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## ARTICLES



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**ARTICLES**

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# MINORITY BUSINESS ENTERPRISE DEVELOPMENT AND THE SMALL BUSINESS ADMINISTRATION'S 8(A) PROGRAM: PAST, PRESENT, AND (IS THERE A) FUTURE?

MAJOR THOMAS JEFFERSON HASTY, III*

## I. Introduction

> *Our Nation's economic growth and ability to compete in the international marketplace depends on the full participation of all members of our society. Minority businessmen and women have helped to expand our economy through innovation, hard work, and by taking advantage of the opportunities available in our free market systems. These entrepreneurs have become an indispensable force in our economy, and they will continue to play a key role in our efforts to expand America's share of world markets.*[1]

Contrary to this statement, compelling evidence exists that minority businesses are a severely underutilized national resource.[2] According to data compiled in the latest census conducted in 1987, minority businesses account for less than nine percent of the total of all United States firms.[3] In 1987, 1.2 million minority owned firms generated gross receipts of $77.84 billion, which represents an increase of $43.4 billion over the 1982-87 period.[4] However, all firms in the United States had gross receipts of $1.99 trillion; therefore,

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[1]President George Bush, Excerpt from Proclamation 6034, Oct. 2, 1989, quoted in United States Comm'n on Minority Business Dev., *Interim Report 1990 on Historically Underutilized Businesses*, at 2 (1990) [hereinafter *Interim Report—1990*].

[2]United States Comm'n on Minority Business Dev., *Final Report on Historically Underutilized Businesses*, at 2 (1992) [hereinafter *Final Report*].

[3]*Id.*

[4]*Id.*

minority firms were only permitted to "participate" in a mere 3.9% of the national total.[5]

It has long been the policy of the federal government to help small businesses owned by minorities become fully competitive and viable business concerns.[6] Congress has recognized that "in troubled economic times minority business has been traditionally that segment of the economy 'hit first, hit hardest, and hit longest.'"[7] The federal government implements a wide range of socioeconomic programs through the federal procurement process, and uses federal procurement agency dollars, specifically appropriated for goods and services, to support these programs.[8] Federal assistance comes in many forms and includes preferential treatment in obtaining procurement contracts and subcontracts, management and technical assistance, grants for education and training, loans and loan guarantees, and surety bonding assistance.[9]

These affirmative action programs include the use of minority business "set-asides" that have grown significantly for more than a decade.[10] Various types of set-asides exist which include, but are not limited to, agency specific set-aside programs and set-asides created by Congress that explicitly establish percentages of expenditures earmarked for minority businesses.[11] One of the programs with the greatest impact on the developmental efforts designed to increase small business participation in government contracts is the Small Business Administration's (SBA) 8(a) program.[12] This program provides preferential treatment in obtaining federal procurement contracts to "small disadvantaged businesses" enrolled in the program.

The opportunities created by set-asides, preferential procurement policies, and similar programs have induced better-educated, younger minority entrepreneurs to create and expand firms in the

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[5]*Id.*

[6]Mark Eddy, *Federal Programs for Minority and Women-Owned Businesses*, CONG. RES. SERV. REP. FOR CONGRESS, Rep. No. 90-312 GOV. 1 (1990).

[7]H.R. REP. No. 956, 97th Cong., 2d Sess. 1 (1982).

[8]General Accounting Office, *Proposals for Minimizing the Impact of the 8(a) Program on Defense Procurement*, REP. TO CONGRESS, GAO Rep. No. PLRD-83-4, at 1 (1982).

[9]Eddy, *supra* note 6, at 1. Literally hundreds of federal agency programs provide financial, technical, management, and contracting assistance to small and minority businesses. *See generally* U.S. DEP'T OF COMMERCE MINORITY BUSINESS DEV. AGENCY, MINORITY BUSINESS GUIDE TO FEDERAL AND STATE RESOURCES 1991 (1991) [hereinafter MINORITY BUSINESS GUIDE] (providing a comprehensive reference guide that describes federal and local program assistance available to minority businesses).

[10]Timothy Bates, *Impact of Preferential Procurement Policies on Minority-Owned Businesses*, 14 REV. BLACK POL. ECON. 51 (1985).

[11]*Id.* at 55-56.

[12]H.R. REP. No. 956, *supra* note 7, at 1.

skill-intensive and capital-intensive lines of business where the presence of minority-owned firms traditionally has been minimal.[13] However, minority-owned businesses lag behind their nonminority counterparts in several important respects.[14] In comparison to nonminorities, minority-owned businesses: (1) are less profitable as a group; (2) have an incidence of nonprofitability that is over four times greater than nonminorities; (3) are highly leveraged and thus vulnerable to delinquency on debt obligations, making actual failure more likely; and (4) are a younger group of firms.[15]

In an effort to combat this problem, Congress established the 8(a) program. The primary purposes of the 8(a) program, as mandated by Congress, are as follows: (1) to foster business ownership by individuals who are both socially and economically disadvantaged; (2) to promote the competitive viability of these businesses by providing contract, financial, technical, and management assistance; and (3) to expand the federal government's procurement program for products and services from small businesses owned by individuals who are both socially and economically disadvantaged.[16] The SBA administers the 8(a) program through its central office in Wash-

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[13]Bates, *supra* note 10, at 57.

[14]*Id.* at 61.

[15]*Id.*

[16]H.R. REP. NO. 956, *supra* note 7, at 3. This congressional mandate resulted from a thorough review of the 8(a) program conducted in the mid-1970s in which Congress found, with specific reference to the 8(a) program, the following:

> (A) That the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;
>
> (B) That many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;
>
> (C) That such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities;
>
> (D) That it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;
>
> (E) That such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
>
> (F) That such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and
>
> (G) That such procurements also benefit the United States by encouraging the expansion of suppliers for such procurement, thereby encouraging competition among such suppliers and promoting economy in such procurements.

*Id.*

ington D.C., with ten regional offices and more than sixty district offices.[17]

The 8(a) program has provided many benefits to minority entrepreneurs. For example, as a result of 8(a) program participation, many firms have been created that would not otherwise have had the resources to go into business.[18] Additionally, many firms have stayed in business because of 8(a) program support, while others have increased sales and income, resolved bonding problems, and improved credit capabilities.[19] However, almost from its inception, the 8(a) program has been plagued with major problems and controversy concerning its administration. These problems prompted the often-cited phrase that "the 8(a) program has done too much for too few for too long."[20]

Fiscal year (FY) 1992 marked the twenty-fourth year of the 8(a) program. Since 1968, 8(a) program participants have received over 79,000 contracts valued at over $39 billion.[21] During FY 1992, the 4509 firms participating in the 8(a) program received nearly $4.02 billion in contracts and modifications.[22] This represents an increase over the previous fiscal years. In FY 1991, there were 3922 firms in the 8(a) program.[23] These 8(a) contractors received 4386 new contracts and over 15,600 modifications to new and existing contracts, all of which totaled $3.77 billion.[24] In FY 1990, the 8(a) program awarded 3924 new contracts and over 14,300 modifications for a total of $3.83 billion.[25]

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[17]General Accounting Office, *Problems in Restructuring SBA's Minority Business Development Program*, REP. TO CONG. COMMITTEES, GAO Rep. No. RCED-92-68, at 18 (1992) [hereinafter *Problems in Restructuring*].

[18]John F. Magnotti, Jr., *The Small Business Administration's 8(a) Program, Part Two—The 8(a) Program*, 25 CONT. MGMT. 10 (1985) [hereinafter Magnotti II].

[19]*Id.*

[20]General Accounting Office, *The SBA 8(a) Procurement Program—A Promise Unfulfilled*, REP. TO CONGRESS, GAO Rep. No. CED-81-55, at 6 (1981) [hereinafter *Promise Unfulfilled*].

[21]Small Business Administration, *Minority Small Business and Capital Ownership Development Fiscal Year 1992*, REP. TO U.S. CONGRESS, at 1 (1993) [hereinafter *SBA Fiscal Year 1992 Report*].

[22]*Id.* As of May 1993, 4483 firms were active in the 8(a) program. General Accounting Office, *Problems Continue with SBA's Minority Business Development Program*, REP. TO CHAIRMAN, COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES, GAO Rep. No. RCED-93-145, at 2 (1993) [hereinafter *Problems Continue*].

[23]*Problems in Restructuring*, *supra* note 17, at 19. *See also* Judith A. Watts, Associate Administrator for Minority Small Business and Capital Ownership Development of the United States Small Business Administration, Statement before the United States House Committee on Small Business 5 (Sept. 24, 1992) (stating that there were currently about 4200 certified 8(a) companies).

[24]*Problems in Restructuring*, *supra* note 17, at 19.

[25]*Id.*

In 1988, Congress enacted the Business Opportunity Development Reform Act of 1988 (BODRA),[26] which represented the first major revision of the 8(a) program in ten years.[27] Congress enacted BODRA because, over the years, the 8(a) program had been unable to achieve its goal of developing disadvantaged firms into viable businesses.[28] This legislation made significant changes in the 8(a) program to improve its organization and participation standards, business development activities, and overall management.[29]

In January 1992, the General Accounting Office (GAO) issued a report that contained findings indicating that the SBA had difficulty implementing many of the changes mandated by the BODRA.[30] Moreover, the GAO found that a lack of reliable data on many program activities hindered the SBA's ability to effectively manage the 8(a) program in a manner consistent with the BODRA's requirements.[31]

The BODRA also established the Commission on Minority Business Development (CMBD or Commission).[32] Congress created the Commission to assess the operations of all federal programs (including the 8(a) program) designed to promote and foster the development of minority owned businesses to ascertain "whether the purposes and objectives of such program[s] are being realized."[33] At the end of its tenure, the CMBD issued a final report[34] to the Congress and the President that contained detailed findings, conclusions, and recommendations for statutory or regulatory changes necessary to further the growth and development of minority businesses.[35]

The CMBD's final report included several significant proposals for promoting national economic development through stimulating minority business programs. One of these proposals concerned the SBA's administration of the 8(a) program. The Commission concluded that the SBA had failed to fully utilize its authority to provide

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[26]Pub. L. No. 100-656, 102 Stat. 3881 (1988) [hereinafter BODRA].

[27]*Problems in Restructuring*, *supra* note 17, at 18.

[28]*Id.* at 3.

[29]*Id.* at 20.

[30]*Id.* at 10.

[31]*Id.*

[32]BODRA, *supra* note 26, § 505(a).

[33]*Id.* § 505(b)(1)(A).

[34]*See Final Report*, *supra* note 2. The Commission was required to issue an interim report by December 31, 1990 and a final report within one year of the interim report. BODRA, *supra* note 26, § 505(b)(2)(A), (B), (C).

[35]BODRA, *supra* note 26, § 505(b)(2)(C). The Commission's proposed findings and conclusions represented the culmination of activities that covered 42 states and 100 cities, including 18 hearings and town meetings and testimony from more than 500 witnesses. *Final Report*, *supra* note 2, at xii.

meaningful business development assistance to firms enrolled in the 8(a) program.[36] As such, the Commission recommended removing most of the SBA's authority under the Small Business Act regarding the 8(a) program and vesting it in a new statutorily created administration within the Department of Commerce.[37] The development of "Historically Underutilized Businesses" (HUB)[38] would be the sole mission of this new administration.[39]

This recommendation, if followed, would have a significant impact on the SBA, an organization that has been in existence since 1953 and has about 4000 employees and more than 100 offices throughout the United States.[40] The SBA has defended its minority business development efforts.[41] As a result of the Commission's recommendations and findings, the SBA has proposed broad, far-reaching initiatives aimed at deregulating and redefining the 8(a) program.[42] The SBA argues that the concepts represented in its proposals reflect the basic philosophy underlying the Commission's recommendations, and if adopted, these proposals would make the 8(a) program more effective, efficient, and responsive to the needs of minority businesses.[43]

This article examines minority business enterprise assistance, focusing on the SBA's 8(a) program. It explores the history and development of minority business enterprise assistance, and discusses the legal challenges to minority business set-asides in light of recent judicial decisions. The article addresses problems confronting the SBA in its administration of the 8(a) program, and evaluates whether the 8(a) program actually accomplishes its stated goals. Finally, the article proposes recommendations concerning the future of 8(a) program assistance.

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[36]*Final Report*, *supra* note 2, at 50.

[37]*Id.* at 108. *See also* Michelle Singletary, *SBA's Help To Minority Firms Hit; Panel Wants Programs Shifted to Commerce*, WASH. POST, June 16, 1992, at C1.

[38]The Commission recommended the use of Historically Underutilized Business (HUB) in lieu of "socially and economically disadvantaged small business concern" based on its belief that the continued use of the latter term is inappropriate because it stresses the status of discrimination rather than the effects of discrimination on the nation's economic system. *Final Report*, *supra* note 2, at 7. This article will use the term "HUB" only when discussing the recommendations and findings of the CMBD. Otherwise, it will use "socially and economically disadvantaged small business."

[39]*Id.* at 108.

[40]MINORITY BUSINESS GUIDE, *supra* note 9, at 7.

[41]*See* Michelle Singletary, *SBA Defends Its Program to Aid Minority Businesses*, WASH. POST, June 17, 1992, at F3.

[42]Watts, *supra* note 23, at 11.

[43]*Id.*

## II. Small Business Set-Asides: The Early Years

Before evaluating the current minority business environment, it is important to understand the broader historical context from which the concept underlying minority business enterprise programs and the 8(a) program developed. Today's policies, regulations, and programs that impact on small and minority businesses "are the result of an evolution of efforts initiated by the government to assist in creating economic wealth in a semi-protected marketplace."[44] Although the 8(a) program assists small businesses owned and controlled by socially and economically disadvantaged individuals or groups, the concept behind this program evolved from the government's efforts to assist *all* small businesses without regard to the business' ownership. This section examines these origins in an effort to place the 8(a) program in its proper historical context.

### *A. Smaller War Plants Corporation*

The concept behind the 8(a) program has roots dating back to World War II. As a result of the stock market crash of 1929, the government, during the period preceding World War II, was attempting to restore confidence in the United States financial and business system by creating laws and agencies aimed at protecting investors.[45] The stock market crash created the need to restructure the United States banking and financial systems, and began what some called "a new era in America where the positive aspects of risk, enterprise, and individuality gave way to security, safety, and bureaucracy."[46]

When the United States entered World War II, substantial business opportunities arose for companies that could provide goods and services to the government. Based on a need "to mobilize the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes,"[47] Congress created the Smaller War Plants Corporation (SWPC). Congress authorized the SWPC to enter into contracts with the federal government[48] and subcontract the performance of these contracts to small business concerns or others.[49] The law specified that if the SWPC was certi-

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[44] *Interim Report*—1990, *supra* note 1, at 7.

[45] *Id.* at 7. The government created these laws and regulations to underwrite an individual's savings. They offer protection of investments made by unsophisticated investors and financial support for both large and small businesses. *Id.*

[46] *Id.*

[47] Act of June 11, 1942, Pub. L. No. 603, 56 Stat. 351.

[48] *Id.* § 4(f)(4).

[49] *Id.* § 4(f)(5). The subcontracting powers of the SWPC were limited only by the regulations prescribed under the First War Powers Act of 1941, which contained no

fied as competent to perform any specific government contract, then the SWPC had the right to receive the contract coupled with extensive subcontracting authority.[50] Some congressmen viewed this power to subcontract with small business concerns as "notice to the procuring agencies to award small business a fair proportion of the prime contracts."[51]

Although Congress's intent for the SWPC was to have it assist small businesses in obtaining contracts during World War II, the SWPC actually entered into very few contracts.[52] Additionally, inequities in the distribution of contracts during the early years of the war resulted in a situation where even though 100 large corporations had received sixty-seven percent of all prime contracts, over one-sixth of the nation's small businesses were forced to go out of business.[53] Congress did not want this mistake to occur again.

*B. Small Defense Plants Administration*

In 1951, the Korean War created substantial business opportunities for those companies that could assist the government in rapidly mobilizing the nation's resources. As a result of the problems identified during World War II, Congress recognized that the "mobilization program had to extend down into the small plants," which were regarded as a major source of productive strength.[54] To ensure that small businesses would receive a fair proportion of federal prime contracts, Congress created the Small Defense Plants Administration (SDPA).[55] Congress gave the SDPA the same power to subcontract that it had given to the SWPC during World War II.[56]

The statutory language authorized procurement officers to

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restrictions as to the method of contracting. *Id.* Therefore, advertising, competitive bidding, and bonds or other forms of security were not required for the subcontracts. Exec. Order No. 9001, 3 C.F.R. § 1054 (Supp. 1941).

[50]John F. Magnotti, Jr., *The Small Business Administration's 8(a) Program, Part One—A Legislative History*, 25 CONT. MGMT. 12, 13 (1985) [hereinafter Magnotti I].

[51]97 CONG. REC. 412 (1951) (remarks by Rep. Patman).

[52]Only 260 contracts were let by the SWPC pursuant to its authority under the statute. *Id.*

[53]Gary L. Hopkins, *Contracting with the Disadvantaged, Sec. 8(a) and the Small Business Administration*, 7 PUB. CONT. L.J. 169, 171-72 (1975).

