concern about the scope of the authority proposed by DOD: "[T]he Department of Defense proposed to 'wipe the books clean' of legislation in pursuit of vague, undefined and unlimited objectives without any identification of specific statutory provisions that were disabling."<sup>113</sup>

In response to what was perceived by Congress as an attempt by DOD to secure authority far in excess of what was actually needed, Congress included in the Act certain "safeguard" provisions designed both to limit the authority it granted and to monitor DOD compliance with both the letter and spirit of the new legislation.<sup>114</sup> Toward these ends, the NMSA, as originally enacted, provided for the following: 1) annual reports to Congress detailing the nature and amount of all transactions under the authority of this legislation;<sup>115</sup> 2) prior review by Congress of implementing regulations issued by DOD;<sup>116</sup> 3) a ceiling on the dollar amount of the transactions that may be conducted in a fiscal year involving the acquisition and transfer of logistic support;<sup>117</sup> 4) pricing principles to guarantee reciprocity or, in the alternative, the application of Arms Export Control Act pricing principles for nonreciprocal sales or transfers;<sup>118</sup> 5) a limitation on the provisions of law that may be waived by U.S. forces in acquisitions to only those provisions absolutely essential to meeting the purpose of the legislation.<sup>119</sup>

The following two sections discuss the major legislative restrictions that Congress placed on DOD in using the NMSA authority. The final section focuses on congressional limitations placed upon the types of support, supplies, and services that may be acquired or transferred under NMSA authority.

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<sup>112</sup>See House Report, *supra* note 17, at 6.

<sup>113</sup>*Id.*

<sup>114</sup>Record, *supra* note 36, at 34,367 (statement of Rep. Dickinson).

<sup>115</sup>House Report, *supra* note 17, at 4.

<sup>116</sup>Record, *supra* note 38, at 34,367 (statement of Rep. Dickinson).

<sup>117</sup>*Id.*

<sup>118</sup>*Id.*

<sup>119</sup>*Id.*

## 2. NMSA "Ceiling" Authority

### a. Generally

Prior to enactment of the NMSA, Congress expressed concern that DOD, if given the chance, would use this new authority to "acquire virtually unlimited quantities of military equipment from European sources in pursuit of abstract political objectives such as the 'two-way street' in defense trade."<sup>120</sup> As a result, the Act contains limiting language and various control mechanisms designed to prevent such an occurrence.

One such limitation imposed by Congress is contained in section 2347 of the Act,<sup>121</sup> which places limitations or "ceilings" on the amounts that may be obligated or accrued for reimbursable transactions by the U.S. in any fiscal year. The ceilings do not apply to nonreimbursable transactions unless converted to a reimbursable transaction because of nonreplacement during the allotted twelve-month period.<sup>122</sup> In addition, these limitations apply only during peacetime operations; they do not apply during periods of active hostilities.<sup>123</sup> The limitations provided for NATO countries and subsidiary bodies differ from those provided for NMSA-eligible non-NATO countries.<sup>124</sup>

The imposition of limitations on the amounts that may be expended by DOD on reimbursable NMSA acquisitions and transfers in a given fiscal year, coupled with the annual reporting requirements discussed earlier, has necessitated the development of elaborate systems within the service components for both requesting NMSA ceiling authorization prior to entering into such a transaction as well as detailed post-transaction reporting requirements.<sup>125</sup> The individual workings of these systems are beyond the scope of this article. Suffice it to say, however, that any organization planning to use NMSA authority should do so only after fully consulting and complying with individual service requirements in this regard.<sup>126</sup>

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<sup>120</sup>House Report, *supra* note 17, at 4.

<sup>121</sup>10 U.S.C. § 2347 (Supp. V 1987).

<sup>122</sup>DOD Instr. 2010.10, para. D.6 a.

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

<sup>124</sup>*Id.* at para. D.6a(1)(b).

<sup>125</sup>See generally DOD Instr. 2010.10.

<sup>126</sup>Army Reg. 12-16, Mutual Logistics Support Between the United States Army and Other North Atlantic Treaty Organization Forces, para. 3-1 (7 Jun. 1995) [hereinafter AR 12-16]; see also USAREUR Reg. 12-16, para. 16.

### b. Reimbursable Acquisitions

The NMSA limits the total amount of reimbursable liabilities (purchases) involving NATO that the U.S. forces may accrue in a given fiscal year to \$150,000,000.<sup>127</sup> Of that amount, the amount of supplies that may be purchased, excluding petroleum, oil, and lubricants (POL), is limited to \$25,000,000.<sup>128</sup> The purpose for the ceiling on reimbursable transactions is to ensure that the emphasis of acquisitions under NMSA authority continues to remain on support services, as opposed to hardware, "where emotions and dollars run high."<sup>129</sup>

Regarding NMSA-eligible non-NATO countries, the Act places limits on the amounts of reimbursable acquisitions that may be made within each country. The total amount of reimbursable liabilities that can be made by U.S. forces in a given fiscal year may not exceed \$10,000,000. Of that amount, only \$2,500,000 may be expended for supplies, excluding, again, POL.<sup>130</sup> The \$10,000,000 per country limit is in addition to the \$150,000,000 limit specified above for NATO.<sup>131</sup>

The Army NMSA implementing regulation<sup>132</sup> adds further funding restrictions on NMSA usage. Reimbursable acquisition of logistics support chargeable to an appropriation or fund for which the acquiring command is not authorized to incur obligations is prohibited.<sup>133</sup> Further, reimbursable acquisitions and transfers will not be made unless the following conditions are met: 1) funds are available; and 2) adequate acquisition or transfer ceiling authority is available.<sup>134</sup>

### c. Reimbursable Transfers

The NMSA limits the total amount of reimbursable credits (sales) involving NATO that the U.S. forces may accrue in a given fiscal year to \$100,000,000.<sup>135</sup> The amount of supplies that may be transferred is not restricted further by the NMSA.<sup>136</sup>

Regarding NMSA-eligible non-NATO countries, the Act also places limits on the amounts of reimbursable credits that may be made on a

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<sup>127</sup>10 U.S.C. § 2347(a)(1) (Supp. V 1987).

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

<sup>129</sup>Record, *supra* note 38, at 34,367 (statement of Rep. Dickinson).

<sup>130</sup>10 U.S.C. § 2347(a)(2) (Supp. V 1987).

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

<sup>132</sup>See generally, AR 12-16, ch. 3.

<sup>133</sup>AR 12-16, para. 1-5a(3).

<sup>134</sup>AR 12-16, para. 1-5j.

<sup>135</sup>10 U.S.C. § 2347(b)(1) (Supp. V 1987).

<sup>136</sup>*Id.*

per country basis.<sup>137</sup> The total amount of reimbursable credits that can be accrued by U.S. forces in a given fiscal year may not exceed \$10,000,000. Again, the amount of supplies that may be transferred is not restricted further.<sup>138</sup> The \$10,000,000 per country limit is in addition to the \$100,000,000 limit for NATO.<sup>139</sup>

### 3. Reporting Requirements

An additional safeguard built into this legislation is the requirement for a detailed annual report to Congress.<sup>140</sup> The reporting requirement is intended to give Congress a yearly opportunity to review DOD usage of NMSA authority.<sup>141</sup> Of particular concern is that DOD "does not expand the scope of the legislation by 'interpretation'."<sup>142</sup>

Specifically, section 2349 of the Act requires that the Secretary of Defense submit to Congress not later than February first of each year a report containing: 1) a description of the agreements entered into using NMSA authority during the fiscal year preceding the year the report is submitted; 2) the dollar value of each reimbursable acquisition or transfer by the U.S. for the agreements and fiscal year in question; 3) a report of the nonreimbursable acquisitions and transfers by the U.S. for the agreements and the fiscal year in question; and 4) a description of the agreements entered into (and expected to be concluded) under NMSA authority expected to be in effect for the fiscal year in which the report is submitted, together with an estimate of the total dollar value of all acquisitions and transfers expected to be concluded for the fiscal year in which the report is submitted.<sup>143</sup>

### 4. Limited Definition of Logistic Support, Supplies and Services

In addition to concern over what it perceived as a DOD initiative to exempt itself from all procurement-related legislation,<sup>144</sup> Congress also saw the originally proposed DOD drafts of the NMSA as an attempt to have authority to acquire "virtually unlimited quantities of military equipment from European sources."<sup>145</sup> In response, the

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<sup>137</sup>10 U.S.C. § 2347(b)(2) (Supp. V 1987).

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

<sup>139</sup>*Id.*

<sup>140</sup>See 10 U.S.C. § 2349 (Supp. V 1987).

<sup>141</sup>Record, *supra* note 38, at 34,367 (statement of Rep. Dickinson).

<sup>142</sup>Record, *supra* note 38, at 34,366 (statement of Rep. Dickinson).

<sup>143</sup>10 U.S.C. § 2349 (Supp. V 1987).

<sup>144</sup>Hearings, *supra* note 29, at 1 (statement of Rep. Daniel).

<sup>145</sup>House Report, *supra* note 17, at 6.

Act includes a limited definition of logistic supplies, support, and services: "The term 'logistic support, supplies, and services' means food, billeting, transportation, petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, and port services."<sup>146</sup>

Acquisitions and transfers under the NMSA are limited to the routine logistic support, supplies, and services set out above. The legislative history, as well as the Army regulation, specify additional items that are excluded from coverage by NMSA authority:

1. major end items of organizational equipment;
2. guided missiles;
3. chemical and nuclear munitions;
4. formal courses of military instruction;
5. Distinctive military uniforms and insignia;
6. major construction; and
7. guidance kits for bombs and other munitions.<sup>147</sup>

Initial quantities of replacement parts and spares for major items of organizational equipment may also not be acquired or transferred under the Act.<sup>148</sup>

## ***E. FORMS OF NMSA AUTHORITY***

### *1. Acquisition Only Authority*

#### a. Generally

The rationale underlying both the acquisition only and the cross-servicing authorities is "that the traditional seller-customer concept is not appropriate to the relationship between sovereign nations of an alliance seeking to enhance military readiness through cooperative arrangements to provide reciprocal logistical support of a routine nature."<sup>149</sup> Subject to the availability of funds,<sup>150</sup> acquisition only

<sup>146</sup>10 U.S.C. § 2350(1) (Supp. V 1987). The legislative history contains a useful, detailed description of the term "logistic support, supplies, and services." See Senate Report, *supra* note 70, at 8-9.

<sup>147</sup>AR 12-16, para. 1-5a(2).

<sup>148</sup>DOD Dir. 2010 9, para. D.7; see also AR 12-16, para. 1-5a(4).

<sup>149</sup>Record, *supra* note 38, at 34,365 (statement of Rep. Daniel).

<sup>150</sup>10 U.S.C. § 2341 (Supp. V 1987).

authority enables DOD to enter into agreements for the acquisition of logistic support, supplies, and services directly from governments of NATO countries, NATO subsidiary body organizations, and governments of NMSA-eligible countries.<sup>151</sup> This authority is limited to acquisitions.<sup>152</sup> It does not, however, require the existence of a mutual support agreement as a prerequisite to its use.<sup>153</sup>

Transactions under acquisition only authority will occur through negotiation and conclusion of an acquisition agreement.<sup>154</sup> When signing this agreement, section 2343 of the Act authorizes the Secretary of Defense to waive nine provisions of law generally applicable to procurements.

Compensation for an acquisition only transaction may be on either a reimbursable or a nonreimbursable basis.<sup>155</sup> Use of the acquisition only authority is also subject to the policies and limitations imposed on the waiver authority contained in section 2343 of the Act.<sup>156</sup>

#### b. Applicability

As originally enacted, use of the NMSA was confined to "Europe and Adjacent Waters." That term is defined as:

The territories of those NATO countries and subsidiary bodies and those waters within the "North Atlantic Treaty Area" as defined in the North Atlantic Treaty (amended by the Protocols on the Accession of Spain, Greece, Turkey, and the Federal Republic of Germany), excluding North America. The NATO European countries include Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom, and Canada when her forces are operating in Europe and adjacent waters.<sup>157</sup>

Congress expanded the applicability of the acquisition only authority in the 1986 amendments to the Act.<sup>158</sup> This authority was extended to countries that: 1) have a defense alliance with the U.S.; 2) permit the stationing of U.S. forces or the homeporting of U.S. Naval

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<sup>151</sup>DOD Dir. 2010.9. para. D.2.

<sup>152</sup>*Id.*

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

<sup>154</sup>*Id.* at para. F.2.

<sup>155</sup>*Id.* at para. D.2.

<sup>156</sup>10 U.S.C. § 2341 (Supp. V 1987).

<sup>157</sup>DOD Dir. 2010.9, encl. 3-1.

<sup>158</sup>Pub. L. No. 99-661, 100 Stat. 3965 (1986).

vessels in such country; 3) have agreed to preposition U.S. materiel in such country; or 4) serve as the host country to U.S. military exercises or permit other military operations by U.S. forces in such country.<sup>159</sup> Unlike cross-servicing authority, use of the acquisition only authority with NATO countries and subsidiary bodies, as well as NMSA-eligible countries, does not require Department of State consultation or prior congressional notification.<sup>160</sup>

### c. Policies and Limitations

The legislative history clearly indicates that the NMSA was intended to facilitate the acquisition by U.S. forces of support, supplies, and services from host nation sources.<sup>161</sup> Specifically, the Act is designed to aid in the acquisition of routine support, such as "base operations, including perimeter security, food services, maintenance and minor construction, transport, dock-side services, and a host of other support services which now draw off United States manpower from combat and direct combat support."<sup>162</sup>

The Act identifies the nine statutory provisions relating to the acquisition of logistic support, supplies, and services that have proved troublesome in the past and that may be waived.<sup>163</sup> Acquisitions under the authority of NMSA, however, must comply in all respects with other provisions of law, including any newly enacted provisions.<sup>164</sup> In addition, acquisitions under NMSA must be conducted in accordance with "general principles of prudent procurement practice" and must use existing DOD acquisition and logistics principles.<sup>165</sup> As will be shown in the analysis portion of this article, this requirement has generated serious questions about the applicability of DOD procurement regulations to NMSA transactions.<sup>166</sup>

The DOD implementing directive encourages use of the acquisition authorities contained within the NMSA whenever acquisition of host nation support is advantageous to the U.S.<sup>167</sup> The NMSA applies to logistic support, supplies, and services acquired from or provided di-

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<sup>159</sup>10 U.S.C. § 2341(2) (Supp. V 1987).

<sup>160</sup>DOD Dir. 2010.9, para. D.5.

<sup>161</sup>See Senate Report, *supra* note 9, at 11.

<sup>162</sup>*Id.*

<sup>163</sup>10 U.S.C. § 2343(b) (Supp. V 1987).

<sup>164</sup>DOD Dir. 2010.9, para. D.6.