[54]H.R. REP. No. 639, 82d Cong., 1st Sess. 31 (1951).

[55]Act of July 31, 1951, Pub. L. No. 96, 65 Stat. 131 [hereinafter Act of July 31, 1951].

[56]*Id.* § 714(b)(1). Just as with the SWPC, the power of the SDPA was limited only by regulations prescribed under the First War Powers Act of 1941, *as amended*, which placed no limits on the method of contracting. As such, advertising, competition, and bonds of any type were not required. Exec. Order No. 10,210, 3 C.F.R. §§ 390, 391 (1951).

contract with the SDPA when the SDPA certified that it was competent to perform the specific government contract.[57] Although this language appeared to give procurement officers discretion to contract with the SDPA, Congress's intent in passing the legislation was to leave no discretion with the procuring agency to refuse to contract with the SDPA once certification was complete.[58] However, despite this broad contracting authority, the SDPA made little use of its powers.[59]

*C. Small Business Administration*

Following the Korean War, Congress sought to create an agency to replace the SDPA that "would be given powers and duties to encourage . . . small business enterprises in peacetime as well as in any future war or mobilization period."[60] Accordingly, pursuant to the Small Business Act of 1953,[61] Congress created the Small Business Administration (SBA) on July 30, 1953, as the first independent agency of the federal government established in peacetime solely to advise and assist the nation's small business concerns.[62] Again, as with both the SWPC and SDPA, Congress granted the SBA the authority to enter into contracts with other government agencies and arrange for the performance of these contracts through subcontracts to small business concerns.[63] However, the SBA's powers were not as broad as those Congress granted to the SWPC and the SDPA.

Whereas both the SWPC and the SDPA had authority to "contract without regard to any other provision of law," Congress did not include this provision in the language creating the SBA.[64] Two possible explanations have been given for the deletion of this language. First, because Congress created the SBA to function during peacetime, it wanted to ensure that the SBA functioned with due regard to other laws and regulations governing federal contracts.[65] Second, if Congress had included this provision, the SBA's contracting

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[57]Act of July 31, 1951, *supra* note 55, § 714(b)(2).

[58]The House Report discussing the act that created the SDPA indicated that the authority of the SDPA to certify qualified small businesses for prime contracts was conclusive and that, if refused by the procuring government agency, the SDPA was "empowered to take prime contracts and subdivide them among small manufacturers." *See* H.R. REP. No. 639, *supra* note 54, at 31.

[59]H.R. REP. No. 494, 83d Cong., 1st Sess. 8 (1953).

[60]*Id.* at 2.

[61]Pub. L. No. 83-163, Title II, 67 Stat. 232 (1953).

[62]H.R. REP. No. 956, *supra* note 7, at 2.

[63]*Id.* § 207(c), (d).

[64]Hopkins, *supra* note 53, at 173.

[65]*Id.* at 174.

powers would be limited only by the regulations prescribed under the War Powers Act of 1941—which became extremely limited after the end of the Korean War. In deleting this language, Congress prevented the SBA from "becoming a virtual law unto itself for the purpose of contracting."[66]

When first established, the SBA functioned as a temporary administration.[67] It was not until the Small Business Act of 1958,[68] which amended the Small Business Act of 1953, that the SBA became a permanent independent agency with traditional contracting authority. The SBA's stated purpose at that time was to accomplish the following:

> [A]id, counsel, assist, and protect, insofar as possible, the interests of small business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts for property and services for the Government (including but not limited to contracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.[69]

*D. Assistance to Disadvantaged Small Businesses*

The Small Business Act of 1958 (1958 SBA) provided the statutory basis for the use of set-aside programs authorizing preferential treatment in the award of government contracts to small businesses.[70] Specifically, section 8(a) of the 1958 SBA became the vehicle for providing subcontracts to small and minority businesses, even though its provisions initially were targeted to *all* small firms.[71] At that time, section 8(a) authorized the SBA:

> (1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement power obligating the Administration to furnish articles, equipment, supplies, or materials to the Government;
>
> (2) to arrange for the performance of such contracts by

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[66] *Id.*

[67] Congress initially created the SBA subject to a two-year "sunset provision." Pub. L. No. 85-536, 72 Stat. 384 (1958).

[68] 15 U.S.C. §§ 631-647 (originally enacted as Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384) [hereinafter Act of 1958].

[69] *Id.* § 631(c).

[70] H.R. REP. No. 956, *supra* note 7, at 2.

[71] *Id.*

> negotiating or otherwise letting subcontracts to small business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof . . . .[72]

However, because the SBA believed that the efforts to start and operate an 8(a) program would not be worthwhile in terms of developing small business, the SBA's power to contract with other government agencies essentially went unused.[73] The program actually lay dormant for about fifteen years until the racial atmosphere of the 1960s provided the impetus to wrestle the SBA's 8(a) authority from its dormant state.[74]

The racial turbulence of the 1960s brought about increased social consciousness and directed attention to labor surplus areas and to small business concerns owned by economically disadvantaged individuals.[75] At the same time, government investigation of civil disorder in the nation's inner cities revealed that in the area of government assistance to small business, generally two societies existed—"one Black and one White . . . separate and unequal."[76] As a result, pressure increased in Congress to use the authority granted under the 1958 SBA which empowered the SBA to contract with other government agencies and subcontract to small businesses[77] while encouraging business ownership by minorities.[78] The earliest statutory basis for federal aid to economically disadvantaged entrepreneurs appeared in the 1967 amendments to the Economic Opportunity Act of 1964,[79] which, in part, directed the Small Business Administration to assist small businesses owned by low-income individuals.

*1. President's Test Cities Program*—Following the 1967 civil disturbances, President Lyndon B. Johnson initiated the President's Test Cities Program (PTCP) where for the first time the SBA used its 8(a) authority to direct federal procurement contracts to small business concerns.[80] In announcing this program on October 2, 1967, President Johnson stated:

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[72]Act of 1958, *supra* note 68, § 8(a)(1), (2). Together, these two subsections form the basis for the 8(a) program currently being administered by the SBA.

[73]Magnotti I, *supra* note 50, at 13.

[74]General Accounting Office, *Questionable Effectiveness of the 8(a) Procurement Program*, REP. TO CONGRESS, Rep. No. GGD-75-57, 1 (1975) [hereinafter *Questionable Effectiveness*].

[75]Magnotti I, *supra* note 50, at 13.

[76]H.R. REP. No. 956, *supra* note 7, at 2.

[77]Magnotti I, *supra* note 50, at 13.

[78]H.R. REP. No. 956, *supra* note 7, at 2.

[79]Pub. L. No. 90-222, § 106(a), 81 Stat. 672 (1967) (repealed 1974).

[80]*Questionable Effectiveness*, *supra* note 74, at 1.

> We are launching today a major test program to mobilize the resources of private industry and the Federal Government to help find jobs and provide training for thousands of America's hard core unemployed. To initiate this effort, the resources of the Departments of Commerce, Defense, Labor, Health, Education and Welfare, and Housing and Urban Development; the Office of Economic Opportunity, the General Services Administration, and the Small Business Administration, will be combined to provide maximum assistance and to minimize the added cost of those in private industry willing to assume responsibility for providing training and work opportunities for the seriously disadvantaged . . .[81]

The PTCP initially fell under the jurisdiction of the Departments of Commerce and Labor and relied primarily on the Department of Labor to provide training grants to companies hiring and training the unemployed.[82] However, very few companies took advantage of the program, and in an effort to increase the number of businesses participating in the government's endeavor to increase job opportunities in the inner cities, the Johnson Administration turned to the SBA for assistance.[83]

*2. Development of the SBA's 8(a) Authority*—The SBA utilized its 8(a) authority to obtain contracts from federal agencies and subcontract them on a noncompetitive basis to firms agreeing to locate in or near ghetto areas and provide jobs for the unemployed and underemployed.[84] The 8(a) contracts awarded under the program were not restricted to minority-owned firms and were offered to all small firms willing to hire and train the unemployed and underemployed in five metropolitan areas, as long as the firms met the program's other criteria.[85]

The Johnson Administration's efforts were unsuccessful and did not result in the desired plant relocations, hiring, and training.[86]

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[81] *Id.* The decision to develop this program arose out of the September 1967 recommendations of the Southern Governors Conference which concluded that "improved education and better jobs in inner cities were of paramount importance in meeting the needs of Black Americans reaching for social equality." *Id.*

[82] *Id.*

[83] Oscar E. Scott, *The Small Business Administration's 8(a) Program: Its Background, Status, and Future Under the Reagan Administration*, CONG. RES. SERV. REP. No. 83-193E, at 4 (1983).

[84] *Questionable Effectiveness*, *supra* note 74, at 2. Additionally, the Department of Labor issued these firms training grants. *Id.*

[85] *Id. See also* Scott, *supra* note 83, at 4.

[86] *Minority Contracting: Joint Hearing Before the Senate Comm. on Small Business and the House Subcomm. on Minority Enterprise and General Oversight of*

The SBA began to recognize that the solution to the problems of the hard-core unemployed involved more than the creation of jobs;[87] for minority and low-income persons to become part of America's economic mainstream, these individuals would have to be offered business ownership opportunities.[88] Consequently, in the spring of 1968, the Johnson Administration phased out the PTCP.[89] With the elimination of the PTCP, the SBA was left without a clear mandate or purpose for exercising its 8(a) authority, even though a precedent of using the authority to address socioeconomic problems had been set.[90]

These events coincided with the presidential campaign and election of 1968, when "Black Capitalism" was emphasized and encouraged.[91] In March 1969, in an effort to foster "Black Capitalism," newly elected President Richard M. Nixon established a national program for minority business when he signed an executive order[92] creating the Office of Minority Business Enterprise (OMBE) in the Department of Commerce. A second executive order,[93] issued in 1970, called for increased representation of the interests of small business concerns, particularly minority business enterprises (MBEs), within federal departments and agencies.[94]

A subsequent executive order,[95] signed in October 1971, further enhanced the scope of the OMBE in developing programs to encourage subcontracting by federal contractors with firms owned or controlled by socially or economically disadvantaged persons.[96]

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*the Comm. on Small Business*, 95th Cong., 2d Sess. 37 (1978) [hereinafter *Minority Contracting*] (report from the SBA's 8(a) Review Board).

[87] *Questionable Effectiveness*, *supra* note 74, at 2.

[88] *Id.*

[89] *Minority Contracting*, *supra* note 86, at 14. The effort to train and employ the unemployed and underemployed in these areas continued under the auspices of the National Alliance of Businessmen (NAB), through the Job Opportunities in the Business Sector (JOBS) Program. As such, a determination was made at that time to handle the employment problem through existing companies participating in the NAB. *Id.*

[90] *Id.*

[91] *Id.*

[92] Exec. Order No. 11,458, 3 C.F.R. § 779 (1969).

[93] Exec. Order No. 11,518, 3 C.F.R. § 907 (1971), *reprinted in* 15 U.S.C. § 639 (1976).

[94] Daniel R. Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61, 65 (1980).

[95] *See* Exec. Order No. 11,625, 3 C.F.R. § 616 (1971), *reprinted in* 15 U.S.C. § 631 (1976) which superseded Exec. Order No. 11,458, *supra* note 92. The OMBE eventually became the Minority Business Development Agency (MBDA).

[96] Socially or economically disadvantaged persons included, but were not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts. Exec. Order No. 11,625, *supra* note 95.

This order authorized the OMBE to provide financial assistance to public and private organizations that provided management and technical assistance to MBEs.[97] Additionally, the order empowered the Secretary of Commerce to coordinate and review all federal activities to assist in minority business development.[98]

With these executive orders, the President specifically directed the executive branch to promote MBEs.[99] Many individuals in government and industry looked to SBA's 8(a) authority as a vehicle to assist and support this movement.[100]

Beginning in 1969, prior to the first of the Nixon MBE-related executive orders, the SBA changed the 8(a) program emphasis from simply hiring the unemployed in ghetto areas to developing successful firms owned by disadvantaged persons.[101] Motivated by the guidance provided in the executive orders, the SBA devoted its 8(a) program resources to the placement of the maximum number of contracts with minority-owned small business concerns that could be enrolled in the program.[102] The SBA's 1970 implementing regulations[103] described the intended use of the 8(a) authority by providing that "[i]t is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place."[104] The SBA hoped that these firms would be a more permanent source of employment opportunities in impoverished areas.[105]

The SBA's administrative decision to turn its 8(a) authority into a minority business program acquired its statutory basis in 1978 with the passage of Public Law 95-507, which broadened the range of assistance that the government—and in particular the SBA—could provide to minority businesses.[106] One of the most comprehensive

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[97]Levinson, *supra* note 94, at 65.

[98]Exec. Order No. 11,625, *supra* note 95. In recognizing the importance of assisting minority businesses, the President stated:

> The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our national economy.

*Id.*

[99]Hopkins, *supra* note 53, at 180.

[100]*Minority Contracting*, *supra* note 86, at 14.

[101]*Questionable Effectiveness*, *supra* note 74, at 2.

[102]*Minority Contracting*, *supra* note 86, at 15.

[103]*See* 3 C.F.R. § 124.8–1(6) (1970).

[104]*Id.*

[105]Scott, *supra* note 83, at 4.

[106]*See* Act of Oct. 24, 1978, Pub. L. No. 95-507, 92 Stat. 1761 (1978) [hereinafter Act of Oct. 24, 1978].

statutes ever enacted dealing with minority business development,[107] this law was hailed as "landmark legislation to increase the small and minority share of the federal procurement dollar."[108]

As a result of Public Law 95-507, all federal agencies with procurement powers are required to establish annual percentage goals for the awarding of procurement contracts and subcontracts to small disadvantaged businesses (SDBs).[109] These federal agencies have Offices of Small and Disadvantaged Business Utilization (SADBU) that are responsible for carrying out the agencies' SDB responsibilities and for coordinating their programs with the SBA. However, this bill and subsequent legislation have not met the expectations surrounding them.[110]

## III. Challenges to Set-Aside Programs

Minority business set-aside programs have their roots in long-standing government policies designed to strengthen the viability of small businesses.[111] The 8(a) program is one of many programs that employ the procurement power to foster MBE.[112] Literally hundreds of federal and state agency programs provide financial, marketing, management, and technical assistance to promote the economic growth of small and minority businesses.[113] These minority preference programs, which direct public contracting dollars to minority contractors, have become the principal tools with which federal, state, and local governments have attempted to redress the effects of past discrimination.[114] Additionally, these programs were developed to ensure that professional opportunities were genuinely and equally accessible to all qualified persons without regard to race and/or national origin.[115] However, these set-aside programs, sometimes referred to as affirmative action programs, have been extremely controversial because they necessarily place burdens on individuals as a result of their nonminority racial status.

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[107]H.R. REP. NO. 956, *supra* note 7, at 3.

[108]Magnotti I, *supra* note 50, at 13.

[109]Eddy, *supra* note 6, at 5.

[110]*Id.* (discussed in greater detail *infra*).

[111]Bates, *supra* note 10, at 53.

[112]A comprehensive list of the numerous small business preferential programs can be found in Levinson, *supra* note 94, at 61 n.1.

[113]*See generally* MINORITY BUSINESS GUIDE, *supra* note 9.

[114]David P. Stoelting, Note, *Minority Business Set-Asides Must Be Supported By Specific Evidence of Prior Discrimination: City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989)*, 58 U. CIN. L. REV. 1097, 1126 (1990).

[115]General Building Contractors Ass'n, Inc. v. City of Philadelphia, 762 F. Supp. 1195, 1206 (E.D. Pa. 1991).

Since 1978, the United States Supreme Court has been confronted with issues concerning the appropriateness and constitutional validity of affirmative action plans.[116] However, recent Supreme Court decisions appear to treat minority preference programs administered by the federal government inconsistently, as opposed to those implemented by state and local governments. These Supreme Court decisions have sent mixed signals concerning the judicial branch's understanding of these minority business programs.[117] This section examines the recent Supreme Court and federal court decisions concerning minority business set-aside programs and evaluates their impact on future programs aimed at assisting minority owned businesses.

### *A. The Case of* City of Richmond v. J.A. Croson Co.

> Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause.[118]

With this pronouncement, the Supreme Court essentially abolished most minority preference business programs for public contracting at the state and local levels that were in effect at the time of the decision.[119] In *City of Richmond v. J.A. Croson Co.*,[120] the Supreme Court struck down a Richmond, Virginia ordinance enacted to set aside for qualified MBEs thirty percent of the dollar value of public contracts.[121] The Supreme Court granted certiorari to reconsider the constitutionality of minority business set-aside programs.[122] As a result of the Supreme Court's ruling in *Croson*, some lower courts have used the decision when considering the validity of

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[116]*See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, (1987) (upheld, under Title VII, a county agency's voluntary affirmative action plan for hiring and promoting minorities and women); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (struck down an affirmative action layoff plan under the Equal Protection Clause of the Fourteenth Amendment); United Steelworkers v. Weber, 443 U.S. 192 (1979) (upheld, under Title VII, the validity of a private employer's voluntary affirmative action plan giving a preference to minority employees in admission to training programs); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (upheld the constitutionality of certain "affirmative action" plans designed to remedy the effects of racial discrimination in university admissions).

[117]*Interim Report—1990, supra* note 1, at 9.

[118]City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989).

[119]Wayne L. Friesner, City of Richmond v. J.A. Croson Co. *Now That We Have It, What Do We Do With It? The Public Agency Perspective*, in MINORITY AND WOMEN BUSINESS PROGRAMS REVISITED: PUBLIC CONTRACTING IN THE 1990s, tab I, 1 (1990).

[120]*Croson*, 488 U.S. at 469.

[121]*Id.* at 511.

[122]*Id.* at 472.

state and local set-aside programs that place minority businesses in peril.[123]

*1. Facts*—The ordinance in *Croson*, entitled the Minority Business Utilization Plan, was designed to increase minority participation in public construction contracts.[124] The ordinance required prime contractors who had been awarded construction contracts by the City of Richmond to subcontract at least thirty percent of the contracts' value to qualified MBEs.[125] The ordinance provided for waivers in "exceptional circumstances" if no suitable MBEs were available.[126] The stated purposes of the ordinance were to remedy prior discrimination in the Richmond construction industry and to encourage increased minority participation in city construction contracts.[127]

The plaintiff, J.A. Croson Company (Croson), a plumbing and heating contractor, submitted a bid for a contract to refurbish a Richmond city jail.[128] Croson was a non-MBE contractor; therefore, in an effort to meet the thirty percent requirement, Croson attempted to contact several MBE subcontractors to perform the plumbing fixtures portion of the contract.[129] On the bid opening date, Croson was the project's sole bidder;[130] however, at that time, Croson had not located a suitable MBE subcontractor.[131] As such, Croson submitted a waiver request form that described the MBEs it had contacted as either "unqualified," "nonresponsive," or "unable to quote."[132]

The city denied the waiver request because a local MBE, Continental Hose, was available to supply the fixtures.[133] After examining

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[125] *Interim Report—1990*, *supra* note 1, at 9. See also Stoelting, *supra* note 114, at 1127 n.219 (expressing fears of minority businesses that their government contracting work may disappear under *Croson* standards).

[124] *Croson*, 488 U.S. at 478.

[126] *Id.* at 477. The ordinance defined a qualified MBE as "[a] business at least fifty-one percent of which is owned and controlled . . . by minority group members." *Id.* at 478. Additionally, the ordinance defined "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.*

[126] *Id.* at 478.

[127] *Id.*

[128] *Id.* at 481.

[129] *Id.* at 482. The plumbing portion of the contract comprised 75% of the total contract price. *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 483–84. The ordinance stated that:

> To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant,

Continental's price quote, Croson determined that it could not economically perform the contract employing Continental as the MBE subcontractor.[134] Croson again applied for a waiver and, in the alternative, requested an increase in its contract price.[135]

The city denied both the waiver and the price increase and, instead, elected to rebid the contract.[136] Croson brought suit against the city under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia (Eastern Virginia District Court), alleging that the Richmond ordinance was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[137]

The Eastern Virginia District Court[138] upheld the ordinance in all respects, and the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) affirmed,[139] applying a test derived from the Supreme Court's decision announced in *Fullilove v. Klutznick*,[140] which gave great deference to Congress's findings of past societal discrimination in upholding a federal minority set-aside program. Croson's petition for certiorari resulted in the Supreme Court vacating and remanding the case for further consideration[141] in light of the Court's intervening decision in *Wygant v. Jackson Board of Education*.[142] On remand, the Fourth Circuit held that the Plan violated the Equal Protection Clause of the Fourteenth Amendment.[143] The City of Richmond appealed and the Supreme Court affirmed.[144]

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qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE goal.

J.A. Croson Co. v. Richmond, 779 F.2d 181, 197 (4th Cir. 1985) (quoting Richmond's Contract Clauses, Minority Business Utilization Plan (Contract Clauses), ¶ D).

[134] *Croson*, 488 U.S. at 483. Croson maintained that it could not perform the contract with Continental as an MBE subcontractor because (1) Continental was an unauthorized supplier of the fixtures required under the contract; (2) Continental's bid was still subject to credit approval; and (3) Continental's bid was higher than other quotations Croson had received. Continental's bid was actually $6,183.29 higher than the next highest bid. *Id.* at 482.

[135] *Id.* at 483.

[136] *Id.*

[137] *Id.*

[138] J.A. Croson Co. v. Richmond, 779 F.2d 181, 182 (4th Cir. 1985) (citing the Eastern Virginia District Court's decision).

[139] *Id.* at 194.

[140] 448 U.S. 448 (1980) (discussed *infra*).

[141] J.A. Croson Co. v. Richmond, 478 U.S. 1016 (1986).

[142] 476 U.S. 267 (1986) (strict scrutiny standard applied in holding that a race-based layoff program agreed to by a school board and the local teacher's union violated the Fourteenth Amendment's Equal Protection Clause).

[143] J.A. Croson Co. v. Richmond, 822 F.2d 1355 (4th Cir. 1987).

[144] *Croson*, 488 U.S. at 511.

*2. Analysis*—The Supreme Court, in affirming the appellate court's decision, examined the scope of Richmond's power to adopt legislation designed to correct past discrimination. Relying on the Supreme Court's decision in *Wygant*, Croson argued that Richmond was required to limit its race-based remedial efforts to eradicating the effects of its own prior discrimination.[145] Richmond maintained, however, that the Supreme Court was bound by its decision in *Fullilove*, asserting that Richmond had the power to define and attack the effects of prior discrimination in Richmond's construction trade.[146] In a plurality decision,[147] the Supreme Court rejected both of these arguments while affirming the Fourth Circuit's decision, invalidating the Richmond ordinance.

The Court concluded that the Richmond ordinance had to be reviewed under the "strict scrutiny" test.[148] To be declared valid under this standard, racial classifications must serve a "compelling interest" and be "narrowly tailored" to serve that interest.[149] The Court noted that any classification based on race must meet the rigid test of strict scrutiny because often it is quite difficult to determine what classifications are "benign" or "remedial" and what classifications are inspired by illegitimate motivations.[150] Toward that end, the Court stated:

> Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[151]

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[145] *Id.* at 486.

[146] *Id.*

[147] Justice O'Connor wrote for the Court in *Croson*, and although her opinion is a majority opinion in some portions, and a plurality in others, her opinion represents the minimum stringency of review to be applied in *Croson*-type cases, because hers is the narrowest of the opinions expressed by the majority of the concurring Justices. *See* Patrick J. Borchers, Croson: *A Look Forward, A Look Back*, in MINORITY AND WOMEN BUSINESS PROGRAMS REVISITED: PUBLIC CONTRACTING IN THE 1990s, tab C, 3 (1990). Lower federal courts analyzing decisions of a fragmented Supreme Court are bound by the holding which represents "'that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15). As such, lower courts generally will follow Justice O'Connor's decision when speaking for a plurality of the Court.

[148] *Croson*, 488 U.S. at 493.

[149] *Id.* at 505–07.

[150] *Id.* at 493.

[151] *Id.*

*a. Compelling Interest*—The Court determined that an ordinance would serve a compelling interest of addressing past discrimination only if the entity enacting the ordinance had established a factual predicate by demonstrating either that the entity itself discriminated in awarding public contracts in the past, or that discrimination in the specific industry had prevented MBE subcontractors from competing meaningfully.[152] The Court further established that even if the entity enacting the ordinance made the requisite findings, the "narrow tailoring" requirement compels the entity to consider "race-neutral" programs, and forbids unnecessarily "rigid" measures.[153]

In defending its ordinance, Richmond argued:

> (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.[154]

After reviewing these justifications for the Richmond ordinance, the Supreme Court held that the city had failed to demonstrate a compelling state interest in awarding contracts on the basis of race.[155] The Court stated:

> None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry.[156]

In addressing the "remedial" nature of the ordinance, the Court stated that the "mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight," and "simple legislative assurances of good intention cannot suffice."[157] The Court also concluded that Richmond's "generalized

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[152] *Id.* at 492.

[153] *Id.* at 507-08.

[154] *Id.* at 499.

[155] *Id.* at 505.

[156] *Id.* at 500 (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 274-75, 277 (1986) (citation omitted).

[157] *Id.*

assertions'' of race discrimination in the Richmond construction industry were inadequate to justify employing suspect classifications in awarding public contracts.[158] Additionally, mere statistical disparity between the minority population and the MBE participation in city contracts was found insufficient to validate the Richmond ordinance.[159] Similarly, evidence of low MBE membership in local contractors' associations was not probative of any discrimination in the local construction industry.[160] Finally, Richmond could not rely on congressional findings of national discrimination as a basis for its authority to address discrimination within the Richmond market area.[161] Thus, the Court determined that the Richmond ordinance lacked the factual predicate necessary to establish a compelling interest.

*b. Narrowly Tailored*—Although the ordinance failed the test of compelling state interest, the Supreme Court still analyzed whether Richmond had narrowly tailored the ordinance to remedy past discrimination. The Court limited its analysis to only two areas because it determined that ''it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.''[162]

First, the Court found that the Richmond City Council apparently did not give any consideration to the use of race-neutral means to increase minority business participation in city contracting.[163] The plurality noted:

> Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial

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[158] *Id.* at 500–01.

[159] *Id.* at 501. Although the minority population in Richmond was 50% and the MBE participation in city contracts was less than 1%, the Court reasoned that the statistical comparison was erroneous because it relied on the faulty assumption that minorities would choose to enter the construction industry in the same proportion as the general population. *Id.* at 507. The Court intimated that "the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 501–02.

[160] *Id.* at 503. The Court explained that "[f]or low minority membership in these associations to be relevant, the city would have to link it to the number of local MBEs eligible for membership. If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion could arise." *Id.*

[161] *Id.* at 504. The Court noted:

> Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.

*Id.*

[162] *Id.* at 507.

[163] *Id.*

> classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation.[164]

Second, the plurality found that the thirty-percent quota could not be said to be narrowly tailored to any goal, except "perhaps outright racial balancing."[165] Discerning no need for a rigid numerical quota, the Court declared:

> Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.[166]

Because the Richmond City Council never considered or tried race-neutral measures and, instead, implemented an arbitrary and rigid thirty percent minority set-aside, the Court concluded that the ordinance "obviously" was not narrowly tailored to remedy the effects of prior discrimination.[167]

### *B. The Case of* Fullilove v. Klutznick

Of particular significance in *Croson* was the Supreme Court's treatment of its prior decision in *Fullilove*, which upheld a minority set-aside program contained within a congressional spending program. This section examines *Fullilove* and considers whether *Croson* had any effect on *Fullilove's* applicability in future minority set-aside cases.

*1. Facts*—In *Fullilove* the Supreme Court considered a constitutional challenge to the Public Works Employment Act of 1977,[168] which amended the Local Public Works Capital Development and

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[164] *Id.*

[165] *Id.*

[166] *Id.* at 508.

[167] *Id.* The Court also described the ordinance as "gross[ly] overinclusive[]" for its random inclusion of racial groups, such as Aluets and Eskimos, who may never have suffered from discrimination in the Richmond area. *Id.* at 506.

[168] Pub. L. No. 95-28, 91 Stat. 116 (1977).

Investment Act of 1976.[169] The 1977 amendments authorized an additional four billion dollar appropriation for federal grants to state and local governments for local public works projects.[170] However, the amendments conditioned eligibility for grants on expending a portion of the federal funds on minority business enterprises. Specifically, the 1977 Act required that:

> Except to the extent the Secretary determines otherwise, no grant shall be made under this Act of any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.[171]

This provision, known as the MBE provision, was challenged by several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work.[172] They alleged that the ten percent MBE requirement violated the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, and various statutory antidiscrimination provisions.[173]

*2. Analysis*—The Supreme Court acknowledged that although programs calling for racial classifications required close examination, the Court also was "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."[174] As such, the Court, in a plurality opinion,[175] described a two-step

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[169]Pub. L. No. 94-369, 90 Stat. 999, 42 U.S.C. §§ 6701-6709 (1976). The 1976 Act was intended as a short-term measure to alleviate the problem of national unemployment and to stimulate the national economy by assisting state and local governments to build needed public facilities. Fullilove v. Klutznick, 448 U.S. 448 (1980).

[170]*Fullilove*, 448 U.S. at 453.

[171]*Id.* at 454 (quoting 42 U.S.C. § 6705(f)(2) (Supp. II, 1976 ed.)). "Minority business enterprise" was defined as "a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." *Id.* "Minority group members" were defined as "United States citizens who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.*

[172]*Id.* at 455.

[173]*Id. See id.* at n.5 which lists the applicable statutes as 42 U.S.C. §§ 1981, 1983, 1985; Title VI, § 601 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, 42 U.S.C. § 2000d; Title VII, §§ 701-716 of the Civil Rights Act of 1964, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000e.

[174]*Fullilove*, 448 U.S. at 472.

[175]Although the Court upheld the statute, no majority opinion was obtained. The plurality decision of Chief Justice Burger and the concurrence of Justice Powell

approach for examining minority set-aside legislation. Courts first must decide whether the objectives of the legislation are within the power of Congress.[176] If so, the second part of the analysis must address whether the limited use of racial and ethnic criteria is a constitutionally permissible means for achieving the congressional objectives without violating the equal protection component of the Due Process Clause of the Fifth Amendment.[177]

*a. Within Congressional Powers*—The plurality decision held that Congress had the authority to enact the minority set-aside legislation pursuant to both the Commerce Clause and section five of the Fourteenth Amendment.[178]

(1) *Commerce Power*—The Court determined that the legislative history of the MBE provision established that a rational basis existed for Congress's conclusion that the prevailing subcontracting practices of prime contractors could perpetuate the limited access minority businesses had to public contracts, and that this inequity had an effect on interstate commerce.[179] The Court found that Congress, in taking action to remedy this situation, could have used its power under the Commerce Clause to regulate the practices of private prime contractors on federally funded local projects.[180] Consequently, the Court concluded that the MBE provision was within the scope of Congress's power under the Commerce Clause.[181]

(2) *Section Five of Fourteenth Amendment*—The Court next examined the limitations imposed on the Commerce Clause's power to regulate the actions of state and local governments. The Court looked to section five of the Fourteenth Amendment as a justification for Congress's power to regulate the procurement practices of state and local entities as grantees of federal funds.[182] The Court held that the objectives of the MBE provision were within the power of Congress under section 5 "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.[183] Although Congress did not make express findings of past discrimination, the Supreme Court did not require these findings

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followed a middle path between the divergent opinions of a fragmented Court. *See supra* note 147. Therefore, pursuant to *Marks*, lower courts are bound to follow the opinions of Justices Burger and Powell.

[176] *Fullilove*, 448 U.S. at 473.

[177] *Id.*

[178] *Id.* at 475–76.

[179] *Id.* at 475

[180] *Id.* at 475–76.

[181] *Id.* at 476.

[182] *Id.*

[183] *Id.*

because the Court determined that Congress had abundant evidence to conclude that minority businesses had been "denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination."[184] Thus, the Court concluded that Congress could achieve its MBE objectives by exercising its power under section 5 of the Fourteenth Amendment.[185]

*b. Constitutionally Permissible Means*—In finding that the minority set-aside was a constitutionally permissible means to achieve Congress's MBE objectives, the Court emphasized three significant characteristics of the legislation: (1) Congress's purpose was strictly remedial; (2) the set-aside functioned prospectively; and (3) the program's administrative safeguards provided for waiver and exemption.[186]

On the basis of these characteristics, the Court noted that Congress has broad, comprehensive remedial powers, providing it with authority to enforce equal protection guarantees.[187] The Court also asserted that, "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct."[188] The Court rejected the contention that Congress, in exercising its remedial powers, must act in a "color-blind" fashion.[189]

The Court also rejected a challenge that the MBE program was underinclusive, because, it was argued, the program limited benefits to specified minority groups rather than extending its remedial objectives to all businesses adversely impacted by the effects of disadvantage or discrimination.[190] In dismissing this contention, the

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[184] *Id.* at 477–78.

[185] *Id.* at 478.

[186] *Id.* at 481–82.

[187] *Id.* at 483.

[188] *Id.* at 483–84.

[189] *Id.* at 482. That the set-aside placed nonminority firms at a disadvantage did not impact the Court's decision:

> When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible . . . . The actual "burden" shouldered by nonminority firms is relatively light . . . . Moreover, . . . it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

*Id.* at 484–85 (citations omitted).

[190] *Id.* at 485.

Court found no evidence "that Congress ha[d] inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that ha[d] been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program."[191]

Similarly, the Court rejected an argument that the MBE program was overinclusive, in that minority group members who had not suffered discrimination conceivably could receive improper benefits from the program.[192] In addressing this claim, the Court placed significant emphasis on the presence of administrative provisions for waiver and exemption within the MBE program, finding that these provisions "provide a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively."[193]

In sum, the plurality found that Congress's method of remedying the present effects of past racial discrimination in public contracting were constitutional.[194]

*3. The Legacy of* Fullilove—As is evident from the previous discussion, the *Fullilove* plurality based its holding primarily on deference to congressional findings of past discrimination and a recognition that Congress adopted an approach that was carefully tailored to remedy the effects of this discrimination. However, Chief Justice Burger, in writing the plurality opinion, refused to adopt a specific equal protection standard for analyzing minority preference programs.[195] Instead, the plurality stated that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[196]

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[191] *Id.* at 486.