<sup>165</sup>*Id.*

<sup>166</sup>See *infra* text accompanying notes 370-80.

<sup>167</sup>DOD Dir. 2010.9, para. D.8.



rectly to foreign governments. NMSA does not apply to logistic support, supplies, and services acquired by U.S. forces from U.S. and foreign commercial sources.<sup>168</sup> Finally, U.S. forces may not use the NMSA "to procure from any foreign government as a routine or normal source any goods or services reasonably available from United States commercial sources."<sup>169</sup>

In its implementing guidance, DOD has restricted use of the acquisition only authority.<sup>170</sup> Apparently for policy reasons, DOD has made cross-servicing authority the preferred method U.S. forces should use in both acquiring and transferring logistic support, supplies, and services. Further, DOD has relegated acquisition only authority to use as an interim measure until a mutual support agreement can be concluded with the supplying country or NATO subsidiary body organization.<sup>171</sup>

#### d. Documentation Requirements

Under the NMSA, all acquisitions and transfers of logistic support, supplies, and services must be documented.<sup>172</sup> Documentation can take many forms, and, depending on the authority used, may involve a type of "tiering," that is, reference to and compliance with one or more agreements previously executed at a higher level.

All documentation of NMSA transactions, regardless of the form or the level at which they are negotiated and concluded, must meet minimum information or data requirements.<sup>173</sup> Information that must be covered in the acquisition or transfer document includes: identification of the parties, an identifying agreement number, transaction type, a U.S. Treasury appropriation account symbol, description of the supplies or services involved, and the unit and total prices to be charged.<sup>174</sup>

Documentation is lacking for acquisition only transactions because of the expressed preference of DOD for use of the cross-servicing authority<sup>175</sup> and for other reasons that will be discussed in the analysis portion of this article.<sup>176</sup> DOD use of acquisition only authority has

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<sup>168</sup>AR 12-16, para. 1-5g.

<sup>169</sup>DOD Dir. 2010.9, para. D.8.

<sup>170</sup>DOD Dir. 2010.9, para. D.12.

<sup>171</sup>*Id.*

<sup>172</sup>DOD Dir. 2010.9, para. F.1.

<sup>173</sup>DOD Instr. 2010.10, para. D.7.

<sup>174</sup>*Id.*

<sup>175</sup>DOD Dir. 2010.9, para. D.12.

<sup>176</sup>See *infra* notes 339-59 and accompanying text.

been severely restricted. As a result, the types of guidance and examples ("lessons learned") normally gleaned from concluded agreements does not exist.

## 2. Cross-Servicing Authority

### a. Generally

Cross-servicing authority was intended by Congress to provide the statutory basis for simplified logistics procedures during the course of combined training and exercises.<sup>177</sup> The NMSA authorizes DOD, after consultation with the Department of State, to enter into mutual support agreements with designated countries and NATO subsidiary bodies for the reciprocal provision of logistic support, supplies, and services.<sup>178</sup> Cross-servicing authority is also combined with the waiver authority to provide for the negotiation and conclusion of mutual support agreements, which provide for acquisitions of logistic support free from the statutorily required provisions that have proved troublesome to the Alliance countries.<sup>179</sup> Transactions conducted using cross-servicing authority are also limited by the availability of appropriations.<sup>180</sup>

The requirement to consult with the Secretary of State prior to conclusion of cross-servicing agreements was added by an amendment proposed by the House of Representatives Committee on Foreign Affairs.<sup>181</sup> The purpose of this amendment was to provide an additional control mechanism on the implementation of the transfer aspects of the cross-servicing authority. Congress felt that the consultation requirement would ensure that cross-servicing authority would "be implemented in a manner consistent with the worldwide arms transfer and security assistance policies of the United States."<sup>182</sup>

Under the terms and conditions of these country-specific mutual support agreements, U.S. forces may both acquire and transfer logistic support.<sup>183</sup> It is important to restate, at this point, that DOD has expressed a preference for the use of cross-servicing authority in all transactions conducted by U.S. forces under the NMSA.<sup>184</sup>

<sup>177</sup>See Hearing, *supra* note 51, at 5 (statement of Hon. Robert W. Komer, Under Secretary of Defense for Policy, Dep't of Defense); see also Hearings, *supra* note 29, at 37 (statement of Brig. Gen. Wayne Alley, Judge Advocate, U.S. Army, Europe).

<sup>178</sup>DOD Dir. 2010.9, para. D.2.

<sup>179</sup>DOD Dir. 2010.9, para. D.6.

<sup>180</sup>10 U.S.C. § 2342(a) (Supp. V 1987).

<sup>181</sup>See House Report, *supra* note 73, at 4.

<sup>182</sup>*Id.*

<sup>183</sup>*Id.*

<sup>184</sup>DOD Dir. 2010.9, para. D.12.

Finally, compensation for acquisitions and transfers under cross-servicing authority may be on a reimbursable (cash payment) or a nonreimbursable basis (replacement-in-kind or exchange).<sup>185</sup>

#### b. Applicability

As originally enacted, the NMSA also restricted use of cross-servicing authority to "Europe and adjacent waters." The 1986 amendments to the NMSA expanded the scope of this authority to provide for cross-servicing agreements with the governments of non-NATO countries, where the U.S. agrees to provide logistic support, supplies, and services to the military forces of such country in return for the reciprocal provision of support to U.S. forces deployed in that country or in the military region in which such country is located.<sup>186</sup>

Procedurally, the 1986 amendments require the Secretary of Defense to "designate" non-NATO countries as eligible for a cross-servicing agreement. This designation, however, cannot occur until after prior consultation by DOD with the Department of State and a joint determination that such a designation promotes U.S. national security interests.<sup>187</sup> In addition, the Act, as amended, also requires a minimum of thirty days prior notification of an intended NMSA eligibility designation by DOD to the Senate Committees on Armed Services and Foreign Relations and the House of Representatives Committees on Armed Services and Foreign Affairs.<sup>188</sup>

The 1986 amendments to the Act also expanded the cross-servicing authority of the Act.<sup>189</sup> It provided for agreements with NATO countries, NATO subsidiary bodies, and other NMSA-eligible countries wherein the U.S. agrees to the reciprocal provision of logistic support, supplies, and services with such countries while their military forces are stationed in North America or are performing military exercises or are otherwise training in North America.

#### c. Policies and Limitations

Cross-servicing authority was originally intended by Congress to provide a statutory basis for DOD to both acquire and to transfer support in a field environment. Policies and limitations that apply to use of the acquisition only authority would generally apply to acquisitions of support here as well.<sup>190</sup>

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<sup>185</sup>DOD Dir. 2010.9, para. D.2.

<sup>186</sup>Pub. L. No. 99-661, 100 Stat. 3965 (1986).

<sup>187</sup>10 U.S.C. § 2342(b)(2) (Supp. V 1987).

<sup>188</sup>*Id.*

<sup>189</sup>Pub. L. No. 99-661, 100 Stat. 3965 (1986).

<sup>190</sup>See generally DOD Dir. 2010.9.

The basic advantage NMSA provides U.S. forces in the area of transfers is the authorization to provide logistic support, supplies, and services to qualified foreign governments without having to treat each case as a Foreign Military Sales transaction subject to the rigors of the Arms Export Control Act.<sup>191</sup> This is not to say, however, that Congress intended that the transfer authority be implemented in a manner inconsistent with "overall U.S. arms transfer and security assistance policies."<sup>192</sup>

The major congressional safeguards designed to prevent abuse of transfer authority include a ceiling on the amount of transfers that may be made in a given fiscal year;<sup>193</sup> the requirement for transfer documentation to specify U.S. written consent to minimize third-country transfers;<sup>194</sup> and DOD assurances that, because of the routine nature of the supplies and services involved, no major end items of equipment or single transfer transactions will occur that would trigger the congressional notification procedures of the Arms Export Control Act.<sup>195</sup> As a further safeguard, transfers by U.S. forces using NMSA authority may only take place under a mutual support agreement, using cross-servicing authority.<sup>196</sup> Further, it is DOD policy that transfers by U.S. forces should be designed to "facilitate mutual logistic support between the United States and designated countries and NATO subsidiary bodies."<sup>197</sup> Additionally, transfers of logistic support should most commonly occur "during combined exercises, training, deployments, operations, or other cooperative efforts and for unforeseen circumstances or exigencies when the recipient may have a temporary need of logistic support, supplies, and services."<sup>198</sup>

The NMSA may not be used to permit allied governments to use U.S. forces as normal or routine sources for logistic support, supplies, and services available from U.S. commercial sources or through Foreign Military Sales procedures.<sup>199</sup> Moreover, inventory levels of U.S. forces may not be increased "in anticipation of orders to be made by other countries pursuant to agreements negotiated under the NMSA."<sup>200</sup> U.S. military supply inventories are to be maintained at

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<sup>191</sup>See House Report, *supra* note 73, at 3.

<sup>192</sup>See Senate Report, *supra* note 9, at 3.

<sup>193</sup>10 U.S.C. § 2347 (Supp. V 1987).

<sup>194</sup>DOD Dir. 2010.9, para. F.3.

<sup>195</sup>22 U.S.C. § 2776(b) (1982).

<sup>196</sup>DOD Dir. 2010.9, para. D.9.

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

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

<sup>199</sup>*Id.*

<sup>200</sup>10 U.S.C. § 2348 (Supp. V 1987).

those levels necessary to meet only our national security interests, and the NMSA is not designed to have an impact on that standard.<sup>201</sup> The reason for this restriction is the congressional perception that a potential exists for allied countries

to allow reductions in their stock levels by relying on the U.S. supply system instead of investing in their own inventory. Such a practice would obviously have a negative rather than a positive effect on overall alliance readiness and would constitute a form of U.S. subsidy to NATO European military forces.<sup>202</sup>

The NMSA authorizes transfers of supplies and services to eligible countries and organizations outside of Foreign Military Sales channels. The NMSA does not, however, waive the requirements for controls on third party transfers and item end use.<sup>203</sup> As a consequence, transfers will only occur under the authority of a mutual support agreement. All mutual support agreements contain a provision requiring that each transfer of logistic support, supplies, or services by U.S. forces must be documented and that the basic transfer document must stipulate that the support, supplies or services provided may not be retransferred without the prior written consent of the U.S.<sup>204</sup>

For transfers of logistic support conducted in the European theater, only logistic support, supplies, and services in the inventory of U.S. forces (or otherwise under their control) may be used.<sup>205</sup> For transfers between U.S. forces and the armed forces of other NMSA-eligible countries that occur outside of North America, the logistic support, supplies, and services transferred must come from the inventories (or control) of U.S. forces deployed in that country or the military region of the receiving country.<sup>206</sup> Transfers occurring in North America must involve logistic support, supplies, and services from the inventory (or control) of U.S. forces in North America and must be limited to satisfying receiving country requirements while they are in North America.<sup>207</sup>

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<sup>201</sup>See House Report, *supra* note 17, at 12 (statement of Rep. Daniel).

<sup>202</sup>See Record, *supra* note 38, at 34,366 (statement of Rep. Daniel).

<sup>203</sup>See Senate Report, *supra* note 9, at 3, 13.

<sup>204</sup>DOD Dir. 2010.9, para. D.6.

<sup>205</sup>DOD Dir. 2010.9, para. D.15.

<sup>206</sup>*Id.*

<sup>207</sup>*Id.*

## d. Documentation

There are normally three types of documents, negotiated and concluded at different tiers or levels, associated with a transaction conducted using the cross-servicing authority of the NMSA. These documents are: 1) the mutual support agreement (also called a cross-servicing or "umbrella" agreement);<sup>208</sup> 2) an implementing arrangement (two types—general and specific);<sup>209</sup> and 3) orders or requisitions.<sup>210</sup>

As stated earlier, cross-servicing authority requires the existence of a mutual support agreement as a precondition to its use.<sup>211</sup> A mutual support agreement is best described as a bilateral government-to-government agreement between the U.S. and the government of a NMSA qualified country or organization, under which the parties agree to the reciprocal provision of logistic support, supplies, and services between their respective military forces (or for the sole benefit of U.S. forces in the case of a NATO subsidiary body organization).

Mutual support agreements provide the legal basis for and set forth the principles by which support, supplies, and services will be acquired and transferred between the U.S. forces and the countries or organizations involved. They are general in nature and, as a rule, do not involve the request for either supplies or services. Because they do not involve the obligation of funds, mutual support agreements may extend for an indefinite period of time.<sup>212</sup> Mutual support agreements are best understood by analogy to a "basic ordering agreement" as that term is commonly used in contracting circles.<sup>213</sup>

Mutual support agreements, although similar in character and content, differ from country to country. For example, the mutual support agreement concluded with the Federal Republic of Germany<sup>214</sup> is unique in that it only authorizes the U.S. to acquire logistic support, supplies, and services from one governmental agency—the Federal Ministry of Defense.<sup>215</sup> In addition, unlike the waiver provisions of

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<sup>208</sup>See DOD Dir. 2010.9, encl. 3-1; see also USAREUR Reg. 12-16, para. 8b.

<sup>209</sup>See DOD Dir. 2010.9, encl. 3-2; see also USAREUR Reg. 12-16, para. 8c.

<sup>210</sup>See DOD Instr. 2010.10, para. D.7; see also USAREUR Reg. 12-16, para. 6d, app. B.

<sup>211</sup>DOD Dir. 2010.9, para. D.2.b.

<sup>212</sup>AR 12-16, para. 1-5f.

<sup>213</sup>See generally FAR 16.703.

<sup>214</sup>Agreement between the Secretary of Defense of the United States of America and The Federal Minister of Defense of the Federal Republic of Germany concerning Mutual Support in Europe and Adjacent Waters, Jan. 21, 1983 [hereinafter Agreement].

<sup>215</sup>*Id.* art. 4, para. 3.

other mutual support agreements, the German agreement authorizes the charging of administrative and handling fees in the processing of U.S. requirements.<sup>216</sup>

Mutual support agreements are negotiated and concluded at the highest governmental levels. As such, they are international agreements within the meaning of DOD Directive 5530.3.<sup>217</sup> The congressional reporting requirements of the Case Act<sup>218</sup> also apply.

The mechanics by which supplies and services are acquired or transferred under a specific mutual support agreement involve the execution of an implementing arrangement or an order or requisition.<sup>219</sup> An implementing arrangement is an agreement that supplements a mutual support agreement. By necessity, then, it is negotiated and concluded pursuant to (or under) the authority of the mutual support agreement and must comply with its terms and conditions.<sup>220</sup>

In the course of its NMSA practice, the Army has further refined the term implementing arrangement to provide for two different types: "specific" and "general." Specific implementing arrangements are "used to satisfy requirements for support of a particular project or event."<sup>221</sup> They are funded documents, very much like an order or requisition. A common situation where use of a specific implementing arrangement would be appropriate is a joint NATO exercise. Specific implementing arrangements, thus, are often the document format used when the U.S. or its allies have support requirements of an operational nature involving some aspect of field support.<sup>222</sup>

A general implementing arrangement provides "a framework for conducting transactions for recurring logistic support requirements with other NATO armed forces and NATO subsidiary bodies."<sup>223</sup> Typically, general implementing arrangements focus on a particular area of recurring support, such as base operations or storage services.<sup>224</sup> General implementing arrangements are usually unfunded and may therefore be concluded for an indefinite period.<sup>225</sup> As

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<sup>216</sup>*Id.* art. 5.