[192] *Id.*

[193] *Id.* at 487.

[194] *Id.* at 492.

[195] The Chief Justice stated "[t]his opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases [addressing affirmative action programs]." *Id.* In contrast to Chief Justice Burger's opinion, Justice Powell, writing in concurrence, articulated a "strict scrutiny" standard as the level of review in any case involving racial classifications. *Id.* at 496 n.1 (Powell, J., concurring). Although utilizing a different standard, Powell, like Burger, upheld the MBE provision while recognizing Congress's broad authority to remedy past discrimination. *Id.* at 515 (Powell, J., concurring). Justice Marshall's concurring opinion, endorsing the set aside, employed a substantially more deferential standard of review, requiring only that racial classifications be "designed to further remedial purposes [and] serve important governmental objectives . . . [that] are substantially related to achievement of those objectives." *Id.* at 519 (Marshall, J., concurring in judgment).

[196] *Id.* at 491.

Commentators have interpreted *Fullilove* as providing a broad mandate for MBE preference programs.[197] However, because the plurality opinion failed to provide a specific formula of equal protection analysis, the decision created a "standardless" standard for judicial review.[198] This amorphous standard of review virtually ensured future litigation in the area of minority business set-aside programs.[199]

Additionally, by framing the analysis in terms of a deferential review of congressional legislation, the *Fullilove* court avoided the question of the legitimacy of similar legislation enacted by a state or local government.[200] The issues surrounding state or locally enacted race-conscious legislation would be "questions of specific application [which] must await future cases."[201]

*4. The Impact of* Croson—*Croson* does not detract from the validity of the *Fullilove* holding—that properly enacted federal minority set-aside programs are a valid exercise of federal authority. The *Croson* plurality distinguished *Fullilove* from the operative facts of *Croson* by stressing the difference between Congress's authority to enact race-conscious remedial legislation and the authority of state and local governments to enact similar legislation.[202]

In dismissing the city of Richmond's contention that its remedial powers were as broad as those of Congress, the Court wrote:

> What [Richmond] ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.[203]

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[197]Jess. H. Drabkin, *Minority Enterprise Development and the Small Business Administration's Section 8(a) Program: Constitutional Basis and Regulatory Implementation*, 499 BROOK. L. REV. 433, 437 (1983). *See also* Levinson, *supra* note 94, at 62 n.6 (1980) (quoting Representative Parren Mitchell of Maryland, the House sponsor of the MBE set-aside, as declaring that the Supreme Court's ruling "was a precedent that should help black Americans in other areas such as health, education, housing, employment, crime prevention, media ownership, transportation, and energy.") (citation omitted).

[198]Drabkin, *supra* note 197, at 437.

[199]Stoelting, *supra* note 114, at 1105.

[200]*Id.*

[201]Fullilove v. Klutznick, 448 U.S. 448, 486 (1980).

[202]*See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489–91 (1989).

[203]*Id.* at 490.

While section 5 of the Fourteenth Amendment was perceived as an expansion of congressional power to "identify and redress the effects of society-wide discrimination," the Court held that the Constitution had entrusted the states with no similar power.[204] To the contrary, the Court held that "Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power . . . ."[205]

Notwithstanding this pronouncement, *Croson* recognized that a state or locality has authority to eradicate the effects of private discrimination within its own legislative jurisdiction when it wrote:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion . . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.[206]

States must exercise this authority to take remedial action within the constraints of section 1 of the Fourteenth Amendment.[207] Moreover, for a state or local government's race-conscious legislation to withstand constitutional scrutiny, the state or local government must show, with greater specificity than that required of Congress: (1) specific findings of discrimination within the targeted industry; and (2) the particular need for race-based, as opposed to race-neutral, measures.[208] These requirements virtually ensured future litigation over the adequacy of findings used to support minority set-

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[204] *Id.*

[205] *Id.* Section 1 of the Fourteenth Amendment provides that "[n]o State shall make any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." In recognizing this restraint on state powers, the Court further stated:

> To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under Section 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under Section 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the State's use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

*Id.* at 490-91.

[206] *Id.* at 509.

[207] *Id.* at 491-92.

[208] *Id.* at 492.

aside programs.[209] The next section will review the post-*Croson* caselaw.

### *C. Post-*Croson *Cases*

The aftermath of *Croson* brought a fervor of judicial activity. At the time that *Croson* was decided, more than two hundred local governments and thirty-six states employed various kinds of set-aside programs directing public contracting dollars to minority businesses.[210] After *Croson*, aggrieved contractors vigorously litigated the validity of minority preference plans, while successful bidders found themselves in bid protests and as parties to potentially void public contracts.[211]

According to the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), as a result of *Croson*, many states were forced to take steps "to dismantle their race and gender conscious MBE programs."[212] Many lower courts struck down MBE set-asides.[213] As a result, state and local governments faced the difficult task of crafting constitutionally permissible minority utilization plans that could withstand judicial scrutiny.[214] It is not surprising that, in 1990, the United States Commission on Minority Business Development (CMBD), in its interim report on historically underutilized businesses, reported that *Croson* "had a chilling effect on the myriad of state and local programs designed to promote minority business development."[215] The MBELDEF, while documenting the destructive effect of *Croson* on minority owned businesses, identified the following examples:

> In Richmond during July 1987, when its program was first overturned by a lower court, minority business construc-

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[209] Stoelting, *supra* note 114, at 1123.

[210] *Id.* at 1126.

[211] Borchers, *supra* note 147, at 1.

[212] *Final Report, supra* note 2, at 98. *See id.* for a list of 33 states and political subdivisions that dismantled their MBE programs as a result of *Croson*.

[213] David J. Burman & Perkins Coie, *Predicate Studies: The Seattle Model*, in MINORITY AND WOMEN BUSINESS PROGRAMS REVISITED: PUBLIC CONTRACTING IN THE 1990s, tab E, 3 (1990) [hereinafter Burman & Coie].

[214] Marcia H. Kamine, *An Agenda For Minority Business Outreach Programs for State and Local Governments*, in MINORITY AND WOMEN BUSINESS PROGRAMS REVISITED: PUBLIC CONTRACTING IN THE 1990s, tab D, 1 (1990). *See also Final Report, supra* note 2, at 99-100 (listing 65 jurisdictions that conducted studies and/or held hearings to review and evaluate their MBE programs in light of *Croson*).

[215] *Interim Report—1990, supra* note 1, at 9. The CMBD reported that, at the time of its writing, 55 race-based, set-aside programs had been, or were being, challenged. Nine of the these programs had either been declared unconstitutional or were being halted by temporary or permanent injunctions. Additionally, twenty state and local jurisdictions had voluntarily suspended or ended their programs. *Id.*

> tion firms were participating in city construction at a rate of nearly 40 percent of the total dollars. Immediately after the court's decision, the minority business share fell to 15 percent and was below 3 percent during the first six months of 1988.
>
> In Tampa, the 22 percent minority business participation level in the prior year dropped to 5.2 percent in the quarter following suspension of the 25 percent goal in March 1989. The number of contracts awarded to Black owned companies decreased 99 percent, while contracts to Hispanic firms fell by 50 percent.[216]

The Supreme Court's holdings in *Fullilove* and *Croson* created a dual inquiry for evaluating the constitutional validity of MBE programs in the public contracting arena.[217] A court first must determine whether the governmental body initiating the MBE program is the United States Congress or a state or local government entity. The answer establishes the standard of review that the courts will apply to the case, which constitutes the court's second level of inquiry. Those MBE programs sponsored solely by state or local governments are subject to the strict scrutiny standard outlined in *Croson*, while programs advanced by Congress face *Fullilove's* intermediate level of scrutiny.[218] Consequently, the answer to the court's first inquiry very well may be the single most important factor in validating an MBE program.

Because of the dual inquiry created after *Croson* and *Fullilove*, cases involving racial preference legislation in public contracting can be divided into at least three separate categories.[219] The first category involves legislation enacted solely by state and local entities with no federal involvement. *Croson* falls within this category. The

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[216]*Final Report*, *supra* note 2, at 99. The MBELDEF also identified the following:

> Hillsborough County, Florida had its minority business awards drop by 99 percent since its program was struck down.
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> In Philadelphia[,] public works subcontracts awarded to minority or woman-owned firms in May 1990 [were] 97 percent less than [they were] the same month a year previous. May was the first full month since the court found its ordinance unconstitutional. In the 6 months from May 3, 1990 to November 13, 1990, the minority business participation rate fell to a mere 1.92 percent.

*Id.*

[217]*See* S.J. Groves & Sons v. Fulton County, 920 F.2d 752, 776 (11th Cir. 1991).

[218]*See id.* for a situation in which the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) remanded a case to the district court, because the district court applied the wrong level of scrutiny in evaluating an MBE program regulation.

[219]Borchers, *supra* note 147, at 8–9.

second category consists of cases in which federal funding contributes to a state or locally administered contract, but the availability of the federal funds is conditioned on the state or local entity complying with a federal directive to give a racial preference. *Fullilove* is included within this category. Finally, the third category involves cases in which the federal government acts directly in implementing a racial preference program without using a state or local government intermediary. The Supreme Court's most recent racial preference decision, *Metro Broadcasting, Inc. v. FCC*,[220] is an example of a category three case. This section will examine the treatment of post-*Croson* cases at the federal court level within each of these categories.

*1. Category I Cases: Pure State and Local Action*—As noted above, Category I consists of cases in which a state or local government implements a racial preference program without federal involvement. The validity of these programs is assessed under the "strict scrutiny" standard set forth in *Croson*. Accordingly, courts are required to determine (1) whether a compelling state interest for establishing a racial preference program exists; and (2) whether the program is narrowly tailored to accomplish the stated purpose.

In *O'Donnell Construction Co. v. District of Columbia*,[221] the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), reversing the decision of a lower court,[222] enjoined the operation of the District of Columbia (D.C. or District) Minority Contracting Act (MCA).[223] The MCA required each District agency to "allocate its construction contracts in order to reach the goal of thirty-five percent . . . of the dollar volume of all construction contracts to be let to minority business enterprises."[224] The D.C. Circuit determined that *Croson* provided the standard for reviewing the MCA,[225] and found that because the District failed to establish a

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[220]110 S. Ct. 2997 (1990). *See infra* notes 294–308 and accompanying text (a more detailed discussion of *Metro Broadcasting*).

[221]No. 91–7056, 1992 U.S. App. LEXIS 8827 (D.C. Cir. May 5, 1992).

[222]O'Donnell Constr. Co. v. District of Columbia, 762 F. Supp. 354 (D.D.C. 1991).

[223]D.C. CODE ANN. §§ 1–1141––1–1151 (1981).

[224]*Id.* § 1–1146(a)(1).

[225]*O'Donnell*, 1992 U.S. App. LEXIS 8827 at *8. The District originally had argued that the *Fullilove* standard applied to the MCA because of the District's unique status as a federally-created municipal corporation and congressional oversight of its local legislation. The District contended that it, therefore, enjoyed the same constitutional mandate to enforce the dictates of the Fourteenth Amendment as Congress did. However, the D.C. Circuit rejected this argument stating "[t]he District of Columbia Council does not share Congress's constitutional power[, and] [c]ongressional oversight of the District did not, and did not purport to, transform the Council's enactments into congressional legislation designed to enforce the Fourteenth Amendment." *Id. See also O'Donnell*, 762 F. Supp. at 363 n.11 (rejecting identical argument at district court level).

"strong basis in evidence" to support its racially-based program, O'Donnell demonstrated a likelihood of prevailing in its equal protection challenge.[226] The D.C. Circuit therefore granted a preliminary injunction against the operation of the program.[227]

The D.C. Circuit pointed to several factors that influenced its finding that the District had no compelling interest for enacting the MBE provision. For example, the court concluded that in enacting the MCA, the District improperly had relied on "generalized assertions" of society-wide discrimination in the construction industry[228] and made "flawed" statistical inferences concerning the level of minority contracting participation.[229] The court also found that the District's "random inclusion" of racial groups for which no evidence of past discrimination existed "raise[d] doubts about the remedial nature of the [MCA's] program."[230] Because the court determined that the District never identified any specific past discrimination for any minority group within the construction industry, it was impossible for the court to assess whether the MCA program was a "narrowly tailored" remedy.[231]

Other courts have similarly enjoined the operation of MBE programs that did not meet both prongs of the strict scrutiny standard.[232] In *F. Buddie Contracting Co. v. City of Elyria*,[233] the United States District Court for the District of Ohio (Ohio District Court) considered an Elyria, Ohio, ordinance requiring prime contractors to subcontract a minimum percentage of public contract dollars to minority businesses.[234] In finding no compelling government interest

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[226]*O'Donnell*, 1992 U.S. App. LEXIS 8827 at *27.

[227]The D.C. Circuit also found that O'Donnell had demonstrated that the other three factors necessary for issuing a preliminary injunction were present: (1) whether O'Donnell would suffer irreparable injury if the injunction was not granted; (2) whether other parties interested in the proceedings would be substantially harmed; and (3) consideration of the public interest. *Id.*

[228]*Id.* at *16.

[229]*Id.* at *19.

[230]*Id.* at *24. The D.C. Council never made any findings with respect to discrimination in the construction industry against Hispanic Americans, Asian Americans, Pacific Islander Americans, or Native Americans, all of whom were included in the MBA's definition of "minority." *Id.*

[231]*Id.* at *23.

[232]*See, e.g.*, Contractors Ass'n of E. Pa. v. City of Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990) (set-aside program declared unconstitutional under strict scrutiny standard). For cases in which the federal courts did not rule on the merits of the constitutional challenges to the at issue set-aside programs but expressed doubt as to the validity of the programs, see Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283 (11th Cir. 1990), *vacated on other grounds*, 951 F.2d 1217 (11th Cir. 1992); Gen. Building Contractors Ass'n, Inc. v. City of Philadelphia, 762 F. Supp. 1195 (E.D. Pa. 1991); and Capeletti Bros., Inc. v. Metropolitan Dade County, 735 F. Supp. 1040 (S.D. Fla. 1990).

[233]773 F. Supp. 1018 (N.D. Ohio 1991).

[234]*Id.* at 1023.

in enacting the ordinance, the district court, as in *O'Donnell*, noted the lack of factual evidence supporting a finding that past and/or present discrimination existed in the specific area covered by the legislation.[235] The district court also held that the ordinance was not "narrowly tailored" to achieve its purpose, because the city made no showing that it attempted less discriminatory, race-neutral alternatives before enacting the race-based legislation.[236] Accordingly, the district court permanently enjoined enforcement of the ordinance.[237] In *Main Line Paving Co., Inc. v. Board of Education*,[238] the United States District Court for the Eastern District of Pennsylvania also invalidated a minority set-aside policy finding a lack of "specific" factual predicate to justify the school board's policy.[239] The district court also found that the school board had failed to narrowly tailor its policy to accomplish the remedial purpose, because it did not consider race-neutral means, which resulted in an impermissible burden on nonminorities.[240]

It is important to recognize that even though a state or local government race-conscious program may meet the "compelling interest" prong of the strict scrutiny test, the program still must satisfy the "narrow tailoring" requirement. In *Concrete General, Inc. v. Washington Suburban Sanitary Commission*,[241] the United States District Court for the District of Maryland (Maryland District Court) examined a local sanitary commission's Minority Procurement Policy (MPP), which was designed to encourage the participation of MBEs in bidding for procurement contracts.[242] Although the Maryland District Court determined that the sanitary commission arguably had shown a sufficient factual predicate to establish past discrimination in support of the MPP, the court invalidated the program because the MPP was not narrowly tailored to serve the interest of remedying past discrimination.[243] Similarly, in *Coral Construction Co. v. King County*,[244] the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) invalidated the county's minority business enterprise set-aside program after assuming, *arguendo*, that the county had met its burden of demonstrating a compelling reason for

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[235] *Id.* at 1031.

[236] *Id.*

[237] *Id.* at 1033.

[238] 725 F. Supp. 1349 (E.D. Pa. 1989). The Philadelphia school board policy required that 15% of contract volume be awarded to MBEs. *Id.* at 1352.

[239] *Id.* at 1361.

[240] *Id.* at 1362.

[241] 779 F. Supp. 370 (D. Md. 1991).

[242] *Id.* at 371.

[243] *Id.* at 379.