<sup>217</sup>Dep't of Defense Directive 5530.3, International Agreements (June 11, 1987) [hereinafter DOD Dir. 5530.3].

<sup>218</sup>1 U.S.C. § 112(b) (1972).

<sup>219</sup>DOD Dir. 2010.9, para. F.1.

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

<sup>221</sup>USAREUR Reg. 12-16, para. 8c(1).

<sup>222</sup>*See id.*

<sup>223</sup>USAREUR Reg. 12-16, para. 8c(2).

<sup>224</sup>*See id.*

<sup>225</sup>*See* AR 12-16, para. 1-5f; *see also* USAREUR Reg. 12-16, para. 8d(2).

both specific and general implementing arrangements are concluded under the authority of a mutual support agreement, they are not considered international agreements for purposes of DOD Directive 5530.3 and the Case Act.<sup>226</sup>

Orders or requisitions represent the NMSA version of the offer and acceptance document for specific logistic support, supplies, or services.<sup>227</sup> They are funded documents, usually executed subject to the terms and conditions of both an implementing arrangement and a mutual support agreement.<sup>228</sup> Most mutual support agreements, however, allow for the direct placement of orders or requisitions for emergency situations.<sup>229</sup>

Transfers conducted under NMSA authority that involve a NATO country or NATO subsidiary body organization will specify in the basic transfer document that the goods or services provided by the U.S. forces may not be retransferred by the receiving entity to any country outside NATO without first receiving the written consent of the U.S. Government.<sup>230</sup> Transfers of logistic support, supplies, and services from U.S. forces to NMSA-eligible non-NATO countries will include a similar stipulation in the basic transfer document limiting retransfer of the goods or services to those situations where prior written consent of the U.S. Government is obtained.<sup>231</sup>

### 3. Waiver Authority

#### a. Generally

Examination of the legislative history behind the NMSA clearly indicates that waiver authority was meant as a direct congressional response to the concerns voiced by our NATO allies concerning U.S. forces using formal commercial contracting methods to acquire logistic support.<sup>232</sup> Under section 2343 of the Act,<sup>233</sup> Congress granted DOD the power to waive the following nine provisions of law when conducting acquisitions under NMSA acquisition only or cross-servicing authority.

1) Title 10, United States Code, section 2207, requires that DOD include in all contracts, except those for personal services, a provision reserving to the government the right to terminate the contract if it is

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<sup>226</sup>DOD Dir. 2010.9, para. F.6.

<sup>227</sup>See DOD Instr. 2010.10, para. D.7; see also USAREUR Reg. 12-16, para. 5c(2)(b).

<sup>228</sup>DOD Dir. 2010.9, para. F.1.

<sup>229</sup>See e.g., Agreement, *supra* note 214, at art. 4, para. 4.

<sup>230</sup>DOD Dir. 2010.9, para. F.3.

<sup>231</sup>*Id.*

<sup>232</sup>See Record, *supra* note 38, at 34,368 (statement of Rep. Broomfield).

<sup>233</sup>10 U.S.C. § 2343 (Supp. V 1987).



later found that gratuities were offered to government employees involved in the acquisition process. This clause also provides that, in addition to breach of contract remedies, the government may seek exemplary damages in an amount of between three and ten times the amount of the gratuity.<sup>234</sup>

2) Title 10, United States Code, section 2304(a), contains a requirement to maximize the number of sources in acquisitions in excess of \$25,000.<sup>235</sup>

3) Title 10, United States Code, section 2306(a), prohibits entering into contracts on a cost-plus-percentage-of-cost basis.<sup>236</sup>

4) Title 10, United States Code, section 2306(b), requires a provision in all negotiated contracts wherein the contractor warrants that no person or agency was retained by the contractor to obtain award of the contract for a commission or contingent fee. If the warranty is violated, the U.S. reserves the right to nullify the contract.<sup>237</sup>

5) Title 10, United States Code, section 2306(e), requires in all cost contracts a clause requiring notification to DOD when fixed price subcontracts are issued in excess of \$25,000 or five per cent of the prime contract.<sup>238</sup>

6) Title 10, United States Code, section 2306(a), requires contractors to submit certified cost and pricing data on contract actions expected to be in excess of \$100,000.<sup>239</sup>

7) Title 10, United States Code, section 2313, requires in all cost-type contracts a provision that guarantees government access to contractor records involving the contract until three years after final payment.<sup>240</sup>

8) Title 41, United States Code, section 22, directs that every government contract include a provision specifying that no member of Congress shall benefit from the contract.<sup>241</sup>

9) Title 50, United States Code Appendix, section 2168, establishes a Cost Accounting Standards Board and directs that in every negotiated contract or subcontract, a provision be included requiring adherence to accounting standards and practices set by the Board.<sup>242</sup>

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<sup>234</sup>Senate Report, *supra* note 70, at 4.

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

<sup>236</sup>*Id.*

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

<sup>238</sup>*Id.* at 4-5.

<sup>239</sup>*Id.* at 5.

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

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

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

Except for these nine statutory provisions that the Act specifically excludes from application to NMSA transactions, acquisitions by U.S. forces of logistic support, supplies, and services are subject to the remaining requirements of the Armed Services Procurement Act<sup>245</sup> and all other statutory requirements.<sup>244</sup>

#### b. Policies and Limitations

In addition to applicable statutory requirements, acquisitions under the authority of NMSA must comply with "general principles of prudent procurement practice" and existing DOD acquisition and logistics principles.<sup>245</sup> These two vague limitations are the source of the much heated controversy concerning applicability of the Federal Acquisition Regulation (FAR) to NMSA transactions.<sup>246</sup>

Similarly, questions have arisen concerning which personnel are authorized to execute NMSA transactions on behalf of the government, particularly transactions of a fund obligating nature (e.g., reimbursable acquisitions). The controversy revolves around whether Congress, in limiting the NMSA waiver authority to nine specific statutory provisions and otherwise requiring that acquisitions conducted under NMSA authority comply with the requirements of the Armed Services Procurement Act, intended only warranted contracting officers (or some recognized substitute, such as an ordering officer) to execute NMSA transactions involving the obligation of funds. This issue and the controversy concerning whether acquisitions conducted under NMSA authority must comply with the FAR are issues that will be dealt with in depth in the analysis portion of this article.<sup>247</sup>

## F. FINANCIAL POLICY

### I. Compensation

#### a. Generally

This section discusses the three methods of compensation for which the Act provides. Under the NMSA, compensation<sup>248</sup> may be on either a reimbursable or a nonreimbursable basis.<sup>249</sup> Reimbursement as a method of compensation simply means that cash payment for

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<sup>243</sup>10 U.S.C. § 2343(a) (Supp. V 1987).

<sup>244</sup>DOD Dir. 2010.9, para. D.6.

<sup>245</sup>*Id.*

<sup>246</sup>See *infra* notes 370-80 and accompanying text.

<sup>247</sup>See *infra* notes 370-87 and accompanying text.

<sup>248</sup>See generally DOD Instr. 2010.10, para. D.

<sup>249</sup>10 U.S.C. § 2344(a) (Supp. V 1987).

supplies or services will be made in the currency of the supplying country.<sup>250</sup> Compensation on a nonreimbursable basis involves replacement-in-kind or exchange as a method of compensation. Replacement-in-kind is compensation by replacement of supplies or services of an identical nature to those provided.<sup>251</sup> Exchange as a method of compensation denotes the replacement of supplies or services of a "substantially" identical nature.<sup>252</sup>

#### b. Reimbursable Transactions

Reimbursable transactions are those acquisitions and transfers that involve currency payments.<sup>253</sup> Section 2345(b) of the Act<sup>254</sup> describes the methods for calculating currency payments. The key feature of this section is the emphasis it places on reciprocal pricing principles.<sup>255</sup>

In narrowing its focus on reciprocal pricing, Congress was cognizant of U.S. pricing principles for Foreign Military Sales cases under the Arms Export Control Act.<sup>256</sup> As discussed previously, these pricing principles require that the U.S. recoup all the costs associated with the item involved.<sup>257</sup> This routinely requires adding "administrative surcharges, prorated retirement costs, and so forth, into the price."<sup>258</sup> The end result is that the U.S. charges the receiving country substantially more than U.S. forces would pay for like items or services.<sup>259</sup>

Congress realized that adhering to this pricing mechanism for NMSA transactions invited the retaliatory application of similar pricing methods by our allies to the goods or services acquired by U.S. forces. The authority to negotiate agreements reflecting reciprocal pricing principles was calculated to avoid this problem.<sup>260</sup> In addition, Congress reasoned that if the supplying country charged the receiving country the same price that it charged its own armed forces for similar goods and services, the resulting price should be the "lowest possible cost."<sup>261</sup> Alternatively, the NMSA also provides that U.S.

<sup>250</sup>DOD Instr. 2010.10, para. D.1.a.

<sup>251</sup>DOD Instr. 2010.10, para. D.1.b.

<sup>252</sup>*Id.*

<sup>253</sup>DOD Instr. 2010.10, para. D.1.a.

<sup>254</sup>10 U.S.C. § 2344(b)(1) (Supp. V 1987).

<sup>255</sup>See Record, *supra* note 38, at 34,365 (statement of Rep. Daniel).

<sup>256</sup>22 U.S.C. §§ 2751-2796(c) (1982).

<sup>257</sup>See *supra* notes 22-27 and accompanying text.

<sup>258</sup>See Record, *supra* note 38, at 34,365 (statement of Rep. Daniel).

<sup>259</sup>*Id.*

<sup>260</sup>*Id.*

<sup>261</sup>*Id.*

transfers (sales) of supplies or services to a receiving country that has not agreed to reciprocal pricing principles require application of the Arms Export Control Act pricing principles.<sup>262</sup>

Finally, agreements involving reimbursable transactions entered into by U.S. forces must also provide that, for these transactions, credits and liabilities accrued by the U.S. will be liquidated not less often than once every three months by direct payment to the supplying entity.<sup>263</sup>

### c. Nonreimbursable Transactions

Congress also had a specific purpose in mind in providing that compensation for goods or services acquired or transferred under NMSA authority may be made on a replacement-in-kind or an exchange basis. These two methods of compensation relate to operational support requirements and "are intended to provide military field commanders with the flexibility to accomplish mutual support on a basis of equitable compensation while maximizing joint effectiveness through the utilization of available supplies and services."<sup>264</sup> DOD policy encourages the use of NMSA replacement-in-kind or exchange procedures where "such transactions enhance operational readiness, foster mutual planning, advance cost-effective alternative means of support, promote interoperability, or otherwise offer advantages to the United States or are of mutual benefit to the United States and other participating countries."<sup>265</sup>

Replacement-in-kind or exchange entitlements will be satisfied by the issuance or receipt of replacement supplies or services within twelve months from the date of the original transaction.<sup>266</sup> If compensation on a nonreimbursable basis is not effected within this twelve-month period, then the transaction must be converted to a reimbursable (cash) one and payment must be made within the time periods specified for reimbursable transactions.<sup>267</sup>

### d. Crediting of Receipts

Any receipt of payment by the U.S. shall be credited to the applicable appropriation, account, and DOD fund.<sup>268</sup> Payments for logistic

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<sup>262</sup>10 U.S.C. § 2344(b)(2)(B) (Supp. V 1987).

<sup>263</sup>10 U.S.C. § 2345(a) (Supp. V 1987).

<sup>264</sup>See House Report, *supra* note 17, at 11.

<sup>265</sup>DOD Dir. 2010.9, para. D.10.

<sup>266</sup>10 U.S.C. § 2345(b) (Supp. V 1987).

<sup>267</sup>DOD Dir. 2010.9, para. D.4.

<sup>268</sup>10 U.S.C. § 2346 (Supp. V 1987).

support, supplies, and services provided by U.S. forces initially as a reimbursable transaction will be credited to the DOD fund or appropriation current at the time the material was dropped from the inventory or when the services were performed.<sup>269</sup> Where compensation for a given transaction was initially recorded as being on an exchange or replacement-in-kind basis, but is subsequently converted to a reimbursable transaction (i.e., because it has not occurred within the designated twelve-month period), it shall be credited to the DOD fund or appropriation current at the time of conversion to a reimbursable transaction.<sup>270</sup>

## 2. Pricing

### a. Generally

In reimbursable transactions involving cash payments, the NMSA requires that the U.S. officials involved in the acquisition or transfer give some consideration to pricing before conclusion of the transaction.<sup>271</sup> In the reimbursement situation, the preference of the NMSA is first for an agreement based on reciprocal pricing principles.<sup>272</sup> In the event that reciprocal pricing cannot be obtained, the Act then requires that a price analysis be conducted and a determination made that the prices to be charged under the agreement are fair and reasonable.<sup>273</sup>

Pricing for nonreimbursable transactions becomes necessary only for those transactions conducted on an exchange basis, that is to say, where identical supplies or services are not available and supplies or services of a substantially identical nature are proposed as compensation. In that situation the Act requires that a determination be made that the replacement supplies or services have the same "form, fit and function" as those originally provided.<sup>274</sup>

### b. Reimbursable Transactions

Section 2344(b)(1) of the Act<sup>275</sup> establishes the pricing principles to be followed in acquisitions or transfers where compensation is to be made on a reimbursable basis. Although the terminology used seems to be directed to transactions made pursuant to a cross-servicing

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<sup>269</sup>DOD Dir. 2010.9, para. D.5.

<sup>270</sup>*Id.*

<sup>271</sup>See generally 10 U.S.C. § 2344 (Supp. V 1987).

<sup>272</sup>10 U.S.C. § 2344(b)(1) (Supp. V 1987).

<sup>273</sup>10 U.S.C. § 2344(b)(2) (Supp. V 1987).

<sup>274</sup>DOD Instr. 2010.10, para. D.1.b.

<sup>275</sup>10 U.S.C. § 2344(b)(1) (Supp. V 1987).

agreement, the legislative history indicates that Congress intended the reciprocal pricing principles contained in this section to be applicable to transactions using the acquisition only authority as well.<sup>276</sup> Accordingly, the pricing principles set out in the Act should be used for all acquisitions and transfers made under NMSA authority.