[244] 941 F.2d 910 (9th Cir. 1991).

enacting the program.[245] However, as in *Concrete General*, the program failed because it was not narrowly tailored.[246]

Both *Concrete General* and *Coral Construction* identified several characteristics of a set-aside program that would suggest that the program was "narrowly tailored" to remedy prior discrimination within the relevant local jurisdiction. In *Coral Construction*, the Ninth Circuit, citing *Croson*, described a narrowly tailored program as one which: (1) should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation; (2) should use minority utilization goals set on a case-by-case basis rather than on a system of rigid numerical quotas; and (3) must be limited in its effective scope to the boundaries of the enacting jurisdiction.[247] In a similar fashion, in *Concrete General*, the Maryland District Court listed four factors which determine whether a sufficient nexus exists between the method and purpose underlying the set-aside program: (1) the necessity for relief and the efficacy of alternative, race-neutral remedies; (2) the flexibility and duration of the relief; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of relief on the rights of third parties.[248]

Among the various narrow tailoring requirements, consideration of race-neutral alternatives is probably the most important for several reasons. First, race-neutral alternatives enable the government to increase minority participation in an affected industry without a corresponding stigma.[249] Moreover, a well-conceived race-neutral alternative ensures that the minority beneficiaries of the program are more likely to be the true victims of discrimination, thereby preventing the implementation of a program that merely acts as a windfall to otherwise successful minority contractors who have either overcome or in some manner avoided discrimination in the relevant locality.[250] In *Croson*, the Supreme Court listed a "whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs," including simplified bidding procedures, relaxed bonding requirements, and

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[245] *Id.* at 922.

[246] *Id.* at 925-26.

[247] *Id.* at 922.

[248] *Concrete General*, 779 F. Supp. at 879 (citing United States v. Paradise, 480 U.S. 149, 171 (1987)).

[249] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.")

[250] *Coral Construction*, 941 F.2d at 923.

training and financial aid for disadvantaged entrepreneurs of all races.[251] Although *Croson* referred to these devices as alternatives to MBE programs, including these measures in a state or local government's MBE plan would promote the plan's flexibility, making it more likely that the program would be validated.[252] However, while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, it does not require exhaustion of every possible alternative.[253]

Despite a strong tendency for courts to enjoin ordinances enacted before *Croson* in Category I cases,[254] *Cone Corp. v. Hillsborough County*[255] represents a case in which a pre-*Croson* MBE preference program survived a constitutional challenge to its validity. In *Cone Corp.*, the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) reversed a district court's order permanently enjoining the operation of a Florida county's MBE preference program.[256] The Eleventh Circuit pointed to several features of the Hillsborough county plan that distinguished it from the plan invalidated in *Croson*. These features included more extensive statistical and testimonial evidence tending to show a continuing practice of discrimination in the local construction industry, which established the necessary factual predicate justifying the need for racial classifications to remedy this discrimination.[257] Additionally, the

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[251] *Croson*, 488 U.S. at 509–10. The Court further stated:

> Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.

*Id.* at 510.

[252] Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 n.11 (11th Cir. 1990).

[253] *See Coral Construction*, 941 F.2d at 923 (The court did not intend that a government entity "exhaust every alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be.").

[254] The following cases, discussed *supra* notes 221–52 and accompanying text, involved pre-*Croson* set-aside programs: *O'Donnell*, *F. Buddie*, *Main Line*, and *Concrete General*. Only *Coral Construction* involved a post-*Croson* program.

[255] 908 F.2d at 908.

[256] In the original decision, the United States District Court for the Middle District of Florida issued a preliminary injunction against Hillsborough County. *See* Cone Corp. v. Hillsborough County, 723 F. Supp. 669 (M.D. Fla. 1989). In another opinion issued shortly thereafter, the district court granted the plaintiff's motion for summary judgment and entered the permanent injunction after finding that the minority business enterprise law violated equal protection. *See* Cone Corp. v. Hillsborough County, 730 F. Supp. 1568 (M.D. Fla. 1990).

[257] *Cone Corp.*, 908 F.2d at 914–16. The Eleventh Circuit determined that a prima facie case of racial discrimination existed based on statistics showing a 10.78% disparity between the percentage of minority construction contractors in the county and the percentage of county construction dollars awarded to minorities. *Id.* at 916. In addition, complaints of discriminatory treatment included evidence of the following:

Eleventh Circuit determined that Hillsborough county implemented the plan only after other MBE programs had failed to remedy the discrimination.[258] Furthermore, the plan targeted only those minority groups most likely to have been discriminated against and utilized a more flexible case-by-case goal-setting approach rather than employing a quota to address the problem.[259] Finding that Hillsborough county had "painstakingly crafted its law" to avoid the problems associated with the downfall of the Richmond plan, the Eleventh Circuit reversed the district court's order.[260]

In *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*,[261] the Ninth Circuit, in affirming the decision of the United States District Court for the Northern District of California[262] denying a preliminary injunction motion, upheld the validity of a post-*Croson* minority business preference program.[263] The appellate court, for many of the same reasons cited in *Cone*, found that the district court had not abused its discretion in determining that the city would likely demonstrate, at trial, that it had a strong basis in evidence for taking the corrective action outlined in its preference program.[264] Moreover, the Ninth Circuit determined that the program was narrowly tailored in that (1) there was no indication that the ordinance resulted in an undue burden on non-MBEs, (2) the remedy corresponded to the identified discrimination

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> [W]hen MBE contractors approached prime contractors, some prime contractors either were unavailable or would refuse to speak to them. Other prime contractors would accept estimates from MBE subcontractors and not submit those estimates with their bids. Contrary to their practice with non-minority subcontractors, still other prime contractors would take the MBE subcontractors' bids around to various non-minority subcontractors until they could find a non-minority to underbid the MBE. Non-minority subcontractors and contractors got special prices and discounts from suppliers which were unavailable to MBE purchasers.

*Id.*

[258] *Id.* at 916.

[259] *Id.* at 916-17.

[260] *Id.* at 917.

[261] 950 F.2d 1401 (9th Cir. 1991).

[262] Associated Gen. Contractors of Cal., Inc. v. City and County of S.F., 748 F. Supp. 1443 (N.D. Cal. 1990).

[263] The San Francisco ordinance at issue centered its remedial focus around "bid preferences" for prime contractors, designed to provide MBEs with a "competitive plus" to compensate for past discriminatory practices. *Id.* at 1446. The ordinance specifically provided for a 10% bid preference for local MBEs in addition to allowing non-MBE businesses to benefit from the preference by joint venturing with a qualified MBE. *Id.*

[264] *Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity*, 950 F.2d at 1418. Both strong statistical disparities and written and oral testimony provided to the San Francisco Board of Supervisors during hearings conducted before enacting the ordinance played important roles in the district court's determination. *See Associated Gen. Contractors of Cal., Inc. v. City and County of S.F.*, 748 F. Supp. at 1450-51.

and was limited to those qualifying MBEs within the enacting jurisdiction who had been discriminated against, and (3) the city considered other race neutral alternatives.[265]

The holdings in these Category I cases lead to several conclusions. First, *Croson* appears to be fatal, in most instances, to MBE preferences enacted prior to the Supreme Court's decision. The recurring theme in these cases is one of insufficient justification, or factual predicate, to adequately support the challenged program.[266] Second, post-*Croson* MBE preferences have a much greater chance of passing judicial scrutiny, as long as the dictates of *Croson* are followed. The elements essential to post-*Croson* MBE preference program survival appear to be: (1) comprehensive statistical and factual findings demonstrating specific instances of discrimination against MBEs within the relevant local jurisdiction; (2) consideration of reasonable race-neutral alternatives; (3) realistic goals, not quotas; and (3) flexibility to ensure that participation is limited to those minority groups who experienced past discrimination.

*2. Category II Cases: Federally Funded State and Local Projects*—Category II consists of cases in which the granting of federal funds is contingent on the adoption of an MBE preference by state or local government entities. Courts review cases in this category under the *Fullilove* standard. Although a somewhat vague standard, the obvious implications of the Supreme Court's holding was that the Court would give great deference to the congressional findings underlying federal legislation. The broad congressional findings of discrimination supporting the preference program examined in *Fullilove* would not support a comparable program enacted by a state or local government, as in *Croson*.[267] As such, one must conclude that the standard of review applied in Category II cases is less stringent than *Croson's* "strict scrutiny" test. In lieu of the strict scrutiny test, the courts, in determining the constitutionality of Category II programs, have required a showing that the program serves important governmental objectives and that it is substantially related to the achievement of those objectives.[268] This section will examine the Category II case law following *Croson*.

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[265]*Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity*, 950 F.2d at 1416–18.

[266]Burman & Coie, *supra* note 213, at 3–4.

[267]City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (generalized assertions of racial discrimination in the construction industry as a whole have little probative value in establishing identified discrimination within the local jurisdiction).

[268]In *Fullilove*, the Supreme Court described this test in a slightly different way when it stated that "[section] 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Fullilove v. Klutznick, 448 U.S. 448, 476 (1980).

In *Tennessee Asphalt Co. v. Farris*,[269] the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) examined the constitutionality of a federal statute and federal regulations requiring the Tennessee Department of Transportation, in awarding federal-aid contracts, to grant preferential treatment to minority businesses.[270] The court found that Congress designed the highway construction set-aside program to ameliorate the effects of past and present discriminatory restrictions on the opportunity for minority road contractors to participate in publicly-funded contracting activities.[271] As such, Congress could legitimately use its power under section five of the Fourteenth Amendment to influence state and local governments to assist in remedying this society-wide discrimination.[272] The plaintiffs argued that Tennessee was required to make "particularized findings" of discrimination within the local jurisdiction before it could implement the federally initiated preferential scheme.[273] The Sixth Circuit disagreed, however, pointing out that the joint lesson of *Fullilove* and *Croson* was

> that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can . . . . And one way it can do that is by authorizing states to do things that they could not do without federal authorization.[274]

Thus, a state's compliance with the mandates of a federal minority preference scheme is nothing more than a legitimate compliance with federal law.[275]

The intermediate level of review required in Category II cases leads to virtually carte blanche validity of these federal programs.[276] However, if a state government, while implementing a federal minority preference program, goes further than what is required under the federal program, then the court will review the state's program under *Croson's* strict scrutiny standard, which normally

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[269] 942 F.2d 969 (6th Cir. 1991).

[270] *Id.* at 970.

[271] *Id.* at 975.

[272] *Id.*

[273] *Id.*

[274] *Id.* (quoting Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 423-24 (7th Cir. 1991)).

[275] *Id.*

[276] *See, e.g.*, Adarand Constructors, Inc. v. Skinner, No. 90-C-1413, 1992 U.S. Dist. LEXIS 5636 (D. Colo. Apr. 21, 1992); United Fence & Guard Rail Corp. v. Cuomo, No. 88-CV-306, 1991 U.S. Dist. LEXIS 14260 (N.D.N.Y. Oct. 1, 1991); Michigan Road Builders Ass'n, Inc. v. Blanchard, 761 F. Supp. 1303 (W.D. Mich. 1991); Ellis v. Skinner, 753 F. Supp. 329 (D. Utah 1990).

results in the court invalidating the state program. *Milwaukee County Pavers Ass'n v. Fiedler*[277] illustrates this point.

In *Milwaukee County Pavers*, the United States District Court for the Western District of Wisconsin considered a challenge to a Wisconsin state plan giving a preference to minority businesses on department of transportation construction contracts.[278] Wisconsin argued that its program was a subsidiary of the federal preference program required under the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA),[279] which required states to have set-aside and minority business participation programs before receiving federal funds for highway construction projects. Under the STURAA, the federal government reimburses the state for the state funds expended on federally approved projects.[280] The district court found that because Wisconsin was required by federal law to expend state funds on primarily federally funded projects, the use of state funds did not alter the fact that Wisconsin was implementing a constitutional federal affirmative action program.[281] However, the district court concluded that several aspects of Wisconsin's implementation of the STURAA were unconstitutional because they were outside the bounds of federal authority.[282]

The district court based its findings on three aspects of Wisconsin's program. First, the state program set goals for minority business subcontractor participation in projects funded exclusively by the state without any federal involvement.[283] Second, the program required minority business prime contractors themselves to make good-faith efforts to use minority business subcontractors, even though the STURAA did not require this effort.[284] Finally, the Wis-

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[277] 731 F. Supp. 1395 (W.D. Wis. 1990), *aff'd*, 922 F.2d 419 (7th Cir. 1991).

[278] *Id.* at 1398.

[279] Pub. L. No. 100-17, § 106(c), 101 Stat. 132 (1987).

[280] *Milwaukee County Pavers*, 731 F. Supp. at 1400.

[281] *Id.* at 1399. The court concluded that:

> [I]t is not *per se* unconstitutional for defendants to allocate state or local expenditures for use on contracts with disadvantaged businesses. What is important to a determination of constitutionality is not the source of the funds, but the source of the state's authority for expending the funds. Where federal law dictates that a project must be partially funded by the state, the expenditure of state funds does not cause the program to lose its character as a federal program. However, when the state provides race-conscious relief that bears no relationship to meeting its overall goal under the [STURAA], it is acting on its own and must base its action on state findings of prior discrimination.

*Id.* at 1411-12.

[282] *Id.* at 1412.

[283] *Id.*

[284] *Id.*

consin program extended beyond the date for which the STURAA was authorized.[285] Because these aspects of Wisconsin's program exceeded the bounds of the STURAA, the district court applied *Croson's* strict scrutiny standard, which meant that Wisconsin could not rely on congressional findings of past discrimination and had to justify its race-conscious remedies in these three areas on its own specific findings of discrimination.[286] Under *Croson's* standards, the district court permanently enjoined Wisconsin from implementing these aspects of its program because they were not integrated with the federal plan.[287] In all other areas where the Wisconsin plan was within the bounds of federal authority, the district court concluded that the program was constitutional under *Fullilove*.[288]

The United States District Court for the Northern District of New York reached a similar result in *Harrison & Burrowes Bridge Constructors v. Cuomo*.[289] The district court enjoined the operation of the portions of a state-wide program funded solely by the state, while refusing to enjoin that part of the state program partially funded under a federal statute.[290] The district court applied *Croson* to the former portions, concluding that the program was probably unconstitutional for failing to establish an adequate factual predicate for the remedial program.[291] Conversely, under *Fullilove*, the district court declared the latter federally funded portions of the state program valid.[292]

*Milwaukee County Pavers* and *Harrison & Burrowes* demonstrate, as one commentator has noted, that the determination of whether an MBE program will be characterized as a Category I or Category II case "can be a life and death matter for MBE preferences," because this determination defines which standard of review will apply to the case.[293] In both of these cases, the district courts invalidated the Category I portion of the plans because they could not meet the strict requirements of *Croson*, but upheld the Category II portions under *Fullilove*. That this determination may

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[285]*Id.* The Wisconsin program extended through 1995 while the mandates of the STURAA only extended through 1991. *Id.* at 1414.

[286]*Id.* at 1412.

[287]*Id.* at 1415-16.

[288]*Id.* at 1408-09.

[289]743 F. Supp. 977 (N.D.N.Y. 1990). *See also* Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190, 1203 (11th Cir. 1991) (noting a district court conclusion that a state set-aside and minority business program, when implemented with federal funds, was constitutional).

[290]*Harrison & Burrowes*, 743 F. Supp. at 1005.

[291]*Id.* at 1002.

[292]*Id.* at 1003.

[293]*See* Borchers, *supra* note 147, at 24.

very well be the single most important factor in validating an MBE program is quite evident.

*3. Category III Cases: Pure Federal Action*—Category III consists of cases in which the federal government acts alone in implementing MBE preference programs without using a state or local intermediary. The numerous contracts involving federal agencies which impose MBE preferences or goals fall within this category. The Supreme Court's most recent pronouncement on the subject of race-conscious remedies, although not in a contracting context, involved a Category III case, *Metro Broadcasting, Inc. v. FCC*.[294] In this case, the Supreme Court examined whether a federal agency's minority preference policies violated the Equal Protection Clause of the Fifth Amendment.

Metro Broadcasting, Inc. v. FCC

*1) Facts*—In *Metro Broadcasting*, the Court considered two race-conscious policies employed by the Federal Communications Commission (FCC) in the area of communications licensing. The first involved a policy in which the FCC, when comparing competing applications for licenses for new radio or television broadcast stations, would award an "enhancement" to businesses with minority ownership and participation. The second policy concerned the FCC's "distress sale" practice, which allowed a radio or television broadcaster—whose qualifications to hold a license had come into question—to transfer the license to a qualified MBE without the FCC hearing normally required before a license may be assigned.[295] The FCC adopted both policies in an attempt to promote diversification of programming after past efforts to encourage minority participation in the broadcast industry had failed to accomplish sufficient broadcast diversity.[296] These policies were challenged in separate cases, resulting in two decisions from the D.C. circuit upholding the first policy[297] while invalidating the second.[298] The Supreme Court consolidated both cases to determine whether the FCC policies violated the equal protection component of the Fifth Amendment.

*2) Analysis*—The Court, in a 5–4 decision, upheld the con-

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[294]Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990).

[295]*Id.* at 3002.

[296]*Id.* at 3002–05.

[297]*See* Winter Park Communications, Inc. v. FCC, 873 F.2d 346 (D.C. Cir. 1989).