Regarding the pricing of reimbursable transactions, the primary focus of the Act is on reciprocal pricing.<sup>277</sup> Simply stated, reciprocal pricing means that the prices charged for the support, supplies, or services provided by the supplying country to the receiving country are in parity with those prices charged to the supplying country's own armed forces, regardless of whether the supplies or services are procured by the supplying country from a private contractor (indirect method) or are provided directly from the supplying country's own inventories or resources (direct method).<sup>278</sup>

In the event that reciprocal pricing is not provided for under the terms of the cross-servicing agreement or is otherwise not applicable to the transaction in question,<sup>279</sup> the Act requires that non-reciprocal pricing principles be followed. That is to say, a price analysis must be conducted and a determination must be made that the prices to be charged are fair and reasonable.<sup>280</sup>

The NMSA requires that for reimbursable acquisitions, an attempt must first be made to secure certification from the supplying country that reciprocal pricing principles will apply to the transaction.<sup>281</sup> As stated earlier, reciprocal pricing is essentially parity or equality in pricing. Inherent in the concept of reciprocal pricing, and in the rationale for the legislative preference for this pricing method, is the assumption that the reciprocal price is both the best price obtainable by the supplying country and that it is also a fair and reasonable price for the goods or services involved.<sup>282</sup> Consequently, if the supplying country certifies that the prices to be charged the receiving country are the same prices paid by its own armed forces for identical supplies or services, then the assumption can be made that these same prices are fair and reasonable. The NMSA pricing requirements, therefore, have been met and there is no further need to per-

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<sup>276</sup>See Senate Report, *supra* note 70, at 6; see also House Report, *supra* note 17, at 4.

<sup>277</sup>See Record, *supra* note 38, at 34,365 (statement of Rep. Daniel).

<sup>278</sup>10 U.S.C. § 2344(b)(1) (Supp. V 1987); see also DOD Instr. 2010.10, para. D.3.

<sup>279</sup>10 U.S.C. § 2344(b)(4) (Supp. V 1987) provides that reciprocal pricing principles are inapplicable to NATO subsidiary body organizations.

<sup>280</sup>10 U.S.C. § 2344(b)(2) (Supp. V 1987).

<sup>281</sup>10 U.S.C. § 2344(b)(1) (Supp. V 1987).

<sup>282</sup>See Record, *supra* note 38, at 34,365 (statement of Rep. Daniel).

form a price analysis or to make an independent determination as to the fairness or reasonableness of the proposed price.<sup>283</sup>

The congressional viewpoint concerning the inherent reliability of reciprocal pricing as a guarantor of price reasonableness appears to have been modified by a recent change to the DOD implementing guidance regarding the NMSA.<sup>284</sup> This change limits use of the NMSA authority to emergency situations when use of reciprocal pricing in a given situation would result in the U.S. paying a higher price for the goods or services than through use of an available alternative method of acquisition.<sup>285</sup>

The implication of this new provision is that DOD no longer considers it "prudent procurement practice" to rely solely on reciprocal pricing guarantees for the attainment of a fair and reasonable price for a given transaction. Rather, this shift in policy suggests that for every reimbursable transaction, regardless of the pricing method, a price analysis should be conducted and an independent determination of price reasonableness should be made.<sup>286</sup>

As contemplated by the Act, reciprocal pricing for the acquisition of support, supplies, or services may take one of two forms, depending on the source of the goods or services: 1) where supplies or services are acquired indirectly, that is, where the supplying country acquires the supplies or services from a private contractor for the benefit of the receiving country,<sup>287</sup> or 2) where the required supplies are furnished from the inventory of the supplying country or where support or services are provided by officers, employees, or governmental agencies of the supplying country.<sup>288</sup>

Where the goods or services are supplied indirectly by a private contractor, the price to be charged the receiving country must be equal to the price charged by the contractor to the armed forces of the supplying country.<sup>289</sup> Prices charged in this situation may differ slightly to account for differences due to varying delivery schedules, points of delivery, and other similar considerations.<sup>290</sup> Where supplies or services are provided directly from the inventories or resources

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<sup>283</sup>See DOD Instr. 2010.10, para. D.3.

<sup>284</sup>DOD Dir. 2010.9, para. D.18.

<sup>285</sup>*Id.*

<sup>286</sup>*Id.*

<sup>287</sup>10 U.S.C. § 2344(b)(1)(A) (Supp. V 1987).

<sup>288</sup>10 U.S.C. § 2344(b)(1)(B) (Supp. V 1987).

<sup>289</sup>DOD Instr. 2010.10, para. D.3.a(1).

<sup>290</sup>*Id.*

of the supplying country, the prices charged will be identical to those prices charged by the supplying country to its own armed forces.<sup>291</sup> When U.S. forces act as the supplier, prices charged shall be equal to rates charged for the provision of logistic support, supplies, and services to DOD component services.<sup>292</sup>

Finally, certification of reciprocal pricing requires proper documentation. Where a guarantee of reciprocal pricing is given in a transaction, a statement to that effect should be included in the agreement, implementing arrangement, order, or other fund obligating document. In addition, some consideration should be given to including a provision allowing U.S. Government access to records to verify price reciprocity.<sup>293</sup>

As stated earlier, the NMSA expresses a clear preference for negotiation and adoption of reciprocal pricing principles in acquisitions and transfers. Failure to achieve a certification of reciprocal pricing requires that, for an acquisition of logistic support by U.S. forces, a price analysis must be conducted and a determination must be made by the U.S. commander delegated this responsibility<sup>294</sup> that the prices for the logistic support, supplies, or services are fair and reasonable.<sup>295</sup> If a price analysis is conducted and a determination of a fair and reasonable price cannot be made, then the proposed acquisition cannot take place.<sup>296</sup>

The Act is silent as to guidance concerning what form an acceptable price analysis must take. The implementing DOD guidance states only that a price analysis should be "based on prior experience and supporting data and consider all applicable circumstances."<sup>297</sup> A great degree of flexibility is accorded to the practitioner in this area. The method and degree of the price analysis should vary depending on the circumstances of the particular acquisition, to include consideration of the dollar value involved and the complexity of the particular transaction.<sup>298</sup>

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<sup>291</sup>DOD Instr. 2010.10, para. D.3.a(2).

<sup>292</sup>*Id.*

<sup>293</sup>See DOD Instr. 2010.10, encl. 2-1.

<sup>294</sup>See generally DOD Dir. 2010.9, para. E.

<sup>295</sup>10 U.S.C. § 2344(b)(2)(A)(Supp. V 1987).

<sup>296</sup>DOD Instr. 2010.10, para. D.3.b(1).

<sup>297</sup>*Id.*

<sup>298</sup>The term "price analysis" is very broad and all encompassing. Basically, it includes whatever actions are taken by the U.S. official responsible for the acquisition that are necessary to reach a decision concerning whether the price at issue is fair and reasonable. There is, however, one factor common to all price analyses: some form of price comparison must be conducted. This comparison may either be from established



The Act specifically provides for situations involving transfers by the United States to a qualified country that are not covered by reciprocal pricing principles. In all such cases, the pricing principles contained within the Arms Export Control Act must be applied.<sup>299</sup>

### c. Nonreimbursable Transactions

As stated earlier, pricing for nonreimbursable transactions becomes necessary only in the event identical supplies or services are not available and supplies or services of a substantially identical nature are proposed as compensation for those supplies or services provided.<sup>300</sup> In that situation, the Act requires that a determination be made that the intended replacement supplies or services have the same "form, fit and function" as those originally provided.<sup>301</sup> It is important to note that the replacement items must be of equal value to those provided. They need not, however, be of equal cost.<sup>302</sup>

## **G. ALTERNATE METHODS FOR THE ACQUISITION OF LOGISTIC SUPPORT, SUPPLIES, AND SERVICES**

### 1. NATO STANAG's

A STANAG "is the record of an agreement among several or all NATO nations to adopt like or similar military equipment, ammunition, supplies and stores, and operational, logistical, and administrative procedures."<sup>303</sup> STANAG's, then, are very much like a mutual support agreement or general implementing arrangement in that they set forth pre-agreed terms, conditions, and procedures. They differ from NMSA agreements in several key respects. First, STANAG's are generally multilateral agreements (as opposed to bilateral) that

market prices, government estimates, or the prices charged for previous transactions. Price comparison is the key to any valid price analysis.

A price analysis should include, as a first step, the gathering and verification of pricing data. This step is important and care should be taken that the data used for comparison is current and accurate, and to the extent other prices are used, these prices must also be fair and reasonable to provide an accurate standard for evaluation. The second step in the price analysis process should be the actual evaluation of the data compiled, to include price comparisons. The final step should be the determination decision, with the corresponding documentation required by the Act and the implementing guidance.

<sup>299</sup> 10 U.S.C. § 2344(b)(2)(B) (Supp. V 1987).

<sup>300</sup> See *supra* note 274 and accompanying text.

<sup>301</sup> DOD Instr. 2010.10, para. D.1.b.

<sup>302</sup> Senate Report, *supra* note 70, at 6.

<sup>303</sup> Army Reg. 34-1, International Military Rationalization, Standardization, and Interoperability, para. 5-1 (14 Mar. 1989) [hereinafter AR 34-1].

cover a wider range of subject matter areas than logistical support, supplies, or services.<sup>304</sup> More importantly, a STANAG does not, by itself, constitute legal authority for U.S. forces to acquire or transfer support.<sup>305</sup> This requires a basis in U.S. law.<sup>306</sup>

The policy of DOD is to encourage and support the development and use of NATO STANAG's.<sup>307</sup> Moreover, implementation of the NMSA should not discourage or replace the use of NATO STANAG's.<sup>308</sup> Whenever possible, NATO STANAG procedures and forms that meet minimum essential data requirements should be used for NMSA transactions.<sup>309</sup> STANAG's and STANAG procedures (in particular, pricing or repayment policies) may not be used, however, if inconsistent with the NMSA. Minor procedural differences should not preclude use of STANAG's.<sup>310</sup>

As a final point, NMSA provides a legal basis for U.S. ratification and use of STANAG's.<sup>311</sup> If another authority can be used to ratify a STANAG, however, DOD policy is to use such other authority.<sup>312</sup> If the NMSA is used as the legal authority to ratify all or a part of a STANAG, ratification by the U.S. shall indicate clearly which portion of the STANAG is ratified using NMSA authority.<sup>313</sup>

## 2. NMSA/FAR Acquisitions

### a. Background

Congressional pressure in the 1970's to reduce the force structure in Europe saw major cuts in the number of support troops, resulting in greater reliance by U.S. forces on NATO host nation countries for logistic support, supplies, and services.<sup>314</sup> Rigidly employed methods for both acquiring support (commercial contracts) and providing support (Foreign Military Sales procedures) caused friction between the U.S. and its NATO allies.<sup>315</sup> The situation in the European theater of operations deteriorated to the point that, for REFORGER 1980.

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<sup>304</sup>D. Bowyer, *International Logistics 5* (draft Chapter 12 for Contract Law Practice Manual, unpublished manuscript, HQ, USAREUR).

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

<sup>306</sup>*Id.*

<sup>307</sup>DOD Dir. 2010.9, para. D.14.a.

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

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

<sup>310</sup>*Id.*

<sup>311</sup>See DOD Dir. 2010.9, para. D.14.c.

<sup>312</sup>DOD Dir. 2010.9, para. D.14.b.

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

<sup>314</sup>See *supra* notes 29-31 and accompanying text.

<sup>315</sup>See *supra* notes 38-58 and accompanying text.

several key NATO countries refused to supply support under commercial contracts.<sup>316</sup> The friction was relieved and the support was provided largely through promises by U.S. officials to our NATO allies that legislative relief was imminent.<sup>317</sup>

Congress provided that relief through passage of the NMSA. In its original form, the Act contained several safeguard provisions designed to monitor implementation and prevent an overly broad interpretation by DOD.<sup>318</sup> One such provision required that both the acquisition only and cross-servicing authorities would not be self-executing.<sup>319</sup> Rather, it required the Secretary of Defense to prescribe regulations implementing these NMSA authorities and forward them to Congress for review at least sixty days prior to their effective date.

The original DOD implementing regulations contained confusing and limiting language that the services interpreted as DOD policy to confine field use of the NMSA to the cross-servicing authority of the Act.<sup>320</sup> The Army regulations reflected this perceived constraint on NMSA implementation: "The acquisition and transfer of logistic support under this regulation will be accomplished under the terms of a support agreement or implementing arrangement."<sup>321</sup>

DOD policy to implement only the cross-servicing authority was problematic in several respects. In response to field concerns, DOD approached Congress with two separate problems: 1) its inability to acquire host nation support because of formal contracting procedures; and 2) the inability to easily acquire and transfer support in a field setting.<sup>322</sup> Each authority, then, was enacted for a specific purpose. Acquisition only authority was designed to alleviate problems in acquiring host nation support; cross-servicing authority would facilitate the reciprocal provision of support in training and exercises.<sup>323</sup> The fact the field needed both authorities is best illustrated by development of the NMSA/FAR acquisition format.

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<sup>316</sup>See *supra* notes 65-70 and accompanying text.

<sup>317</sup>See Hearings, *supra* note 29, at 51 (statement of Gen. James R. Allen, Deputy Commander in Chief, U.S. Army European Command).

<sup>318</sup>See *supra* notes 112-19 and accompanying text.

<sup>319</sup>10 U.S.C. § 2329 (1982), amended by 13 U.S.C. § 1304(a)(6) (Supp. III 1985).

<sup>320</sup>Dept of Defense Directive 2010.9, Mutual Logistic Support Between the United States and Other NATO Forces, para. E.1.f (Aug. 25, 1980).

<sup>321</sup>Army Reg. 12-16, Mutual Logistic Support Between the United States and Other NATO Forces, para. 5f (15 Aug. 1981).

<sup>322</sup>See Senate Report, *supra* note 9, at 3.

<sup>323</sup>See Hearing, *supra* note 51, at 6 (statement of Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff for Logistics, U.S. Army).

Use of cross-servicing authority requires, as a precondition, the existence of a mutual support agreement.<sup>324</sup> Further, mutual support agreements are negotiated at the government-to-government level, having the full status of international agreements. Largely because of their international status, negotiation and conclusion of mutual support agreements was a slow process. By April 1981 (a key planning time for REFORGER), no agreements had been signed.<sup>325</sup> Discussions were ongoing, however, with the Federal Republic of Germany, the Netherlands, Belgium, and the United Kingdom.<sup>326</sup> Only Belgium indicated that it might be possible to conclude an agreement in time for REFORGER 1981.<sup>327</sup>

USAREUR officials were faced with a very serious problem. It looked like REFORGER 1981 would have to be cancelled due to the lack of host nation support.<sup>328</sup> With the aid of USEUCOM officials (and with some creative lawyering), however, a solution was soon forthcoming.

Faced with the fact that the acquisition only and cross-servicing authorities were not self-executing, U.S. officials focused their attention on the waiver authority of the Act.<sup>329</sup> With regard to the waiver authority, the view was formulated that Congress, in passing this portion of the Act, meant to create a third, separate, "stand alone" authority. This was an authority that by the terms of the statute was self-executing and that could therefore be used immediately, without the need for congressionally reviewed implementing regulations.<sup>330</sup>

The Head of the Contracting Activity (HCA) in USAREUR was the Deputy Commander-in-Chief (DCINC). As the HCA, he exercised general contracting authority and was authorized to negotiate and to conclude contracts conforming to the Armed Services Procurement Act.<sup>331</sup> At this same time there existed in USAREUR an approved deviation from all Defense Acquisition Regulation regulatory requirements when U.S. forces contracted with NATO host nations for services (and incidental supplies) and for construction contracts.<sup>332</sup>

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<sup>324</sup>See *id.* at 7.

<sup>325</sup>Memorandum, AEAJA-KL, 15 Apr. 1981, subject: NATO Mutual Support Act (PL 96-323).

<sup>326</sup>See *id.*

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

<sup>328</sup>Message, CINCUSAREUR, AEAGD-PS, 1760719Z July 81, subject: USAREUR Use of NATO Mutual Support Act of 1979 (NMSA PL 96-323) for REFORGER 81 Support.

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

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

<sup>331</sup>*Id.*

<sup>332</sup>*Id.*

U.S. officials combined the authority of the NMSA to waive the nine most troublesome statutory provisions, the general contracting authority of the DCINC, and the DAR deviation from regulatory requirements and formed the "hybrid" NMSA/DAR (now NMSA/FAR) acquisition authority. A message was drafted and sent to Headquarters, Department of the Army (HQDA), indicating the intent to use this new approach.<sup>333</sup> USAREUR officials received no negative response from HQDA, and thus the NMSA/DAR acquisition format was implemented in time for use in REFORGER 1981.<sup>334</sup>

#### b. Procedures

The creators of the NMSA/FAR acquisition format felt that its use of the NMSA waiver authority made it subject to all the limitations and requirements imposed by the NMSA.<sup>335</sup> Consequently, NMSA/FAR acquisitions are subject to the \$150 million obligational ceiling and they are reported to Congress annually.<sup>336</sup> Further, use of the NMSA/FAR transaction is limited to reimbursable acquisitions, because replacement-in-kind or exchange transactions can only occur under acquisition only or cross-servicing authority of the NMSA.<sup>337</sup>

Because of the scope of the DAR deviation,<sup>338</sup> use of the NMSA/FAR authority is limited to acquisitions of services (and incidental supplies). Supply acquisitions are not covered by this approach. As an additional safeguard, the file must contain a Determination and Finding (D&F) supporting the decision to use this format, a price analysis must be conducted, and a determination as to a fair and reasonable price must also be made.<sup>339</sup>

## IV. ANALYSIS

### A. NMSA IMPLEMENTATION PROBLEMS

#### 1. *Overly Restrictive and Confusing Implementing Regulations*

The NMSA was passed with an effective date of August 4, 1980.<sup>340</sup> By the original terms of this legislation, the acquisition only and cross-servicing authorities contained within the Act were not self-executing; they required that DOD prescribe implementing regula-

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<sup>333</sup>*Id.*

<sup>334</sup>See Memorandum, AEAJA-KL, 24 July 1981, subject: PL 96-323.

<sup>335</sup>See generally USAREUR Reg. 12-16, para. 12.

<sup>336</sup>USAREUR Reg. 12-16, para. 12a.

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

<sup>338</sup>See Message, *supra* note 326.

<sup>339</sup>See generally USAREUR Reg. 12-16, para. 12a(1).

<sup>340</sup>126 Cong. Rec. 21,715 (1980).

tions, reviewed by Congress, prior to use of the authority.<sup>341</sup> In promulgating these regulations, however, DOD failed "to fully recognize or embrace the intent of Congress with regard to certain statutory provisions and, therefore, did not reflect that intent in its implementing documents and procedures."<sup>342</sup>

The original DOD regulation became effective in August 1980.<sup>343</sup> Almost a full year later, none of the services had promulgated their implementing guidance. By the summer of 1981 it became clear that NMSA authority would not be available in time for REFORGER. DOD's implementing guidance was seen as the major reason for the holdup:

The primary deterrent to a speedy implementation has been the DOD guidelines, which served to confuse rather than clarify the statutory authority. The DOD implementing guidelines created delays by including provisions more restrictive than the Act, as well as by poorly defining certain terms which have only served to confuse the two statutory authorities.<sup>344</sup>

The DOD implementing regulation has been revised twice since it became effective in August 1980. In its present form it is still overly restrictive, vague, and confusing. This section will examine some of the major problems created for the field by DOD's implementing policies and guidance.

The NMSA clearly provided DOD with two distinct acquisition authorities: 1) the authority to acquire goods and services through acquisition agreements (acquisition only authority); and 2) the authority to enter into cross-servicing agreements, after consultation with the Department of State, for the acquisition and transfer of logistic support, supplies, and services. When first published, however, the DOD regulation blurred this distinction by introduction of a new term, "support agreements,"<sup>345</sup> which was inartfully defined and served to confuse the two authorities.<sup>346</sup> One reason the distinction between the two authorities was important involved its impact on the appropriate level of authority for concluding agreements in the Euro-

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<sup>341</sup>10 U.S.C. § 2329 (1982), amended by 13 U.S.C. § 1304(a)(6) (Supp. III 1985).

<sup>342</sup>See K. Allen, *supra* note 107, at 1.

<sup>343</sup>Dept of Defense Directive 2010.9, Mutual Logistic Support Between the United States and Other NATO Forces (Aug 25, 1980).

<sup>344</sup>K. Allen, *supra* note 107, at 4.

<sup>345</sup>See *supra* notes 320-21 and accompanying text.

<sup>346</sup>See K. Allen, *supra* note 107, at 4.

pean theater.<sup>347</sup> Implementation of the Act within USAREUR was delayed as a result.<sup>348</sup>

In the July 1984 revision to the DOD regulation, DOD eliminated the term "support agreements."<sup>349</sup> In an attempt to clarify DOD's position, the revised regulation stated unequivocally that the NMSA created two separate forms of authority. It then described each and declared DOD's intention to implement both.<sup>350</sup> DOD's implementation of the acquisition only authority was, however, for unknown reasons, overly restrictive. It prescribed a clear preference for use of the cross-servicing authority and limited use of the acquisition only authority as an interim measure, that is, only until a cross-servicing agreement could be negotiated and concluded.<sup>351</sup>

As an aside, the July 1984 revision contained a reference to and authorization for publication of a manual to provide guidance for acquisition only transactions.<sup>352</sup> January 1, 1985, was listed as the date by which the manual would be published.<sup>353</sup> To date, however, no manual has been forthcoming. The current revised regulation has dropped any reference to the acquisition manual.

The current regulation also continues to limit use of the acquisition only authority to situations of an interim nature pending the conclusion of a cross-servicing agreement.<sup>354</sup> Mutual support agreements have been negotiated and concluded with Belgium, Canada, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the NATO Maintenance and Supply Activity.<sup>355</sup> Significantly, by limiting acquisition only authority to interim use, DOD has, in effect, all but prohibited its use by the services. That the services need acquisition only authority is evidenced by the continued viability of the NMSA/FAR format.<sup>356</sup>

Finally, the current revised regulation continues to provide problematic guidance to the field. Its use of the term "acquisition," for example, is confusing from the standpoint that the distinction be-

<sup>347</sup>*Id.* at 7.

<sup>348</sup>*See* Message, *supra* note 328.

<sup>349</sup>*See generally* Dep't of Defense Directive 2010.9, Mutual Logistic Support Between the United States and Governments of Other NATO Countries and NATO Subsidiary Bodies (June 7, 1984).

<sup>350</sup>*Id.* at para. D.2.

<sup>351</sup>*Id.* at para. E.2.

<sup>352</sup>*Id.* at para. E.3.

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

<sup>354</sup>*See* DOD Dir. 2010.9, para. 12.

<sup>355</sup>USAREUR Reg. 12-16, app. A.

<sup>356</sup>*See generally* USAREUR Reg. 12-16, para. 1b.

tween acquisition only and cross-servicing authorities is often merged. In some provisions the term is used to apply to acquisitions conducted under acquisition only authority<sup>357</sup> and in still others the term refers to both authorities.<sup>358</sup>

Additional examples of the problems generated by the confusing and restrictive implementation by DOD of the NMSA are discussed in succeeding sections.<sup>359</sup> Clearly, what is needed is a statement of DOD policy that provides clear and concise guidance to the field on NMSA usage. In addition, removal of the restrictions on use of the acquisition only authority and publication of an instructional manual on use of NMSA authority in general would be of significant benefit to the services.

## 2. *Different Support Requirements Warrant Different Procedures*

Many of the problems associated with implementation of the NMSA stem from DOD's failure to recognize that logistic support requirements for U.S. forces are of two fundamentally different kinds and the concomitant failure to provide for separate procedures to accommodate these differences. The fact that there are two different types of support requirements is reflected both in the two different peacetime purposes of the NMSA and the two different congressional grants of acquisition authority contained within the Act.

As discussed previously, the two peacetime purposes of the NMSA are to provide for simplified procedures to facilitate the interchange of logistic support between U.S. forces and the military forces of allied countries in training and exercises and to permit better use of host nation resources by providing U.S. forces with the means to acquire support services without the need to resort to "complex contracting procedures."<sup>360</sup> Congress granted DOD cross-servicing authority to provide for support requirements of an "operational" nature.<sup>361</sup> It granted acquisition only authority to resolve problems faced by U.S. forces in acquiring "host nation support."<sup>362</sup>

It is at once axiomatic that U.S. forces' operational and host nation support requirements are fundamentally different. Operational support requirements are typified by the exigent circumstances encountered by troops in a field environment. Accordingly, they are driven

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<sup>357</sup>DOD Dir. 2010.9, para. D.3.

<sup>358</sup>DOD Dir. 2010.9, paras. D.6, 8.

<sup>359</sup>See e.g., notes 369-70 and accompanying text.

<sup>360</sup>Record, *supra* note 38, at 34,368 (statement of Rep. Broomfield).

<sup>361</sup>See Senate Report, *supra* note 9, at 3.

<sup>362</sup>See *id.*



by field conditions that require simplified, mobile, and flexible procedures to accommodate the exigencies involved. Operational support requirements are characterized by one-of-a-kind, low dollar value transactions. Examples of this type of support are food, clothing, billeting, POL, transportation services, ammunition, communication services, spare parts, medical services, and training services.<sup>363</sup>

Host nation support, on the other hand, is support of a static and a recurring nature. The acquisition of host nation support often necessitates the execution of acquisition agreements of a highly complex nature, applying over a long period of time, and involving a large dollar amount. Examples of host nation support include base operations support (including incidental minor construction), storage services, use of facilities, and repair and maintenance services.<sup>364</sup>

As has already been shown, the original DOD implementing regulation merged the distinction between these two types of support requirements and their corresponding NMSA authorities as well. In so doing, DOD restricted NMSA usage to cross-servicing authority, causing the birth of the hybrid NMSA/FAR authority. Tragically, DOD failed to take full advantage of the momentum generated by these legislative initiatives. As a result, the NMSA has not and probably never will realize its full potential.

An examination of the legislative history predating passage of the NMSA clearly indicates that Congress was aware of the differences in these support requirements.<sup>365</sup> Moreover, it is equally clear that Congress, by including two separate authorities in the NMSA, intended each to respond to a specific need: cross-servicing for operational support; and acquisition only for host nation support.<sup>366</sup> The fact that U.S. forces in the field needed acquisition only authority is clearly evidenced by the birth and subsequent growth of the NMSA/FAR hybrid approach. The continued existence of the NMSA/FAR approach is, again, proof of a present need for a stand alone acquisition only authority.

The two sections that follow will examine each of these different support requirements, focusing on the problems unique to each. Special emphasis is placed on the continued need for separate policies

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<sup>363</sup>See *supra* note 146.

<sup>364</sup>*Id.*

<sup>365</sup>See *e.g.*, Hearings, *supra* note 29, at 37 (statement of Brig. Gen. Wayne Alley, Judge Advocate, U.S. Army Europe).

<sup>366</sup>See *e.g.*, Hearing, *supra* note 51, at 6-7 (statement of Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff for Logistics, U.S. Army).

and procedures responsive to the unique problems generated by each form of support.

## **B. OPERATIONAL SUPPORT REQUIREMENTS**

### *1. Introduction*

Operational support concerns, as reflected in NMSA's legislative history, focus on the need to resort to Foreign Military Sales procedures to transfer support to our allies in combined training and exercises and the need for U.S. forces to resort to formal, time-consuming contracting procedures to meet emergency logistics requirements under field conditions.<sup>367</sup> In short, what the U.S. forces in the field needed was (and is) a simplified, flexible, and deployable system to acquire and to transfer operational support. What they received were traditional contracting procedures, minus the nine statutory provisions waived by operation of the Act.

Once again, confusing and restrictive DOD policy was the source of the problem. The legislative history expressed concern that acquisitions under NMSA authority should comply with "general principles of prudent procurement practice."<sup>368</sup> This concern was liberally interpreted by DOD officials as evidence of an expressed intent to "graft" the newly enacted NMSA authority onto the existing DOD procurement system, as implemented by the then DAR. What this did, in effect, was "wed" implementation and usage of the NMSA to the contracting community, with only secondary involvement by the logistics community. This is not to suggest that overall responsibility for the NMSA belongs entirely in either camp. Rather, for purposes of operational support requirements, primary responsibility should reside with the logisticians. As will be shown in the next section, because of its complexities and high dollar value, responsibility for host nation support quite correctly requires the involvement of the contracting community.<sup>369</sup>

As a result of DOD's adherence to established contracting channels in implementation of the NMSA, questions concerning DAR/FAR applicability have plagued NMSA usage since its inception. The following sections examine this controversy. The concluding section

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<sup>367</sup>*Id.* at 4 (statement of Hon. Robert W. Komer, Under Secretary of Defense for Policy, Dep't of Defense).

<sup>368</sup>See DOD Dir. 2010.9, para. D.6.

<sup>369</sup>See *infra* notes 407-12 and accompanying text.

discusses the unique opportunity for field usage presented by the NMSA, with suggestions for establishment of a procedure to create a truly deployable cross-servicing system.