[298]*See* Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989). The D.C. Circuit, in invalidating the distress sale policy, concluded that the policy: (1) was not narrowly tailored to remedy past discrimination or to promote programming diversity; (2) unduly burdened the disappointed applicant, an innocent nonminority; and (3) was not reasonably related to the interests that the policy sought to vindicate. *Id.* at 934.

stitutionality of both policies, extensively citing *Fullilove* as precedent for its decision. The majority found it of "overriding significance" that the FCC's policies were "specifically approved—indeed, mandated—by Congress."[299] In announcing the standard of review for congressionally mandated race-conscious remedies, the Court stated "that benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."[300]

The Court noted that Congress had made findings that "the effects of past inequities stemming from racial and ethnic discrimination ha[d] resulted in a severe underrepresentation of minorities in the media of mass communications."[301] As such, the majority concluded that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the [FCC's] minority ownership policies."[302]

The Supreme Court next pointed to several factors justifying its determination that the "substantial relationship" prong of the test also had been satisfied. First, the majority noted that Congress, after realizing that the minority ownership programs were a critical means of promoting broadcast diversity, had specifically approved the FCC policies at several points through appropriations legislation.[303] Second, the Court surmised that the "link between expanded minority ownership and broadcast diversity d[id] not rest on impermissible stereotyping[;] . . . [r]ather, both Congress and the FCC maintain[ed] simply that expanded minority ownership of broadcast outlets w[ould], in the aggregate, result in greater broadcast diversity."[304] Additionally, the Court stated that the FCC had adopted these policies and Congress had endorsed them "only after long study and painstaking consideration of all available alternatives," which demonstrated that race-neutral means could not produce adequate broadcasting diversity.[305] The Court also found that these policies were "aimed directly at the barriers that minorities face[d] in entering the broadcasting industry," and were designed to guarantee that the minority ownership policies would be applied correctly in individual cases and that there would be frequent opportunities to revisit the merits of these policies.[306] Finally, the majority did not

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[299] *Metro Broadcasting*, 110 S. Ct. at 3008.

[300] *Id.* at 3008-09.

[301] *Id.* at 3009-10.

[302] *Id.* at 3010.

[303] *Id.* at 3012-16.

[304] *Id.* at 3016.

[305] *Id.* at 3019, 3022.

[306] *Id.* at 3024, 3025.

believe that the FCC policies imposed an impermissible burden on nonminorities.[307]

As a result of the above findings, the Supreme Court ultimately concluded that the "[FCC's] minority ownership policies bear the imprimatur of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity."[308]

*D. Impact on Set-Aside Programs*

Racial preference programs have enjoyed broad-based political support for more than twenty years.[309] The Supreme Court's decisions in *Fullilove*, *Croson*, and *Metro Broadcasting* set forth the constitutional standards of review for these race-conscious programs. These decisions make it clear that race-conscious classifications prescribed by state and local governments will continue to be judged under the "strict scrutiny" standard of review. As a result, one commentator has noted that state and local government set-aside ordinances will continue to face difficult times in the courts and may soon become a "relic of the past."[310] Only the most rigorously and scrupulously documented set-aside programs are likely to withstand constitutional challenge.[311] Accordingly, states and cities will find it difficult to formulate new strategies to meet this challenge and should concentrate on compiling extensive records of discrimination within their jurisdictions.[312]

*Croson* had no impact on the analysis applied to cases in which Congress established similar racial classifications. The *Metro Broadcasting* majority acknowledged this when it wrote:

> *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Crosson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different

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[307] *Id.* at 3025.

[308] *Id.* at 3027-28.

[309] Stoelting, *supra* note 114, at 1135.

[310] *Id.* at 1127, 1135.

[311] Burman & Coie, *supra* note 213, at 7.

[312] Stoelting, *supra* note 114, at 1135. For a discussion on how some jurisdictions have attempted to document discrimination within their regions, see John M.L. Gruenstein, *Documenting Discrimination in Contracting with a Statistical Disparity Model: The City of San Francisco, in* MINORITY AND WOMEN BUSINESS PROGRAMS REVISITED: PUBLIC CONTRACTING IN THE 1990s, Tab G (1990); and John Lunn, *Academic Model: Louisiana, in* MINORITY AND WOMEN BUSINESS PROGRAMS REVISITED: PUBLIC CONTRACTING IN THE 1990s, Tab F (1990).

> standard than such classifications prescribed by state and local governments.[313]

As such, a more deferential "intermediate" standard of review applies to congressionally mandated MBE preference programs. However, the dissenting Justices in *Metro Broadcasting* would distinguish Category II cases from Category III cases, contending that Congress is entitled to deference in establishing racial preferences only when it acts pursuant to its power to direct state action under section five of the Fourteenth Amendment.[314] Consequently, when Congress acts for itself in implementing racial preferences, these Justices argue that "strict scrutiny" is the proper standard of review for the policy.[315]

The present makeup of the Supreme Court makes the future treatment of Category I cases, compared to Category II and Category III cases, uncertain.[316] However, the current state of the law requires the application of the more deferential "intermediate" standard of review to racial classifications established by Congress. Thus, at least for the time being, congressionally mandated MBE programs apparently will continue to be a constitutional means by which the federal government can combat the effects of past discrimination in the public contracting arena.

The CMBD, in its final report, suggests that Congress should use its powers under section five of the Fourteenth Amendment to assist state and local governments in combating the problems faced by minority businesses.[317] The CMBD argues that Congress could create a "National Program," where Congress delegates authority to the state and local governments, to give them the requisite flexibility to address their local needs.[318] As a result, the deferential standard of review applicable to federally mandated programs could be used to resolve these problems at the local level. However, as of this writing, there has been no substantive effort in either the House of Representatives or the Senate to fashion a federal solution to these local problems.[319]

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[313] *Metro Broadcasting*, 110 S. Ct. at 3009.

[314] *Id.* at 3030 (O'Connor, J., dissenting). Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice O'Connor's dissenting opinion.

[315] *Id.* at 3033 (O'Connor, J. dissenting).

[316] Justice Brennan, who wrote the majority opinion in *Metro Broadcasting*, and Justice Marshall, who joined the majority opinion, have retired from the Court since the *Metro Broadcasting* decision. Justices Souter and Thomas have replaced them.

[317] *Final Report*, *supra* note 2, at 97.

[318] *Id.*

[319] *Id.* at 97-98.

## IV. Frauds and Abuses in the 8(a) Program

The implementation of the 8(a) program has been plagued with numerous difficulties throughout its history. Perhaps the most serious problem uncovered in the extensive and well-publicized record of abuses in the 8(a) program's administration was the proliferation of 8(a) "fronts,"[320] which have been described as groups of minority members with little or no education or business experience who posed as company officers to qualify a firm for the 8(a) program.[321] A related problem involved the practice of accepting minority owned firms into the 8(a) program who "technically" qualified for entry, even though they did not need the special assistance of the program because of the educational level or business experience of the firms' owners. Additionally, due to "inadequate and vague" graduation criteria,[322] many firms remained in the 8(a) program when assistance no longer was needed.

Congressional investigations of the 8(a) program during 1976 and 1977 disclosed substantial abuses in the operation of the program evidenced by ineffectiveness, inefficiency, and questionable practices.[323] These abuses prompted one Senate committee to observe that "[i]t is apparent that for a lucky, mainly nondisadvantaged few, the 8(a) program is a gravy train of impressive proportions."[324] This chapter will examine the proliferation of frauds and abuses in the 8(a) program and the responses from Congress and the SBA to confront and eliminate these problems.

### *A. Sponsorship Programs*

Sponsorship programs under which the SBA encouraged white-owned and nondisadvantaged businesses to provide management services, training, and capital to disadvantaged small businesses, facilitated the creation of 8(a) fronts.[325] These arrangements were designed to aid in the development of the small businesses enrolled in the 8(a) program. However, rather than simply provide advice, services, or capital to the minority entrepreneur, the sponsoring

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[320] Levinson, *supra* note 94, at 68.

[321] SUBCOMMITTEE ON FEDERAL SPENDING PRACTICES AND OPEN GOVERNMENT OF THE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 2D SESS., REPORT BASED ON HEARINGS AND INQUIRIES CONDUCTED ON THE SMALL BUSINESS ADMINISTRATION INVOLVING ABUSES IN THE 8(A) PROGRAM AND IRREGULARITIES CONCERNING MINORITY BUSINESSES 5 (Comm. Print 1978) [hereinafter ABUSES IN 8(A) PROGRAM].

[322] Drabkin, *supra* note 197, at 450.

[323] *See* ABUSES IN 8(A) PROGRAM, *supra* note 321; *Minority Contracting*, *supra* note 86.

[324] ABUSES IN 8(A) PROGRAM, *supra* note 321, at 11.

[325] Levinson, *supra* note 94, at 68.

business often would retain control of the 8(a) firm.[326] Because no basic standards existed to assure that applicants had at least the potential to become competitive, the following scenario was common in many cases:

> [A]n applicant might lack minimal levels of experience, education, or motivation and still be eligible for the [8(a)] program provided he or she was of good character and had a majority ownership in the firm. Without basic skills to run a business, 8(a) owners might be influenced by non-disadvantaged businesspersons whose experience, superior business knowledge, personal contacts, reputation and access to financial and other resources, could be used to control the 8(a) firms.[327]

This result was inconsistent with the SBA's objective of helping small businesses become self-sufficient.[328] Senator Lawton Chiles, the former chairman of the Senate Subcommittee on Federal Spending Practices and Open Government, voiced concern over these sponsorship arrangements when he stated "[i]t's serious when non-disadvantaged firms, through a highly questionable sponsorship program, seek to rip off tax dollars by using disadvantaged persons to secure contracts that the non-disadvantaged firms could not get in the competitive marketplace."[329]

*1. General Accounting Office Audit*—In 1974, the General Accounting Office (GAO) reviewed the effectiveness of the sponsorship program through a full-scale audit of the SBA. This audit was prompted in part by investigations that indicated mismanagement and possible criminal activities at certain SBA field offices.[330] The GAO's review of the 8(a) program was directed towards ascertaining: (1) the degree of success the program had in assisting firms to become self-sufficient; (2) whether all firms admitted to the program—based on their social or economically disadvantaged status—actually needed 8(a) program assistance; and (3) whether sponsor organizations actually assisted disadvantaged firms and gradually relinquished control over these firms.[331]

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[326] *Id.*

[327] Small Business Association, *Eligibility Review of 8(a) Firms*, REP. OF AUDIT, Rep. No. 2-79, 6 (1979) [hereinafter *Eligibility Review*].

[328] *Questionable Effectiveness*, *supra* note 74, at 18.

[329] ABUSES IN 8(A) PROGRAM, *supra* note 321, at 1.

[330] Henry Eschwege, Director of the Community and Economic Development Division of the General Accounting Office, Statement Before the United States Senate Subcommittee on Federal Spending Practices and Open Government Committee on Governmental Affairs on SBA's 8(a) Procurement Program 2 (July 8, 1977).

[331] *Id.* at 3.

In performing the portion of the audit concerning sponsorship arrangements, the GAO reviewed files at the ten SBA regional offices and identified eighty-nine 8(a) firms that had sponsors.[332] The GAO selected twenty-five firms for evaluation along with the seven sponsors of these firms to determine: (1) how and why experienced non-8(a) firms became sponsors; (2) what controls were exercised by sponsors; and (3) what services and other items cost 8(a) firms.[333] The results of the audit disclosed that, for a variety of reasons, these sponsorship arrangements did little to develop viable 8(a) firms.[334]

At the time of the audit, the SBA's practice was to award large government contracts to sponsored 8(a) firms rather than award smaller contracts to smaller nonsponsored firms because latter action would have required more of SBA's manpower and other resources for monitoring, training, and management assistance.[335] The independent contractors that previously obtained and performed these contracts competitively became highly critical of the SBA and the program because they realized that they would lose contracts to the 8(a) program.[336] However, when these contractors discovered the profits that they could earn by becoming sponsors, they joined in the SBA's effort to develop these 8(a) firms into viable businesses.[337] In reality, these companies became sponsors solely to make profits and protect their livelihoods and had very little incentive to create viable businesses that would later become competitors.[338] Instead, the sponsors preferred to establish a relationship of interdependency with the 8(a) firm, which would last for as long as possible so that the sponsor could continue to profit from their investment.[339] The sponsors accomplished this goal of interdependence by:

> (1) forming new corporations using former employees as majority stockholders and officers;
>
> (2) securing minority stock ownership for themselves;

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[332] *Questionable Effectiveness*, *supra* note 74, at 18.

[333] *Id.*

[334] Eschwege, *supra* note 330, at 5.

[335] *Questionable Effectiveness*, *supra* note 74, at 18.

[336] *Id.* at 19. The seven sponsors evaluated in the audit disclosed that they were generally very much opposed to the SBA's practice of using large contracts for the 8(a) program. In voicing their opposition, these contractors actually contacted SBA officials, sought solutions in the courts, contacted congressional representatives, and ultimately sent a delegation of representatives to the White House. *Id.*

[337] *Id.*

[338] *Id.*

[339] Eschwege, *supra* note 330, at 5.

(3) getting the new corporations approved for the 8(a) program;

(4) identifying and negotiating contracts for the new corporations; and

(5) subsequently providing them with services and items for a fee.[340]

As a result of these sponsorship arrangements, the twenty-five firms evaluated in the audit were extremely dependent on their sponsors and had, through various actions or inactions, delegated a high degree of control to them.[341] The business plans and/or management agreements between the firms and their sponsors generally stipulated that the sponsors would provide the 8(a) firms with those services that customarily were considered general and administrative in nature—such as training, accounting, figuring taxes, making management reports, and providing secretarial and clerical help.[342]

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[340] *Id.*

[341] *Questionable Effectiveness*, *supra* note 74, at 19.

[342] *Id.* The GAO audit identified the following as the activities of the firms most commonly influenced by the seven sponsors:

(1) Accounting: At one time the books of 20 firms were maintained by the sponsors at the sponsors' places of business. At the completion of our review, the books of 18 firms were still maintained there.

(2) Corporate records: At one time the corporate records of 20 firms were maintained by the sponsors at the sponsors' places of business. At the completion of our review, the corporate records of 11 firms were still maintained there.

(3) Cash Expenditures: Six sponsors were authorized to make cash expenditures for 17 firms without obtaining cosignatures of officials of the firms.

(4) Payroll: This function, provided by six sponsors to 19 firms included (1) computing gross pay and withholding, (2) writing the checks, (3) signing the names of the firms' treasurers by machine, and (4) mailing checks to firms.

(5) Contract negotiations: The seven sponsors represented 20 of their firms in negotiations with contracting agencies.

(6) Board of directors meetings: At one time seven sponsors were on the boards of directors of 21 firms, and three of these sponsors controlled the boards of five of these firms. At the completion of our review, three sponsors were still on the boards of six of the firms, and two sponsors still controlled the boards of three of the firms.

(7) Stockholders meetings: Six sponsors held stock in 18 firms at some time and were in a position to influence the stockholders' meetings. Although the other sponsor did not have stock ownership, it had similar influence through a partnership agreement. Stock in six firms is still owned by three of the sponsors.

(8) Dealings with financial institutions: Four sponsors arranged for loans of lines of credit for 14 firms by arranging for assignment of contract receipts to banks, usually located near the sponsors' places of business. The banks paid no interest to the firms because their funds were main-

In addition, all of the sponsors generally represented the 8(a) firms in identifying and negotiating new contracts, dealing with SBA and union representatives, and locating and obtaining financing.[343]

Although the SBA considered ownership of fifty-one percent or more of an 8(a) firm by disadvantaged individuals as evidence of their control, the audit concluded that control of these 8(a) firms rested firmly in the hands of the sponsors.[344] The activities of the disadvantaged owners of the twenty-five sponsored 8(a) firms that were evaluated often were limited to supervising, to include keeping employee time records and keeping the sponsors aware of any financial problems.[345] Interviews with the owners generally indicated that they lacked "even a basic understanding of routine business matters and were not aware of very important matters specific to their own businesses."[346]

The audit found that the SBA had relinquished to sponsors its responsibilities to insure that these sponsors provided the 8(a) firms with capital, management services, and training to aid them in becoming self-sufficient.[347] As a result, sponsorship abuses flourished. The GAO recommended that the SBA establish a system to

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tained in checking accounts. Although the accounts were sizeable, there were no indications that short-term investments were considered.

(9) Leasing equipment: Two sponsors and a leasing company owned by a stockholder of another sponsor leased equipment to 10 firms. None of the firms had an option to buy the equipment.

(10) Dealing with contracting agencies: All of the sponsors represented the firms in resolving problems arising from contract performance and in negotiating changes in contract specifications and any other items which would affect the successful completion of contracts.

*Id.* at 20-21.

[343] *Id.* at 19-20.

[344] *Id.* at 21.

[345] *Id.* at 22.

[346] *Id.* Interviews of the presidents of the 25 8(a) firms disclosed the following:

(1) One did not know if he was on the board of directors;

(2) Two did not know who prepared their firms' financial statements;

(3) Three did not know if their firms were on a cash or accrual accounting basis;

(4) One did not know if his firm had paid dividends;

(5) Two did not know if the fees for the general and administrative services provided by their sponsors were based on a percentage of gross income;

(6) Three did not know if their firms were drawing interest on the cash in their bank accounts; and

(7) Six said they were weak in finance and accounting, nine said they were weak in preparing contract bids, and two said they were weak in negotiating contracts.

*Id.*

[347] *Id.* at 25.

monitor (1) the extent to which sponsors control 8(a) firms and (2) the progress of the sponsor-controlled firms toward becoming self-sufficient.[348] The SBA agreed and revised its procedures to increase control and surveillance over sponsorship arrangements.[349] However, these initial revisions did little to control sponsorship abuses.