## 2. FAR Applicability

The question of FAR applicability to NMSA transactions is essentially a question of congressional intent. More specifically, in passing the NMSA, did Congress intend it to be an extension of the Armed Services Procurement Act (ASPA) and, therefore, subject to the existing system of implementing regulations? Or did Congress, in enacting this new legislation, intend to create a truly separate authority, requiring the creation of its own, parallel system, drawing on the DAR only for its experience and expertise on an as-needed basis? This question and those corollary to it have been among the most intensely debated questions surrounding passage of the Act.<sup>370</sup>

Those individuals advocating the NMSA as an extension of the ASPA (and therefore subject to the FAR) argue that Congress intended the NMSA to be authority for DOD to use simplified contracting procedures to enter into agreements with qualified governments and NATO subsidiary body organizations for the acquisition or reciprocal provision of logistic support, supplies, and services. In support of this position, they point to section 2343(a) of the Act,<sup>371</sup> which provides that, with the exception of the nine statutory provisions that may be waived, NMSA transactions must, in all other respects, comply with the ASPA. Because the ASPA applies to all NMSA transactions, and because the FAR implements ASPA within DOD, it necessarily follows that the FAR applies to all NMSA transactions.<sup>372</sup>

As further support for this proposition, proponents of this position point to evidence of DOD's intent to make the NMSA subject to the FAR in the implementing regulation. That regulation provides that acquisitions conducted under NMSA authority shall comply with "general principles of prudent procurement practice"<sup>373</sup> and that when implementing the NMSA, existing DOD acquisition and logistics principles will be used.<sup>374</sup>

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<sup>370</sup>See e.g., Memorandum for Arthur Daoulas, Deputy Assistant Secretary of the Army (Acquisition) from Col. Richard J. Womack, Principal Assistant for Contracting (21 Oct. 1980) (discussing DA implementation of Public Law 96-323, the NATO Mutual Support Act of 1979).

<sup>371</sup>10 U.S.C. § 2343(a) (Supp. V 1987).

<sup>372</sup>See Memorandum, *supra* note 370, at 1.

<sup>373</sup>DOD Dir. 2010.9, para. D.6.

<sup>374</sup>*Id.*

Resolution of this question requires reference to the Act as originally passed.<sup>375</sup> The Act provided that the authorities conferred by the NMSA for DOD to enter into acquisition only and cross-servicing agreements were not self-executing. Rather, the Act required DOD to prescribe its own regulations prior to use of either of these authorities. If Congress had intended to "graft" this new authority onto existing regulations, then the requirement for newly promulgated regulations would be rendered meaningless.

Arguments that NMSA transactions are subject to the ASPA in all respects, with the exception of the nine waived provisions, also miss the mark. Apart from the six provisions included in the ASPA from which NMSA transactions are excluded, very few provisions remain that, because of the subject matter involved, are applicable to NMSA transactions.<sup>376</sup> In addition, the sections in the ASPA from which NMSA transactions are exempted relate to basic contract functions as to competition, solicitation, award, cost and pricing data, and examination of records.<sup>377</sup> Application of the FAR minus these provisions and contracting concepts "would produce a fragmented set of requirements and procedures of questionable value."<sup>378</sup>

As a final note, the requirement to conduct NMSA transactions in consonance with "principles of prudent procurement practice" has its origin in House and Senate concerns expressed prior to passage of the Act.<sup>379</sup> As such, these congressional references to acquisition principles were a reference to the need to exercise good business judgment and were not an imposition of the very regulatory scheme on NMSA transactions<sup>380</sup> that Congress was enacting legislation to avoid.

### 3. Contracting Authority

An important corollary to that of FAR applicability is whether NMSA transactions involving reimbursable acquisitions require the involvement of a warranted contracting officer. Supporters of this position point, again, to the DOD regulation, which provides in part that "[p]ersonnel implementing these agreements and arrangements by issuing and accepting requisitions or other forms shall be desig-

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<sup>375</sup>10 U.S.C. § 2329 (1982), amended by 13 U.S.C. § 1304(a)(6) (Supp. IV 1986).

<sup>376</sup>See Comment 2, AEAJA-KL, 11 May 1987, subject: Contracting Under NATO Mutual Support Act, Waiver of FAR/DFARS.

<sup>377</sup>*Id.*

<sup>378</sup>*Id.*

<sup>379</sup>See Senate Report, *supra* note 70, at 5; see also House Report, *supra* note 17, at 11.

<sup>380</sup>See *id.*

nated specifically and shall be selected so as to have the necessary knowledge and experience to carry out authorized transactions in accordance with applicable laws, this Directive, and other implementing regulations.<sup>381</sup>

Proponents of this position point to the fact that it is a well established principle of acquisition law and practice that the contracting officer is the single, responsible U.S. Government representative authorized to contract on behalf of the government. As such, his or her position is one of special trust and independence that cannot or should not be compromised.<sup>382</sup> Moreover, acquisition restrictions in annual DOD authorization and appropriation acts and other acquisition laws (e.g., fiscal laws) apply to NMSA transactions.<sup>383</sup> In addition, the application of nonreciprocal pricing principles requires a price analysis and a fair and reasonable price determination. Because of the broad and highly specialized range of knowledge, experience, and pricing expertise required, it is argued that only warranted contracting officers are able to adequately represent the government's interests in NMSA acquisitions.

The argument that only warranted contracting officers may obligate the government in NMSA transactions is specious. Although admittedly vague, the DOD policy to have only qualified personnel conduct NMSA actions was meant to restate congressional emphasis on the need to have knowledgeable personnel conducting the issuance and acceptance of orders and requisitions for support. Emphasis by Congress on simplified procedures for pricing (reciprocal pricing), for example, indicates a preference for simplified procedures that do not require contracting officer involvement.

That is not to say, however, that all NMSA acquisitions should be conducted by non-contracting personnel. The circumstances of the individual acquisition should dictate the need for and the involvement of a contracting officer. Once again, the distinction between operational support and host nation support becomes important. For example, a high dollar value, complex, long term acquisition of storage services involving the POMCUS<sup>384</sup> program, requiring specialized expertise in price analysis and negotiation as well as detailed knowledge of funding restrictions, may well necessitate use of a contracting officer and supporting personnel.<sup>385</sup>

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<sup>381</sup>DOD Dir. 2010.9, para. F.7.

<sup>382</sup>See FAR 1.602.

<sup>383</sup>DOD Dir. 2010.9, para. F.4.

<sup>384</sup>Prepositioned Organization Materiel Configured to Unit Sets.

<sup>385</sup>See *infra* notes 409-10 and accompanying text.

The questions regarding FAR applicability and the need for warranted contracting officer involvement in NMSA transactions represent yet another example of the problems in NMSA implementation and usage created by vague and confusing DOD guidance. The present DOD regulation should be revised to clear up this controversy.

### 3. Fully Deployable Reciprocal Support Procedures

The legislative history of the NMSA is replete with references to a field functioning system for the mutual exchange of logistic support.<sup>386</sup> The point was stressed in committee hearings time and again that NATO military operations must be conducted on the basis of a coalition approach.<sup>387</sup> American forces will be required to fight next to British, German, Dutch, Belgian, Italian and other allied military forces.<sup>388</sup> With this in mind, the "important question"<sup>389</sup> of mutual logistics support arises. The armed forces of each Alliance country "cannot all behave as if we were logistically independent when in the crunch we will all be dependent on each other. Hence the first purpose of the proposed legislation is to facilitate such mutual support, especially in peacetime training and exercises, to facilitate common readiness in event of war."<sup>390</sup> Moreover, the purpose of combined training and jointly held exercises is to "test the ability of our forces, and those of our Allies, to function under wartime conditions. . . . [O]ur arrangements for mutual logistic support during exercises should be as close to realism as we can practically make them."<sup>391</sup>

A second reason for simplified procedures for mutual logistic support is the fact that U.S. forces operate in Europe "at the end of a logistic pipeline 3,000 miles long."<sup>392</sup> The end result is therefore always "short-term demands" for support by U.S. forces.<sup>393</sup> By this same token, our Allies, although operating under a shorter pipeline,

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<sup>386</sup>See e.g., Senate Report, *supra* note 9, at 12; see also Hearing, *supra* note 51, at 4 (statement of Hon. Robert W. Komer, Under Secretary of Defense for Policy, Dep't of Defense).

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

<sup>388</sup>Hearing, *supra* note 51, at 4 (statement of Hon. Robert W. Komer, Under Secretary of Defense for Policy, Dep't of Defense).

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

<sup>390</sup>*Id.*

<sup>391</sup>*Id.*

<sup>392</sup>*Id.*

<sup>393</sup>*Id.*

often require short-term support during training and exercises. The NMSA was designed as a means for U.S. forces to acquire and to transfer support quickly and efficiently under field operating conditions.<sup>394</sup>

The need for a deployable, field functioning system for the reciprocal provision of logistic support is easily established from a review of the legislative history. It also seems equally clear that Congress intended the cross-servicing authority to provide the statutory basis for the establishment of such a system.<sup>395</sup> The question arises as to why such a system has not been forthcoming. The answer to that question lies, once again, in the confusing DOD guidance.

As discussed earlier, the DOD regulation requires that acquisitions under NMSA authority comply with "general principles of prudent procurement practice" and with existing DOD acquisition principles. In addition, personnel empowered to conduct NMSA transaction must be specifically designated, having the requisite knowledge of applicable laws and regulations.<sup>396</sup> These policies and guidance have, in the past, been interpreted as requiring that all NMSA acquisitions comply with FAR requirements and that reimbursable acquisitions be conducted by warranted contracting officers.<sup>397</sup>

To add to this confusion, the regulation also states that "when useful and applicable, DOD components are encouraged to establish simplified procedures under cross-servicing agreements, implementing arrangements, contracts, or other contractual instruments under the NMSA similar to those used in basic ordering agreements, with authority to place orders delegated to the lowest practical and prudent level."<sup>398</sup> The implication of this provision is that DA is free to establish a system for fulfilling operational support requirements that does not require application of the FAR or the use of warranted contracting officers for reimbursable acquisitions. Still, DOD's intent in this regard is unclear. The HQDA response has largely been inertia. What is needed is a clear, unequivocal statement from DOD that acquisitions under the NMSA are, in fact, not subject to FAR requirements, although DOD components should continue to refer to the FAR for guidance. This statement should also clearly state that warranted contracting officers may, but need not, conduct acquisitions under the Act.

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<sup>394</sup>Hearing, *supra* note 51, at 6-7 (statement of Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff for Logistics, U.S. Army).

<sup>395</sup>See Senate Report, *supra* note 9, at 12.

<sup>396</sup>DOD Dir. 2010.9, para. F.7.

<sup>397</sup>See Memorandum, *supra* note 370, at 1.

<sup>398</sup>DOD Dir. 2010.9, para. F.7.

On a more positive note, USAREUR has established extensive procedures covering NMSA transactions.<sup>399</sup> Most importantly, they provide for delegation of the administration of certain specific and general implementing arrangements down to the command level. The authority to acquire and to provide support is also in the delegation.<sup>400</sup>

The problem with the USAREUR procedures is that they are decidedly vague, both with respect to FAR applicability and the need for contracting officer involvement in the acquisition process. Further, the USAREUR approach fails to provide standardized procedures for local command administration of these agreements. It leaves the establishment of internal procedures for redelegation, selection of qualified personnel for placing and accepting orders, and the assurance of adequate NMSA ceiling authority and fund availability to each individual command tasked with administering an implementing arrangement.<sup>401</sup>

As stated earlier, the July 1984 DOD implementing regulation called for publication of an acquisition manual.<sup>402</sup> In 1984 a draft version of such a manual was compiled by representatives of the DOD components, under the direction of the Special Assistant to the DCINC for Host Nation Negotiations, Headquarters, EUCOM.<sup>403</sup> That draft included a provision for field acquisitions that could form the nucleus upon which a deployable system could be based. It was based on the DAR small purchase provisions and the concept of an ordering officer. Under this procedure, called "simplified acquisition authority," a field commander of the rank of O-5/GS-14 or higher would be authorized to acquire logistic support, supplies, or services, of a value less than or equal to \$25,000, without the need of a warranted contracting officer. In addition, the O-5/GS-14 could designate, in writing, a subordinate to carry out the transaction. The O-5/GS-14 would, however, still have to approve the transaction in advance and would remain personally responsible for the acquisition. Specific training for designated personnel would also be provided.<sup>404</sup>

It is beyond the scope of this article to delineate with any degree of specificity the procedures that should be used for a field functioning

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<sup>399</sup>See generally USAREUR Reg. 12-16.

<sup>400</sup>See USAREUR Reg. 12-16, paras. 10j, 11b.

<sup>401</sup>*Id.*

<sup>402</sup>See *supra* notes 351-52 and accompanying text.

<sup>403</sup>L. Aron, Acquisition of Logistic Support from Governments of Other NATO Countries and NATO Subsidiary Bodies (Mar. 13, 1984) (unpublished manuscript, proposed draft acquisition manual).

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



logistic support system. There are, however, certain basic requirements that such a system should meet. It should be deployable and mobile (making reliance on contracting officer support impractical); it should be flexible enough to adapt to changing conditions on today's integrated battlefield; and, finally, the procedures involved should be simple (for ease of use) and standardized (to present a common face to our Allies). Empowering field commanders with limited authority to acquire operational support is a positive step in this direction.

### C. HOST NATION SUPPORT REQUIREMENTS

#### 1. Introduction

Army requirements for host nation support, provided under NMSA authority, are many and varied. Most notably they include storage services,<sup>405</sup> base operations support,<sup>406</sup> and repair and maintenance services.<sup>407</sup> For fiscal year 1985 the total amounts expended for host nation support by the Army exceeded \$53 million, over half the NMSA ceiling allocation available for all DOD components.<sup>408</sup> Interestingly, only eleven separate NMSA transactions were involved in these expenditures.<sup>409</sup>

As might well be expected, these eleven acquisitions of logistic support and services involve very complex, high dollar value acquisition agreements. They also involve static, recurring, long term support requirements, some of an indefinite duration. Indeed, several of these agreements<sup>410</sup> predate passage of the NMSA.

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<sup>405</sup>An example is the agreement for storage services between the United States and the Grand Duchy of Luxembourg. Under that agreement, WSA (Warehouse Services Agency), a government owned company formed to perform these services, receives, stores, preserves, and maintains approximately 89,000 short tons of U.S. Army war reserve materials requiring 200,000 square meters of storage space. See S. Kasparian, Commander's Briefing Book of Host Nation Agreements (May 31, 1985) (unpublished manuscript on file at the Host Nation Support Branch, U.S. Army Contracting Center, Europe) [hereinafter Briefing Book].

<sup>406</sup>An example is the base operations agreement between the United States and the Federal Republic of Germany for operation of the Garlstedt Cantonment Area. Under this agreement, the Federal Ministry of Defense provides base operation services in support of the 2d Armored Division (Forward) at Lucius D. Clay Kaerne. See Briefing Book, *supra* note 405.

<sup>407</sup>An example is the agreement for repair and maintenance services of U.S. army trucks provided by the Ministry of Defense, Federal Republic of Germany, at Juelich, Germany. See Briefing Book, *supra* at 405.