*2. Small Business Administration Internal Audits*

*a. 1976 Internal Audit*—In 1976, the SBA conducted an internal audit[350] of the sponsorship program to determine the success of the corrective actions taken by the SBA in response to the 1974 GAO audit findings. These auditors found that even with revised procedures, nondisadvantaged sponsors still controlled many 8(a) firms and were the prime recipients—instead of the disadvantaged 8(a) owners—of the 8(a) program's benefits.[351] The auditors concluded that the corrective actions taken by the SBA were ineffectual primarily because the belief persisted that ownership of fifty-one percent or more by disadvantaged individuals was sufficient evidence that the 8(a) firms were controlled by their owners.[352]

One attempt by the SBA to reduce sponsors' influence required the sponsoring firms to divest themselves entirely from ownership in the 8(a) firms.[353] The sponsors were able to retain control, however, through management and joint venture agreements.[354] Another

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[348] *Id.*

[349] Eschwege, *supra* note 330, at 6. These revisions included the following:

> (1) Management agreements between sponsors and 8(a) firms were required to be approved by the SBA's Associate Administrator for Procurement Assistance.
>
> (2) The Business Plan, which all 8(a) applicants were required to submit when applying for admittance to the program, was expanded to collect information on sponsorship arrangements.
>
> (3) Revised procedures required field office personnel to monitor the compliance of sponsors with approved agreements, to include personal meetings with sponsored 8(a) firms to review sponsorship arrangements.
>
> (4) A surveillance team of four members was established to review the 8(a) program through field investigation.

*Id.* at 6–7.

[350] Small Business Association, *Review of 8(a) Sponsorships*, REP. OF AUDIT, Rep. No. 10–77 (1977) [hereinafter *Sponsorships*]. The SBA performed this audit on a total of 44 8(a) firms and based it on case file reviews and field visits that examined the firms' business plans and contract files. *Id.* at 2–3.

[351] Eschwege, *supra* note 330, at 7.

[352] *Sponsorships*, *supra* note 350, at 7.

[353] *Id.* at 8.

[354] *Id.* In addition, in the act of divesting, sponsors often sold their stock back to the 8(a) firm for a substantial profit, which caused a drain on the firms' assets that potentially crippled their growth. *Id.*

attempt to curb sponsorship abuses involved the creation of a surveillance team to improve monitoring of sponsored firms.[355] Although the team performed effectively in identifying potential abuses, the SBA usually took no corrective action because lax standards defining ownership and control made it difficult to show that a violation existed.[356] As one Senate report noted, "Clearly, whenever the SBA changed the rules governing sponsorships, the sponsors merely changed their actions to get around the new regulations."[357]

The SBA's internal auditors determined that further revisions were necessary to eliminate sponsorship abuses. In the auditors' opinion, the SBA had not taken serious action to remove sponsorships from the 8(a) program even though the SBA had received evidence showing actual abuses.[358] The auditors attributed this inertia to the belief that all parties involved in the sponsorship program—sponsor, 8(a) owner, procuring agencies and SBA program officials—appeared to benefit from the status quo:

> Sponsors were able to take advantage of contracts obtained on a noncompetitive basis. [Disadvantaged] individuals cast in the role of minimal owners could enjoy the status and often sizeable incomes without having to concern themselves with entrepreneurial responsibilities which were borne by the sponsors. Contracting officials of procuring agencies should have been contented with sponsorship arrangements, since sponsored firms were backed by experienced, reliable [nondisadvantaged] businessmen, and were more likely to perform well [sic] than nonsponsored 8(a) firms. We also believed SBA program officials felt more comfortable with the sponsorship concept, because sponsored firms usually performed well on contracts, were in better financial condition, had less need for other SBA services, and generally gave the Agency less trouble.[359]

The auditors felt that drastic measures were necessary to solve the problems created by sponsorships and they recommended eliminating the sponsorship concept as it existed in favor of establishing more stringent criteria for defining ownership and control of 8(a) firms.[360] The SBA agreed that its existing practices concerning the

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[355] *Id.*

[356] *Id.*

[357] ABUSES IN 8(A) PROGRAM, *supra* note 321, at 41.

[358] *Sponsorships, supra* note 350, at 8.

[359] *Id.*

[360] *Id.* at 9.

use of sponsors should be discontinued and set about revising its procedures and developing specific criteria to effect the change.[361] However, before embarking on this task, the SBA's Administrator directed that the SBA conduct a review of every firm in the 8(a) program to obtain pertinent information relating to (1) the socially and economically disadvantaged status of the 8(a) firm owners on whom eligibility was based and (2) the degree of ownership and control over the 8(a) firms by their owners and the extent to which they were involved in day-to-day operations.[362] Interim control measures were imposed in a memorandum issued by the SBA's Administrator that promulgated instructions to the field as cited below:

> We will closely control ownership in 8(a) firms by non-disadvantaged individuals. Such ownership arrangements will be permitted, providing the non-disadvantaged individuals are not former employers of the disadvantaged owner and are not affiliated or associated with other firms operating in the same or similar type business. A non-disadvantaged individual may participate as a minority owner in only one 8(a) firm. His involvement in the business must be commensurate with his percentage of ownership in the 8(a) firm. If the percentage of ownership in the 8(a) firm exceeds 35 percent, the non-disadvantaged owners must also be actively involved in the business on a 100 percent, day-by-day operational basis. In every case, compensation received by the disadvantaged owner, as the firm's chief executive, must exceed that of any other employee.[363]

*b. 1978 Internal Audit*—The SBA's internal audit of the entire 8(a) portfolio reviewed 1505 firms that were enrolled in the 8(a) program at the time of the audit.[364] The audit identified a total of 526 8(a) firms that had deficiencies of varying degrees of signifi-

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[361] *Id.* at 11.

[362] *Eligibility Review*, *supra* note 327, at 4.

[363] *Minority Contracting*, *supra* note 86, at 73 (Report and Recommendations on the Section 8(a) Program submitted by the 8(a) Review Board).

[364] *Eligibility Review*, *supra* note 327, at 1. The scope of the audit was described as follows:

> Individual reviews consisted of an examination of each 8(a) contractor's business plan file plus, where necessary, other SBA records including 8(a) contract files and loan case files. In addition, field visits to 8(a) firms were made in those cases where ownership and control problems were suspected or where sufficient information was not available in SBA's records to complete the reviews. . . . Additionally, . . . telephone interviews were held in those instances when field visits were considered unnecessary.

*Id.* at 5.

cance.[365] In 234 cases, or sixteen percent of the 8(a) portfolio, the auditors found evidence indicating that nondisadvantaged businesspersons exercised control of the 8(a) firm[366]—control effected through part ownership and various types of management and other agreements.[367]

Consistent with the results of the previous audit, the auditors determined that these abuses occurred because the SBA's standards on 8(a) firm ownership and control were inadequate.[368] The auditors also identified certain characteristics of the 234 firms that would be useful in determining if an 8(a) firm was controlled by nondisadvantaged individuals or firms, or had the potential for such control.[369]

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[365] *Id.*

[366] *Id.* at 6.

[367] *Id.*

[368] *Id.*

[369] *Id.* The following characteristics of control by nondisadvantaged individuals or firms were described by the auditors (number in parentheses indicates the number of firms examined during the audit with this characteristic):

1. Disadvantaged owner owned less than 51% of the stock—(51).

2. 8(a) firm was involved with individuals who were in most instances owners, officers, or employees in other firms—(54).

3. Management, joint ventures, subcontracting or lease agreements were entered into with nondisadvantaged firms whose line of work was identical or similar to 8(a) firms—(35).

4. 8(a) owner worked for nondisadvantaged entity prior to heading 8(a) firm—(16).

5. 8(a) owner did not give appearance of actually managing the firm—(39).

6. 8(a) owner did not appear to have sufficient education and experience to operate a business—(19).

7. 8(a) owner did not pay for capital stock received—(5).

8. 8(a) owner could not present proof of stock ownership—(44).

9. Firm reorganized/changed ownership without SBA approval—(19).

10. 8(a) firm shared same office space with the nondisadvantaged firm—(15).

11. 8(a) firm rented office space from the nondisadvantaged entity—(17).

12. 8(a) firm purchased/rented machinery and equipment, furniture and fixtures and supplies from the nondisadvantaged entity—(12).

13. 8(a) firm received financial, technical, and/or administrative services from the nondisadvantaged entity—(29).

14. 8(a) firm received working capital, bonding, or other financial assistance from the nondisadvantaged entity—(14).

15. 8(a) firm was not separately listed in telephone directory—(3).

16. Nondisadvantaged entities controlled firm through convertible debentures/stock/promissory note—(9).

17. Partnership agreement/corporate by-laws gave nondisadvantaged owners power to control firm—(27).

18. 8(a) owner's salary was unreasonably low or equal to other officers' salaries—(9).

These characteristics were similar in nature to the ownership and control deficiencies noted in the previous audit. Ultimately, the 1978 audit reached the same conclusion: the SBA should eliminate the sponsorship concept from the 8(a) program and develop stringent, specific criteria defining ownership and control by the disadvantaged owner.[370] This result was consistent with the following findings and recommendations reported during congressional hearings on the 8(a) program: "The sponsorship program should be limited as a consideration for joining the [8(a)] program and should not be advocated nor advanced by the SBA."[371]

*3. Current Ownership and Control Standards*—Concurring in large part with the recommendations of the internal audits, the SBA published revised guidelines concerning 8(a) firm ownership and control criteria that complied with a majority of the auditors' recommendations.[372] These guidelines appear in the Minority Small Business and Capital Ownership Development Program's Standard Operating Procedure, which establishes and updates policies, procedures, requirements and guidelines for the administration of the 8(a) program. These guidelines also appear as implementing regulations in Title 13 of the Code of Federal Regulations, Part 124.[373]

The current guidelines concerning eligibility criteria for control and management of 8(a) firms require that at least fifty-one percent of the firm be "unconditionally owned"[374] by a disadvantaged indi-

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19. 8(a) owner did not devote full time to firm—(23).

20. 8(a) firm was formed in response to the 8(a) program—(6).

21. 8(a) firm was formed by, or with assistance of, nondisadvantaged entity—(28).

22. Capital injection of 8(a) firm was minimal, $1000 or less—(9).

23. Ownership of 8(a) firm could not be verified—(8).

24. Eligibility based on group rather than individual ownership—(1).

25. Control of firms was in hands of estates/trustees (i.e., firm bankrupt)—(2).

26. 8(a) firm retained public accountant of nondisadvantaged entity—(9).

*Id.* at 7–8.

[370] *Id.* at 8.

[371] ABUSES IN 8(A) PROGRAM, *supra* note 321, at 22.

[372] *Eligibility Review, supra* note 327, at 10.

[373] *See* SBA, MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT PROGRAM STANDARD OPERATING PROCEDURE 80 05 2 (1990) [hereinafter SOP].

[374] "*Unconditional ownership* means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, shareholder agreements or other similar arrangements that serve to allow the primary benefits of [8(a)] program participation to accrue to entities or individuals other than upon whom 8(a) program eligibility is based." 13 C.F.R. § 124.100 (1992).

vidual(s).[375] The disadvantaged person(s) also must control the management and daily business operations of the firm.[376] To be considered in control of the business, the disadvantaged individual must have managerial or technical experience and competency directly related to the primary industry in which the firm seeks 8(a) certification.[377] Additionally, to preclude control by nondisadvantaged persons, control of the Board of Directors must rest with the disadvantaged individual(s), either in actual numbers of voting directors or through weighted voting.[378]

Nondisadvantaged individuals may be involved in the management of the 8(a) firm as stockholders, partners, officers, and/or directors; however, limitations on their involvement exist. The implementing regulations state that nondisadvantaged individuals may not:

> (1) Exercise actual control or have the power to control the applicant or 8(a) concern;[379]
>
> (2) Be an officer or director or more than a ten percent owner, stockholder, or partner of another firm in the same or similar line of business as the applicant or 8(a) concern;[380]
>
> (3) Receive excessive compensation from the applicant or 8(a) concern as directors, officers or employees;[381]
>
> (4) Be former employers of the disadvantaged owner(s) of the 8(a) firm unless the SBA determines that the contemplated relationship between the former employer and the disadvantaged individual does not give the former actual control or the potential to control the applicant or 8(a)

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[375] *Id.* § 124.103.

[376] *Id.* § 124.104(a).

[377] *Id.* The implementing regulations also require the disadvantaged person to hold the position of President or Chief Executive Officer of the firm. This means that the owner cannot engage in outside employment or any other business interest that would conflict with the management of the firm unless the owner requests approval in writing and the SBA grants it. *Id.* § 124.104(a)(2).

[378] *Id.* § 124.104(b). For example, if a firm has a two-person Board of Directors where one individual is disadvantaged and the other is not, the disadvantaged member's vote must be worth more than the nondisadvantaged member's vote. *Id.*

[379] *Id.* § 124.104(c)(1).

[380] *Id.* § 124.104(c)(2).

[381] *Id.* § 124.104(c)(3). Compensation is deemed excessive if the nondisadvantaged individual's compensation exceeds that of the President or Chief Executive Officer of the 8(a) firm. However, with written consent from the SBA, the President or Chief Executive Officer may elect to take a lower salary than a nondisadvantaged individual if it is demonstrated to be in the best interest of the applicant or 8(a) concern. *Id.*

concern and the relationship is in the best interests of the 8(a) firm;[382] and

(5) Have an equity ownership interest of more than ten percent in another 8(a) concern.[383]

To assist SBA personnel in recognizing potential control and management problems, the SBA's regulations also describe circumstances where nondisadvantaged individuals or entities may be found to control or have the power to control 8(a) firms. These circumstances, which are not all inclusive, include the following:

(1) Nondisadvantaged individuals control the voting Board of Directors of the 8(a) concern, either directly through majority voting membership, or indirectly, if the nondisadvantaged individuals can block any action through negative control.[384]

(2) A nondisadvantaged individual, as an officer or member of the Board of Directors of the 8(a) concern, or through stock ownership, has the power to control day-to-day direction of the business affairs of the concern.[385]

(3) The nondisadvantaged individual or entity provides critical financial or bonding support or licenses to the 8(a) concern which directly or indirectly allows the nondisadvantaged individual to gain control or direction of the 8(a) concern.[386]

(4) A nondisadvantaged individual or entity exercises voting control of the participant through a nominee(s).[387]

(5) A nondisadvantaged individual or entity controls the corporation or the individual disadvantaged owners through loan arrangements.[388]

(6) Other contractual relationships exist with nondisadvantaged individuals or entities, the terms of which would create control over the disadvantaged concern.[389]

*B. Ambiguous Eligibility Criteria*

The purpose of the 8(a) authority concept is to improve disad-

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[382] *Id.* § 124.104(c)(4).
[383] *Id.* § 124.104(c)(5).
[384] *Id.* § 124.104(d)(1).
[385] *Id.* § 124.104(d)(2).
[386] *Id.* § 124.104(d)(3).
[387] *Id.* § 124.104(d)(4).
[388] *Id.* § 124.104(d)(5).
[389] *Id.* § 124.104(d)(6).

vantaged individuals' economic positions and abilities to compete in the financial marketplace. However, uncertainty as to requirements for program eligibility has allowed situations where businesses have been admitted into the 8(a) program when their need for assistance has been highly questionable. As noted below, some would argue that this result is desirable.

A fundamental question that must be answered before examining the abuses caused by ambiguous eligibility criteria is who should be the target recipients of the 8(a) program—the most deprived minorities or those whose prospects of business success are greatest. In other words, should the 8(a) program aid the most deprived minorities who need help most, or those who need help less but have much better prospects for business success?[390] The first approach entails using minority business aid as a "redistributive poverty program" for assisting those who are in dire economic straits.[391] The second approach involves encouraging business creation and expansion, usually by those who already possess the traits of successful entrepreneurs, such as managerial experience, strong educational credentials, and generally above-average incomes.[392]

The question that invariably follows when the program affords assistance to "non-disadvantaged" minority businesses is, "Why help those who are already successful?" One commentator has answered this inquiry with the following justification:

> These rapidly growing, economically viable firms promote economic development by creating jobs in minority communities. Their profits support investments that, in turn, permit further business expansion and job creation. The presence of business success stories lures younger, better-educated minorities into self-employment, thus further promoting the economic development thrust of minority entrepreneurship. Similarly, existing minority-owned firms in less profitable lines of business are induced—by the success story phenomenon—to reorient their operations to areas that offer greater profit potential; once again, economic development is promoted. All of the above describe the process whereby the vestiges of discrimination are gradually overcome, allowing minority enterprise to approach parity with the nonminority entrepreneur universe.[393]

Contrary to these views, the 8(a) program utilizes business set-

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[390]Bates, *supra* note 10, at 54.

[391]*Id.* at 52.

[392]*Id.*

[393]*Id.*

asides as a means of helping deprived minority businesses. In theory, these deprived firms receive contract support to attain self-sufficiency and graduate once they have become viable businesses. However, due to ineffective eligibility criteria for the 8(a) program, many businessmen in the program do not meet these criteria because they are not, or never were, economically or socially disadvantaged. Similarly, firms that entered the program validly remained in the program even after obtaining self-sufficiency because few criteria existed for determining when, if ever, an 8(a) contractor should leave the program.