<sup>408</sup>See Briefing Book, *supra* note 405.

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

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

Unlike the problems experienced in acquiring and transferring operational support, the problems associated with the acquisition of host nation support do not, for the most part, stem from poor guidance or from the dogmatic adherence to traditional contracting methods. As a result, problems experienced by U.S. forces in the acquisition of host nation support involve traditional issues of government contract law. As will be shown in the succeeding discussion, they focus on formation issues, claims and disputes, and significant fiscal law concerns.

For purposes of illustration and discussion, this section will refer to a case study involving an agreement between the U.S. and the Federal Republic of Germany (FRG), concluded under NMSA authority, for the acquisition of storage services. This agreement has proven to be a test case with the German Government where many of the current problems and shortfalls in the acquisition of host nation support have surfaced.

Specifically, this agreement concerned a USAREUR requirement for war reserve storage of approximately 65,000 metric tons of U.S. Army owned stocks. Shortages in NATO infrastructure funding, which could have been used to construct storage facilities, required U.S. forces to seek an alternate means to meet this requirement. An agreement for storage services under NMSA authority was the chosen format.

U.S. officials approached the Federal Ministry of Defense (FMOD), FRG, to provide the required services. The FMOD indicated it did not have the resources to provide these services but referred the U.S. to the Federal Ministry of Finance, (FMOF), FRG, which provided similar services to the German armed forces. The FMOF was contacted and it expressed a willingness to perform the services.

An implementing arrangement was concluded under the Mutual Support Agreement between the U.S. and the FRG. That implementing arrangement provided that the FMOF would task a government-owned corporation, *Industrieverwaltungsgesellschaft (IVG)*, to perform the services. IVG provided petroleum and ammunition storage services for the German armed forces. The implementing arrangement also provided that the details of the support would be negotiated between IVG and U.S. contracting personnel in the form of an order. The order would be in the nature of a service contract on a cost reimbursement basis. It would be funded with annual appropriations.

## 2. Funding

### a. Annual Funding for Multi-Year Commitments

A common thread running through all host nation support agreements is that they are funded with annual appropriations.<sup>411</sup> U.S. officials are therefore prohibited by law<sup>412</sup> from making any commitments beyond the present fiscal year, save those "subject to the availability of funds."<sup>413</sup> These funding restrictions have created significant problems with our allies in securing much needed host nation support.

Agreements for host nation support, such as base operations or storage services, generally require the host nation to acquire facilities, hire personnel, and enter into subcontracts on behalf of the U.S. These actions typically require the host nation to make long term commitments. U.S. problems in the area of funding center on the tension created between the need for these long term host nation commitments and the U.S.'s inability to commit itself to payment for support beyond the current fiscal year term.

A major host nation concern with regard to the U.S.'s inability to commit itself beyond the near term involves labor force concerns, long term employment contracts, and associated termination costs. NATO host nation governments are working with a constant labor force, characterized by conditions of full employment and a nonmobile pool of workers.<sup>414</sup> In contrast, the American labor force is highly mobile and variant, with a relatively high percentage of unemployed workers.<sup>415</sup> In general, it is difficult, at the outset, for NATO host nations to find the personnel needed to fulfill long term U.S. support requirements. Added to the availability of manpower problem is the problem of strong labor unions that require long term employment contracts with healthy severance pay penalties.<sup>416</sup> In addition, depending on the type of arrangement, personnel hired for use in performing work on U.S. support agreements are often hired as host nation government employees, making termination difficult if not impossible.

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<sup>411</sup>See Briefing Book, *supra* note 405.

<sup>412</sup>10 U.S.C. § 1341(a) (1982).

<sup>413</sup>See DOD Dir. 2010.9, para. F 4.

<sup>414</sup>See Frisch, *European Overview Part I: Competition, Education, and Taxation*, 5 Concepts 7, 35 (1982).

<sup>415</sup>See *id.*

<sup>416</sup>See *id.*

Besides labor force concerns, performance of a storage or base operations agreement may require the host nation to enter into long term lease agreements to secure the facilities needed to perform the requested services. In the IVG arrangement, for example, German landlords were generally unwilling to accept less than a five-year lease term. This unwillingness was due, in part, to local customs. It was also the result, however, of the need to make significant alterations to the physical configuration of the facilities to accommodate storage of large, heavy military equipment.

Performance of a complex agreement for host nation support typically requires the host nation to enter into a number of subcontracts with commercial firms to meet U.S. requirements. Services such as maintenance of facilities and guard services are prime areas for subcontracting. As is true with personnel contracts and lease agreements, long term host nation commitments are often required. From a cost effectiveness standpoint, long term arrangements certainly prove more beneficial to U.S. interests.

These and other problems with regard to funding surfaced in negotiations with IVG for war reserve storage services.<sup>417</sup> The German position on these points is indicative of the response the U.S. will likely meet in future negotiations with our other Allies for long term host nation support. The German position was simply that questions and concerns generated by annual funding restrictions are strictly internal U.S. matters of no concern to the Germans. If the U.S. has a requirement for long term support, then it is up to the U.S. to guarantee payment for the entire period support is required. This guarantee must extend to all costs associated with performance of the agreement, to include all costs incurred in the event the agreement is cancelled. In this same vein, it was clear from discussions with the German negotiators that IVG had been instructed by the FMOF to undertake no financial risks ("kein riskio") in performing this agreement.

When faced with such a Hobson's choice, the kind of creative lawyering such a situation engenders is surprising. As might well be expected, several compromise measures were suggested to satisfy German concerns. With regard to time limitations, it was stressed that, although the order for services would be funded annually, the

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<sup>417</sup>It should be noted that, from November 1983 until July 1985, the author was the legal advisor to the U.S. contracting delegation responsible for negotiating the order for storage services with IVG. As such, much of the information expressed regarding this acquisition is based upon personal experience.

implementing arrangement would be renewed in five-year increments, thus evidencing U.S. intent for a longer term arrangement. The downside of this approach to the Germans was the fact that the U.S. was not legally obligated beyond the current fiscal year.

It was not possible to obtain multi-year funding for this requirement. As an alternative, it was proposed that the agreement be structured to take advantage of the U.S. statutory exception to the bona fide needs rule for depot maintenance contracts.<sup>418</sup> This exception makes current fiscal year appropriations available to fund a contract for depot maintenance services for a period of twelve months beginning at any time during the fiscal year. The agreement for storage services could then be signed with an initial performance date between six to nine months after the beginning of the fiscal year. In this way, IVG would always have at least six months' advance notice of the U.S. intent to fund or cancel the agreement for the succeeding year.

The structuring of agreements for storage services to cross fiscal year lines and empty gestures of good faith regarding the duration of support agreements are acts of desperation on the part of U.S. forces that skirt the real issue. What is really needed, if the U.S. is to have any hope of acquiring continued long term support from Alliance countries, is a specific line item appropriation for host nation support under the NMSA, with a five-year period of availability. Appropriated amounts should parallel those presently in place for the artificial NMSA ceiling authority (i.e., \$150 million).

#### b. Advance Payment Authority

Another funding issue related to host nation support acquisitions relates to the often repeated request by host nations for advance payments by the U.S. to cover start-up costs and the costs of initial commitments. In the IVG agreement, for example, IVG proposed to establish a daughter company, MDBG,<sup>419</sup> for the singular purpose of performing the services required by the U.S. forces. The FMOF committed itself to providing DM 100,000 as formation capital under German law. The new company would, however, have no operating capital to meet start-up costs and to make initial commitments.

In general, advance payments in connection with government contracts are prohibited by title 31, United States Code, section 3324. Title 10, United States Code, section 2396, however, provides limited

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<sup>418</sup>10 U.S.C. § 2410(a) (1982).

<sup>419</sup>Materialdepot Betriebsgesellschaft mit beschränkter Haftung.

authority for U.S. forces to make advance payments under certain situations. Most relevant to this discussion is the situation where advance payments are required by the laws or ministerial regulations of a foreign country, an exception that did not apply to the IVG arrangement. Contracting personnel specifically apply for approval of advance payments, but the authorization is only granted on a case-by-case basis.<sup>420</sup>

At the time the U.S. military approached Congress for legislative relief (resulting in passage of the NMSA), it had very little experience with regard to the problems acquisition of long term support would create. If U.S. forces had been aware of the problem regarding advance payments, this would have resulted in a request for waiver of a tenth statutory provision. What is needed then is an amendment to the Act providing for relief from this prohibition.

### c. The Concept of "Full Funding"

In the course of acquiring host nation support, another major funding issue arises that, by either design or happenstance, is patterned after U.S. pricing policy for Foreign Military Sales cases under the Arms Export Control Act. As discussed previously, U.S. policy in this regard is that prices cited in the DD Form 1513 were estimates only.<sup>421</sup> The receiving country must agree to open-ended liability, remaining responsible for all costs associated with filling its request for supplies or services.

Increasingly, our allies have taken a similar approach to U.S. requests for host nation support. As a result, host nations have begun to object to U.S. attempts to place funding ceilings on its liability for payment under specific support agreements. The host nation position is simple: although it may be willing to undertake to meet U.S. forces' support requirements, it will not assume any financial risks in the process.

This host nation "full cost" position is particularly troublesome when viewed in terms of termination or cancellation charges in connection with long term commitments made in the performance of a support agreement. From a U.S. fiscal law standpoint, the U.S. cannot commit itself to an open-ended, indeterminate liability.<sup>422</sup> U.S. liability for contingencies must be limited to avoid potential Anti-deficiency Act violations.

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<sup>420</sup>10 U.S.C. § 2396 (1982).

<sup>421</sup>See *supra* notes 22-27 and accompanying text.

<sup>422</sup>10 U.S.C. § 1341 (1982).

The problems surrounding the use of annual funds for multi-year agreements are not new. The legislative history of the Act mentions DOD concerns in this regard.<sup>423</sup> Indeed, the predecessor bill to the NMSA,<sup>424</sup> submitted by DOD, contained a specific provision that dealt with multi-year agreements.<sup>425</sup> The focus of that provision was on agreements entered into under NMSA authority "for base operations support or use of facilities (and related services)."<sup>426</sup> Under this proposal, such agreements would be allowed to extend for periods in excess of one year. Obligations incurred under these agreements would be recorded during the period (fiscal year) the support or service was provided. Special provisions were included for contingent liabilities, such as "personnel separation allowances" and "costs of cancellation or termination of the agreement."<sup>427</sup> As an alternative to a specific line item appropriation for host nation support, Congress could provide general legislative relief through incorporating such a provision, or a similar provision, as an amendment to the NMSA.

From the host nation perspective the equation is a simple one. If the U.S. desires support on a long term basis, then the U.S. should be able to provide guarantees that it will compensate the host nation for the entire period support is required. Moreover, as the support is en-

<sup>423</sup>See Hearings, *supra* note 29, at 28 (statement of Brig. Gen. Wayne Alley, Judge Advocate, U.S. Army, Europe).

<sup>424</sup>See *id.* at 2-12.

<sup>425</sup>That provision is as follows:

(2) Agreements entered into pursuant to this section for base operations support or use of facilities (and related services) may extend for terms longer than one year. Obligations incurred under an agreement for a term longer than one year may be recorded during each reporting period in which the support or other service is provided, but—

(i) with respect to personnel separation allowances, may be recorded against applicable current appropriations in the full amount of the liability therefor that accrues during the reporting periods of each fiscal year, and shall remain obligated without fiscal year limitation until expended, or no longer required, to liquidate that liability; and

(ii) in the event funds are not made available for the continuation of such an agreement into a subsequent fiscal year, may be recorded in the amount of the costs of cancellation or termination of the agreement during the reporting period in which the liability for such costs ceases to be contingent and becomes payable, and may be paid from—

(A) appropriations originally available for the performance of the agreement concerned;

(B) appropriations currently available for acquisition of the equipment, materials, goods, other supplies or services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

See Hearings, *supra* note 29, at 4-5.

<sup>426</sup>*Id.*

<sup>427</sup>*Id.*

tirely for the benefit of the U.S., the U.S. must agree to open-ended liability and agree to pay all costs associated with operation and termination of these support agreements.

Finally, provision of logistic support by the host nation is a discretionary act. Esoteric references to alliance cooperation are not always controlling. What matters, essentially, is the concept of "goodwill." This is a finite commodity that is quickly expended by an inflexible attitude and corresponding references to domestic funding restrictions. What is really needed are funds specifically appropriated for use in NMSA acquisitions that have a multiple-year period of availability. Alternatively, amendments to the Act to facilitate acquisition of host nation support are required.

## *2. Government Owned Corporations*

The NMSA is authority for U.S. forces to acquire and to transfer support at the government-to-government level. As such, host nation support can be acquired under the NMSA in one of two basic ways: a direct acquisition from the resources of the host nation; or an indirect acquisition of support through the host nation from a private source.<sup>428</sup> In the case of the direct approach, it is permissible for U.S. forces to make arrangements to acquire the support directly from the host nation agency tasked to provide it. In the case of the indirect approach, however, for the transaction to retain its nation-to-nation character all arrangements should be made through the host nation. U.S. forces should not deal directly with the private source.

Unfortunately, in practice, the methods of acquisition and the lines of authority are not so clear cut. Moreover, U.S. acquisitions, in the future, will see more merging between these two methods. This is largely due to the unique, complex, and long term nature of the U.S. forces' requirements for host nation support. These are requirements that typically involve substantial commitments of personnel, leases of facilities, and the need for capital to fund start-up costs. Most allied countries do not have the direct resources to meet such requirements. As an alternative, host nations will turn increasingly to whole or partly owned (or funded) government corporations to meet U.S. support requirements.

In the case study involving the acquisition of war reserve storage services by U.S. forces from the FRG, the implementing arrangement was concluded between USAREUR, the FMOF, and the FMOD. The

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<sup>428</sup>See U.S.C. § 2344(b)(1) (Supp. V 1987).



implementing arrangement then designated IVG to perform the services and provided for conclusion of an order for the services between U.S. contracting personnel and IVG representatives. IVG, in turn, proposed to establish a subsidiary company (MDBG) that would actually be required to perform the storage services.

During negotiations with IVG, serious questions arose concerning its status as either a private corporation or an agency of the FMOF and consequently the FRG. The distinction as to status was critical for several reasons. First and foremost was the obvious effect IVG's status as a private firm would have on USAREUR's ability to proceed with this acquisition under the authority of the NMSA. If IVG was, in fact, a commercial business entity, then more direct involvement by the FMOF or the FMOD in the acquisition was required to preserve the government-to-government character of this arrangement. Alternatively, if this could not be accomplished, commercial contracting methods would have to be used. A primary concern in this regard was the U.S.'s ability to justify IVG as a sole source for this acquisition.

IVG's private or public status had additional ramifications. Most important for the purposes of this discussion were the payment by the U.S. to IVG of a profit or fee and the requirement for the U.S. to pay taxes of a corporate nature. Regarding the question of profit or a fee, in its initial proposal IVG sought a fee of between five and six per cent of the total costs incurred. The method for calculating the fee would therefore be on a cost-plus-a-percentage-of-cost basis, where the contractor has an incentive to drive-up and not to hold down costs.

There is a statutory prohibition against using the cost-plus-a-percentage-of-cost contract type.<sup>429</sup> This provision, however, is one of the nine statutory provisions that can be waived in NMSA transactions. Waiver of this provision is based upon the understanding that, because NMSA transactions would be concluded at the government-to-government level, profit or fee would not be a factor.<sup>430</sup> As a result, the statutory prohibition could be waived to allow the host nation to impose a charge in the form of an administrative surcharge to cover expenses incurred in administration of the agreement.

It was obvious from IVG's written submissions and from statements made in negotiations that both IVG and MDBG were commercial firms, organized on a profit making basis. This illustrates two

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<sup>429</sup>See *supra* note 236 and accompanying text.

<sup>430</sup>See Hearings, *supra* note 29, at 32 (statement of Brig. Gen. Wayne Alley, Judge Advocate, U.S. Army, Europe).

key points. The first involves the complex, multifaceted corporate status of IVG (and MDBG), a phenomenon that might be termed the "chameleon effect." It seems that for certain purposes (i.e., eligibility to perform the services as a directed source) IVG was a government agency, and for other purposes, such as charging a profit and tax liability, it was a private concern.

The second point illustrated by IVG's dual nature involves certain assumptions made by Congress concerning the nature of the relationship between the parties to a NMSA transaction. Of paramount concern here is the assumption that NMSA transactions would be noncommercial in nature. Clearly, the learning point from the IVG experience in this regard is that NMSA transactions involving participation by a government owned corporation will retain some commercial aspects. As a result, "blanket" application of the NMSA waiver provision may not always be in the government's best interests. Further, involvement by contracting professionals in a transaction of this nature is absolutely necessary to adequately protect governmental interests.

Another issue raised by host nation involvement of a government owned corporation to perform services for the U.S. forces is the question of taxes. Typically, an agreement for host nation support will be on a cost-reimbursement basis. As such, the U.S. Government is obligated to reimburse the corporation for all costs it incurs in the performance of this agreement. While the corporation may enjoy the financial backing of the country involved in general, it receives no special status with regard to taxes. Of particular concern are real estate, business, and municipal taxes.

It is DOD policy to secure relief to the maximum extent practicable from payment of foreign taxes with appropriated funds.<sup>431</sup> Toward this end, DOD has established a Foreign Tax Relief Program.<sup>432</sup> This program involves designation of a single military commander as responsible for a given country. That military commander then has the following responsibilities: maintain a current country tax law study; serve as a single point of contact for U.S. contracting officers to investigate and resolve specific foreign tax relief matters; and serve as liaison with responsible Department of State and local foreign tax authorities.

Problems of tax liability involving a foreign corporation, such as in

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<sup>431</sup>See Dep't of Defense Directive 5100.64, DOD Foreign Tax Relief Program (June 12, 1979) (hereinafter DOD Dir. 5100.64).

<sup>432</sup>*Id.*

the IVG case, are complicated and involve highly sensitive issues. If questions of this nature should arise, it is important that they be surfaced early on in the negotiations. Ideally, the corporation's status and the U.S. Government's liability for payment of taxes should be agreed upon, in writing, in advance of concluding the NMSA transactions. If agreement cannot be reached, compliance with the DOD Foreign Tax Relief Program is required.

The questions raised by host nation use of government owned or financed corporations to provide support to U.S. forces are important in several respects. Because of the resource intensive and complex nature of the support involved (i.e., storage services) future U.S. requirements for host nation support should see increased use of government corporations. In this vein and, again, drawing on the problems encountered in the IVG experience, how U.S. officials resolve these problems will have a decidedly precedent-setting effect. Experience dictates that our allies have long-term memories. Concessions and deviations from U.S. procedures made in the course of concluding an agreement for one acquisition will undoubtedly change future acquisitions with that country as well, particularly if the change or deviation proved beneficial to the host nation. Perhaps more importantly, however, is a corollary to the idea of intracountry precedence. Experience also dictates that there is continuing dialogue or a process of "networking" between Alliance countries. Concessions and deviations from U.S. procedures with regard to a particular acquisition may very well necessitate across-the-board changes in U.S. policies and procedures within the European theater.

## ***D. FINANCIAL POLICY***

### *1. Reciprocal Pricing*

The Act, the implementing regulation,<sup>433</sup> and the financial policy Instruction<sup>434</sup> all emphasize reciprocal pricing as the preferred pricing arrangement for reimbursable NMSA transactions. Reciprocal pricing is based essentially on the concept of parity or equality in pricing. Under this form of financial arrangement, the host nation agrees to charge prices identical to those charged its own armed forces for supplies and services from host nation resources.<sup>435</sup> For supplies and services that the host nation acquired for the U.S. from a host nation contractor, the price charged will be equal (with some

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<sup>433</sup>DOD Dir. 2010.9.

<sup>434</sup>DOD Instr. 2010.10.

<sup>435</sup>See *supra* notes 281-93 and accompanying text.

minor adjustments) to the price charged by the contractor to the armed forces of the supplying country.<sup>436</sup>

The assumption underlying the concept of reciprocal pricing is that, because the supplying country has paid the same price for the goods or services, then that price is the best obtainable and is also a fair and reasonable one. Implied in this notion is that the supplying country undertook some efforts (i.e., competed its requirements) to obtain at least a fair and reasonable price. The question arises as to whether, in light of differing commercial markets, the requirement of many defense ministries to pay taxes on goods and services acquired, and the promotion by host nations of internal "domestic" policies, the assumptions underlying reciprocal pricing are indeed valid ones.

The quickest and easiest way to analogize the potential problem in reliance on reciprocal pricing is by reference to the DOD procurement system. DOD does not always get the best price obtainable for goods and services. Some would argue, in light of recent procurement fraud scandals, that DOD does not always get a price that is fair and reasonable. The potential exists then that the procurement systems in use by the armed forces of our NATO allies are equally problematic.

Apart from speculation as to the validity of a given country's procurement system, some very real, concrete differences exist between U.S. markets and business practices and those of their European counterparts. These differences impact directly on the concept of reciprocal pricing. A prime example of these differences is the idea of competition, a cornerstone of both the U.S. marketplace and the federal procurement system. Based largely on the uniquely European views of a guild mechanism, European concepts of competition differ radically from American held beliefs.

[L]arge parts of the European population are raised in a quasi-protective, non-competitive environment. Hence, the concept of competition as we know it in the United States is essentially unknown to the European mentality. . . . You may like or dislike the European attitude toward competition. The fact remains, however, that no fierce competition exists among the Europeans, and most definitely not in the defense market.<sup>437</sup>

Differing views on competition are not the only factors that distinguish the two business markets. In the U.S., government-industry

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<sup>436</sup>*Id.*

<sup>437</sup>See Frisch, *supra* note 415, at 15.

relations are typically cast in terms of a *laissez faire* light. Relationships between European governments and private business, particularly in the defense trade, are, almost as a rule, "cozy."<sup>438</sup> Moreover, European governments place a premium on full employment and a stabilized work force.<sup>439</sup> Private business is seen as a source of employment, and European governments are

willing to give a business anything and everything that is necessary to make it flourish: tax incentives, protection, and the right to make decisions with a minimum of legislative constraints. In return for those incentives the governments expect private industry to carry a considerable amount of social burdens as a *quid pro quo*.<sup>440</sup>

As a final note, U.S. experience with some NATO governments (i.e., Federal Republic of Germany and Government of Luxembourg) has indicated that their armed forces regularly pay taxes (including value added taxes (VAT)) on goods and services. The countries involved have argued that, because the armed forces pay the taxes, under reciprocal pricing principles these taxes must be passed on to U.S. forces. The alternative is for the host nation country armed forces to assume responsibility for the taxes, which they, as a rule, are unwilling to do. The question then becomes whether the U.S. can and, in light of existing tax agreements, should pay them.

Most of the taxes at issue are of a revenue raising nature (i.e., VAT). As such, they are used to fund the operation of government and government sponsored programs. Traditionally, NATO countries do not pay taxes of a revenue raising nature between nations.<sup>441</sup> This principle forms the basis of most tax agreements.<sup>442</sup> The odds are therefore good that the tax treaty between the U.S. and the country in question would allow for the exclusion of the questioned taxes.

As stated earlier,<sup>443</sup> recent changes to the DOD implementing regulation appear to indicate a change in DOD's views on acceptance of reciprocal pricing without requiring a price analysis and independent determination of fairness and reasonableness as to price. It is, however, unclear what DOD's current policy is in this regard. This matter should be resolved in favor of requiring a price analysis for all ac-

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<sup>438</sup>*Id.* at 13.

<sup>439</sup>*See id.* at 27.

<sup>440</sup>*Id.*

<sup>441</sup>*See generally* DOD Dir. 5100.64.

<sup>442</sup>*See id.*

<sup>443</sup>*See supra* notes 284-86 and accompanying text.

quisitions of host nation support and for acquisitions of operational support above a certain dollar threshold. In this way, reciprocal pricing could still be used in a field environment for the acquisition and transfer of operational support.

## 2. Continuing Congressional Requirements

When Congress passed the NMSA, it included a number of safeguards and limitations designed to monitor DOD's usage of the Act. The NMSA includes a prohibition against increasing U.S. inventories to meet European demands on the supply system;<sup>444</sup> a limited definition of logistic support, supplies, and services;<sup>445</sup> a detailed annual reporting requirement to Congress; a provision making use of the NMSA subject to the availability of funds;<sup>446</sup> and a \$150 million limit or ceiling on the amount of reimbursable acquisitions that could be made in a fiscal year (\$25 million for supplies, excluding POL).<sup>447</sup> A review of the legislative history concerning the NMSA suggests that, of these limitations and safeguards, the annual reporting requirement and the \$150 million ceiling were designed "as a means of assisting the Congress in identifying activity taking place under the new statutory authority."<sup>448</sup> Arguably, as such, these safeguards were meant as temporary measures.

The legislative history also suggests that the ceiling amounts were designed as a means to limit NMSA transactions to support and services, as opposed to supplies.<sup>449</sup> Since imposition of these restrictions, some U.S. officials have thought them "unnecessary as a control mechanism" and "overly burdensome."<sup>450</sup> The original amount (\$100 million), although not arbitrary, was based upon information and projections in 1979 as to NMSA usage. At the time the ceiling was set, USAREUR officials anticipated a sufficient rate of NMSA usage to require a change in the ceiling amount by 1982.<sup>451</sup> Granted, primarily because of problems encountered in implementation of the Act, NMSA usage has not kept pace with these expectations. In 1988, however, Congress raised the ceiling to \$150 million.<sup>452</sup>

The fact is that the costs to DOD in terms of management and accounting efforts necessary to apportion and to account for these ceil-

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<sup>444</sup>10 U.S.C. § 2348 (Supp. V 1987).

<sup>445</sup>10 U.S.C. § 2350(1) (Supp. V 1987).

<sup>446</sup>10 U.S.C. § 2341, 2342 (Supp. V 1987).

<sup>447</sup>10 U.S.C. § 2347 (Supp. V 1987).

<sup>448</sup>K. Allen, *supra* note 107, at 15.

<sup>449</sup>See Record, *supra* note 38, at 34,367 (statement of Rep. Dickinson).

<sup>450</sup>See K. Allen, *supra* note 107, at 15.

<sup>451</sup>*Id.*

<sup>452</sup>Pub. L. 100-456, § 1001 (1988).

ing amounts far exceed their benefits in terms of a control mechanism. The annual reporting requirement to Congress, setting forth the details of each NMSA transaction, provides sufficient information to monitor NMSA use and also acts as a sufficient deterrent to prevent abuse of the authority.<sup>453</sup> Further, the existing planning, programming, and budget process provides additional controls over NMSA transactions.<sup>454</sup> The NMSA ceiling requirement should therefore be eliminated.

Part of the problem with the ceiling requirement is that it carries no funding and is therefore artificial in nature.<sup>455</sup> As an alternative to eliminating the ceiling requirement, Congress should give some careful consideration to providing special funding for NMSA transactions. Again, a specific line item appropriation with a five-year period of availability would go a long way toward resolving funding problems that continue to hamper U.S. efforts to obtain logistic support and to strain relations with our allies.

## V. CONCLUSION

Congress enacted the NMSA in direct response to the needs of U.S. forces for simplified procedures to facilitate the interchange of operational support in training and exercises with allied forces. Congress intended to resolve problems created by the use of commercial contracting methods in the acquisition of host nation support from our allies. Congress granted DOD cross-servicing authority to provide for a simplified system for the reciprocal provision of logistic support. It granted DOD acquisition only authority to provide a special authority to acquire host nation support without the need to use established, complex contracting procedures.

Since passage of the NMSA, DOD has failed to fully embrace these authorities. Implementation of the Act has been, and still remains, confusing and overly restrictive. As a result, the distinction between these authorities has been lost and the NMSA has been "wed" to the existing procurement system.

Several actions on the part of DOD are needed to correct these problems and to regain the initiatives that Congress provided. First, the DOD implementing regulation should be revised to clearly reflect the differences between operational and host nation support requirements and the corresponding distinction between the acquisition only

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<sup>453</sup>See Record, *supra* note 38, at 34,366 (statement of Rep. Daniel).

<sup>454</sup>See K. Allen, *supra* note 107, at 16.

<sup>455</sup>*Id.*

and cross-servicing authorities. Second, DOD should clearly indicate that U.S. personnel conducting NMSA transactions are not bound by FAR requirements. The FAR should be consulted only for guidance, particularly with regard to large dollar value acquisitions of host nation support. Similarly, DOD should clearly indicate that a warranted contracting officer is not required to execute reimbursable acquisitions under the NMSA. Third, all restrictions on the use of acquisition only authority should be removed and, in order to effect full implementation of that authority, an instructional manual should be published. Finally, DOD should provide clear authorization to the services to create simplified, flexible, and deployable systems for the acquisition and transfer of operational support under field conditions.

Apart from questions of policy, problems have been encountered by U.S. forces in the acquisition of host nation support that require legislative action for resolution. Simply stated, the U.S. policy of recovering full costs in Foreign Military Sales cases under the Arms Export Control Act has come full circle. Increasingly, our allies are insisting on long term commitments for host nation support requirements and for open-ended liability on the part of U.S. forces for all costs associated with performance of these services. If U.S. forces are to continue using the resources of allied countries for long term support, a specific line item appropriation with a five-year period of availability for acquisition of host nation support under NMSA authority is needed.



By Order of the Secretary of the Army:

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