*1. The History of the Eligibility Standards*—As previously noted, the 8(a) program, as originally enacted, authorized the SBA to enter into contracts with other government agencies and subcontract the work to small businesses. Although the implementing statute was silent on the issue of direct government assistance to minority small businesses, the SBA exercised its authority under the 8(a) program to permit this narrowing of focus.[394] As such, the SBA administratively developed the 8(a) program into a minority-based set-aside to assist in the development of firms owned and controlled by "socially *or* economically disadvantaged" persons.[395] The SBA intended to insulate these businesses from the rigors of competition in hopes that the disadvantaged owners would develop their business abilities and ultimately achieve a competitive position in the marketplace.[396]

The determination and application of the "social or economic disadvantage" criteria proved troublesome for the SBA and generated criticism from the GAO as well as discussion in congressional hearings.[397] Although Congress never precisely defined the term "disadvantaged," the SBA decided to base its eligibility criteria on a section of the Economic Opportunity Act of 1964 (1964 Act), which indicated that the SBA should attempt to assist small businesses in any way that furthered the purposes of the 1964 Act.[398] While recognizing that disadvantage may arise from cultural, social, or chronic economic circumstances or background or similar causes, the SBA's policies and regulations prohibited 8(a) eligibility based principally on an individual's race, creed, or ethnic background.[399]

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[394]Levinson, *supra* note 94, at 64.

[396]Drabkin, *supra* note 197, at 441.

[396]S. REP. NO. 1070, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3835, 3842.

[397]General Accounting Office, *An Analysis of How Eligibility Criteria Are Applied for Participation in the 8(a) Program*, REP. BY COMPTROLLER GEN. U.S., Rep. No. CED-78-92, 1 (1978) [hereinafter *Analysis of Eligibility Criteria*].

[398]*Questionable Effectiveness*, *supra* note 74, at 3.

[399]John Landicho, Associate Director of the Community and Economic Devel-

Even so, the "social or economic disadvantage" criteria circumstantially enabled large numbers of minority groups to enter the 8(a) program.[400]

That the vast majority of persons in the 8(a) program were members of minority groups did not mean that eligibility was based solely on minority status.[401] The economic and social conditions faced by minority businessmen in the 1970s made them eminently qualified under the social/economic disadvantage criteria.[402] However, this did not mean that all minority group members were automatically disadvantaged. In any event, in the early 1970s, SBA field officers, driven by quota-conscious senior SBA officials in Washington, D.C., recruited as many minority businessmen as could be found.[403] In some cases, SBA officials coached the applicants, advising them as to how to establish the firm's eligibility.[404] As a result, applicants who did not actually qualify as socially or economically disadvantaged were approved for 8(a) participation.[405] Additionally, the subjective nature of determining social or economic disadvantage led to inconsistent application of the criteria from region to region.[406] In 1977, responding to allegations of program abuse, the SBA's Administrator imposed a temporary moratorium on new 8(a) program entries and directed an 8(a) review board to reassess the eligibility criteria.[407]

At the time of the review, the SBA based eligibility determinations on criteria established by the SBA's General Counsel.[408] The

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opment Division of the General Accounting Office, Statement Before the House of Representatives Subcommittee on Minority Enterprise and General Oversight Committee on Small Business on SBA's 8(a) Procurement Program 2 (June 20, 1978).

[400] ABUSES IN 8(A) PROGRAM, *supra* note 321, at 4.

[401] *Id.*

[402] *Id.* at 5. The Committee reported that:

> The rationale behind the 8(a) program has a strong basis in fact. Economic statistics consistently show that minority groups have lower incomes, live in less desirable neighborhoods and suffer crime rates which the average suburbanite would consider intolerable. Socially, blacks and other minorities receive demonstrably poorer and briefer educations than their more advantaged white counterparts, and are still the victims of discrimination on a nationwide basis.

*Id.* at 4-5.

[403] *Id.* at 5.

[404] *Id.*

[405] *Eligibility Review*, *supra* note 327, at 12.

[406] ABUSES IN 8(A) PROGRAM, *supra* note 321, at 5. For example, in the Atlanta region minority candidates were rejected for entry into the program because a college education or solid business experience made these individuals "over-qualified." At the same time, on the west coast, businessmen of substantial means, whose companies were proven successes, were being certified for the same program. *Id.*

[407] *Analysis of Eligibility Criteria*, *supra* note 397, at 1.

[408] *Eligibility Review*, *supra* note 327, at 12.

SBA used these criteria—which described certain factors or situations that may have been present in an applicant's background—to qualify an individual as socially or economically disadvantaged.[409] According to the criteria, the following factors could establish 8(a) program eligibility:

> (1) social background, which may affect the applicant's ability to obtain adequate technical, business, or financial assistance, (2) past experiences with discrimination, which may impede the applicant's entry into the economic mainstream, (3) previous failures to compete for government contracts because of restrictions imposed by financial and commercial institutions in favor of established firms, (4) length of residence in an urban area with a high concentration of unemployed or low-income persons, (5) record of unemployment or marginal employment, and (6) chronic low-income status.[410]

In addition, an applicant's veteran status and its effect on social or economic disadvantage also could be used to establish eligibility.[411]

The 8(a) review board found that social background and its detrimental effect on the applicant appeared to be the leading factor used in assessing applicant eligibility.[412] An earlier GAO report similarly indicated that the SBA admitted applicants into the 8(a) program on the basis of social disadvantage without showing the connection between the applicant's disadvantage and the need for 8(a) assistance.[413] The reliance on social factors appeared to have two causes: (1) economic disadvantage was difficult to analyze without specific criteria or standards; and (2) social disadvantage was relatively easy to analyze.[414] The GAO's recommendation that the SBA establish a connection between an applicant's disadvantage and the need for 8(a) assistance before awarding contracts was included as a revision to the SBA's standard operating procedures.[415] Although the SBA made these revisions to their implementing regulations, the

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[409] *Id.*

[410] *Analysis of Eligibility Criteria*, *supra* note 397, at 2.

[411] *Id.*

[412] Landicho, *supra* note 399, at 5.

[413] *Questionable Effectiveness*, *supra* note 74, at 31. In many cases, determinations for eligibility were based entirely on ethnic backgrounds, in which minority status was equated with being disadvantaged. For example, a regional director said the national administration's intent, in his judgment, was to consider black Americans and others as automatically disadvantaged. *Id.* at 28.

[414] *Id.* at 28.

[415] *Id.* at 31.

8(a) review board nonetheless reached three conclusions that were critical of 8(a) program eligibility determinations.[416]

First, the board concluded that the eligibility criteria were vague and not applied uniformly and consistently.[417] One GAO report described the problem as follows:

> Some eligibility determinations included descriptions of racial discrimination and injustice which occurred during the applicant's youth. Others reported that the applicants had been subjected to underemployment and ghetto living during maturity. Many determinations were based entirely on ethnic backgrounds, and minority status was equated with being disadvantaged.[418]

Instead of identifying the applicant's specific problems and relating them to the principal eligibility criteria established by the SBA General Counsel, approval appeared to be granted based on vague information about the applicant's social or economic position.[419] The applicants approved for 8(a) entry ranged from those of obviously low economic status and social position to those with much greater economic, educational, and professional achievement.[420] In either

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[416]The review was based on 28 8(a) applications in Region IX. The board analyzed applications and supporting documentation, and held discussions with agency officials to examine how program criteria were applied and to determine whether the criteria were uniformly or subjectively applied. Landicho, *supra* note 399, at 3. The review board's results were consistent with conclusions of the SBA's 1978 internal audit where auditors found that 119 of the 1505 firms, or 8% of the total 8(a) portfolio, had questionable economic and social disadvantage status. *Eligibility Review, supra* note 327, at 12.

[417]Landicho, *supra* note 399, at 3.

[418]*Questionable Effectiveness, supra* note 74, at 28.

[419]*Analysis of Eligibility Criteria, supra* note 397, at 3.

[420]*Id.* at 9. The following cases demonstrate how the SBA applied the criteria:

> Applicant, a Mexican American, entered the janitorial business with very limited equipment and managed to make an average yearly income of $6,000 over a 5-year period. The disadvantaged statement referred to his adolescent problems and his failure to complete school. It also stated that he could not find employment to make an adequate living; consequently, he started his own business. Without any further explanation the statement concluded that due to regional social and economic conditions the applicant had been unable to become competitive in his field.
>
> Applicant, a Japanese American, owns a newly established construction business. He graduated from college in 1964 with a B.S. in civil engineering, had been employed for 12 years, and, at the time he started his business, had been averaging $24,000 a year for 5 years. His last position had been general manager of a construction firm at a salary of $30,600. No specific examples or documentation are in his file to show economic or social disadvantage. The case appears to have been approved because it was a new firm, not competitive in a slumping construction industry, experiencing difficulties in financing and bonding, and in need of SBA support.

*Id.* at 9-10.

case, it was difficult to determine from applicant files why the SBA deemed an applicant eligible.

Second, the review board determined that the SBA was not complying with program procedures because its files did not identify the specific criteria used to approve eligibility.[421] Additionally, the SBA did not document the connection between applicants' social or economic disadvantage and their inability to compete successfully in the economic mainstream.[422] In some cases information suggested that applicants had overcome their disadvantage,[423] while in other cases, how the applicants' background excluded them from the economic mainstream was unclear.[424]

Finally, the review board found that because of the subjective nature of the criteria, different offices could reach different decisions on eligibility.[425] As such, the SBA was not uniformly administering the 8(a) program because of varying interpretations made by SBA evaluators who viewed the eligibility criteria differently.[426] For

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[421]Landicho, *supra* note 399, at 3.

[422]*Id.*

[423]*Analysis of Eligibility Criteria*, *supra* note 397, at 5. The following example is illustrative of this point:

> Two applicants earning $27,000 or more a year and whose company was new were declared eligible for the program. Their applications claimed that they were raised in poverty, lacked money for business education, and had received neither training nor orientation in business careers. However, one applicant received an MBA from Harvard and the other received an MBA from the University of Southern California. No SBA analysis supported the presumption that social disadvantage precluded the applicants from obtaining the necessary technical, business, or financial assistance.

*Id.*

[424]*Id.* at 4. The following examples are indicative of cases where the 8(a) review board found firms whose eligibility appeared questionable under these circumstances:

> The statement of one minority applicant with average earnings of $16,000 a year discussed his childhood poverty and his present inability to obtain financing which forced him to turn down contracts. However, no examples were found to document his inability to obtain contracts. The applicant's social background was not connected to his ability to obtain financing.
>
> Another applicant with a salary of $45,000 a year, company sales of over $700,000, and an after-tax profit of $66,000 argued that his social background had prevented him from obtaining traditional financing, especially from friends, relatives, and parents. The statement mentioned an unsuccessful attempt to obtain financing from a bank that had made loans to a competitor. Aside from the vague remark that his social background had made it difficult to obtain assistance, there was no discussion about how this precluded obtaining assistance or what efforts had been made to obtain help.

*Id.*

[425]Landicho, *supra* note 399, at 3.

[426]*Analysis of Eligibility Criteria*, *supra* note 397, at 12. The following case is

example, some district offices emphasized an applicant's social disadvantage in determining eligibility while others stressed economic disadvantage.[427]

In 1978, with the passage of Public Law 95-507,[428] Congress enacted reforms in the 8(a) program. Striving to correct "inequitable determinations of eligibility,"[429] Congress provided objective criteria for the SBA to use in considering whether an applicant should be entitled to participate in the 8(a) program. One major change in the statute involved defining program eligibility in terms of both social *and* economic disadvantage.[430] This change meant that applicants no longer could qualify for the 8(a) program solely on the basis of racial or ethnic criteria.[431] Instead, program entry was restricted to those minority entrepreneurs who met an economically-based standard of eligibility.[432] The next section will describe 8(a) program eligibility as it presently exists.

*2. Current Eligibility Standards*

*a. Eligibility*—As a result of Public Law 95-507, participation in the 8(a) program requires that one or more socially and economically disadvantaged individuals[433] unconditionally own[434] at

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an excellent example of what happens when field offices rely on different interpretations of eligibility criteria:

> The applicants, who were Black, owned an established architect/engineering firm. Before going into business, the applicants, both graduates of prestigious universities, had worked for several architectural firms. Over the previous five years each had an average income of $50,000. Both had acquired personal net worths exceeding $300,000. Alleging past socioeconomic disadvantage, the owners applied for 8(a) entry. Although the San Francisco district office approved the firm as eligible for the 8(a) program, the Los Angeles office refused to recommend the company when the application was transferred to its district. The regional review board found that the company was ineligible because the board felt the owners had overcome any social or economic disadvantage they may have suffered. To complicate matters further, the Regional Director, interpreting the criteria differently, admitted the firm into the 8(a) program.

*Id.* at 10, 12.

[427] *Id.* at 11.

[428] *See* Act of Oct. 24, 1978, *supra* note 106.

[429] Levinson, *supra* note 94, at 69.

[430] 15 U.S.C. § 631(e)(i) (Supp. III 1979).

[431] Drabkin, *supra* note 197, at 441.

[432] Levinson, *supra* note 94, at 69.

[433] 15 U.S.C. § 637(a)(4)(A)(i). In the case of a publicly owned business, 8(a) eligibility requires that one or more of the socially and/or economically disadvantaged groups previously described unconditionally own at least 51% of the concern's stock. *Id.* § 637(a)(4)(A)(ii).

[434] 13 C.F.R. § 124.100 (1992). 13 C.F.R. § 124.112 sets forth the special ownership requirements for concerns owned by Indian tribes and Alaska Native corporations. The ownership requirements for Native Hawaiian organizations are set forth in 13 C.F.R. § 124.113. (1992).

least fifty-one percent of a small business concern. Although the 8(a) program also assists both "economically disadvantaged Indian tribes" and "economically disadvantaged Native Hawaiian organizations,"[435] this article will not address the specific provisions concerning these two groups, but will deal solely with the application of the 8(a) program to "socially and economically disadvantaged individuals."

*(1) Social Disadvantage*—Under this statutory scheme, program applicants first must establish that they are socially disadvantaged. The statute describes socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."[436]

*(a) Designated Groups*—Absent evidence to the contrary, some groups are presumed to be socially disadvantaged. These groups include: Black Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians), Asian Pacific Americans, and Subcontinent Asian Americans.[437] The SBA also may designate other groups as socially disadvantaged if certain procedures these groups follow.[438] These procedures include a requirement that an identifiable group make an adequate preliminary showing to the SBA that it has suffered chronic racial or ethnic prejudice or cultural bias.[439] In determining whether a group has made an adequate preliminary showing, the SBA must determine the following:

> (1) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;
>
> (2) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and
>
> (3) Whether such conditions have produced impediments

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[435] *Id.* § 637(a)(4)(A)(i).

[436] 15 U.S.C. § 637(a)(5).

[437] 13 C.F.R. § 124.105(b). Asian Pacific Americans include those persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, the Philippines, United States Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru. Subcontinent Asian Americans include those persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, or Napal. *Id.*

[438] *Id.*

[439] 13 C.F.R. § 124.105(d)(1).

> in the business world for members of the group over which they have no control and which are not common to all small business owners.[440]

*(b) Nonmembers of Designated Groups*—One author has argued that the presumption in favor of eligibility for certain minority group members could provide the basis for distributing preferential procurement opportunities along racial and ethnic lines by treating "social and economic disadvantage" merely as a euphemism for minority businesses.[441] However, Congress has recognized that some nonminorities also come from disadvantaged backgrounds.[442] As such, these groups may participate in the 8(a) program if they meet certain conditions. Individuals who are not members of the groups described in the previous section can establish their individual social disadvantaged status on the basis of clear and convincing evidence.[443] To establish a clear and convincing case of social disadvantage, individuals must show the following elements:

> (1) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.
>
> (2) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim

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[440]*Id.* § 124.105(d)(2). If the group meets these criteria, the SBA publishes a notice in the *Federal Register* which identifies the group making the request for socially disadvantaged group status and the date, time, and location of a hearing on the matter, if deemed appropriate. *Id.* § 124.105(d)(1), (d)(2)(iii). Public comment concerning the group's request is permitted for a period of up to thirty days. *Id.* § 124.105(d)(4). Any member of the public, including government representatives and any member of the private sector, may submit information to the SBA concerning the matter. *Id.* § 124.105(d)(3). The SBA collects all information to support or refute the group's request and must make a final decision within sixty days of the close of the comment period and publish the decision as a notice in the *Federal Register*. *Id.* § 124.105(d)(3), (4).

[441]Levinson, *supra* note 94, at 70.

[442]The legislative history of Pub. L. No. 95-507 confirms Congress's recognition that nonminorities may come from disadvantaged backgrounds. H.R. REP. No. 1714, 95th Cong., 2d Sess. (1978) noted:

> [B]ecause of present and past discrimination many minorities have suffered social disadvantagement. However, the Conferees realize that other Americans may also suffer from social disadvantagement because of cultural bias. For example, a poor Appalachian white person, who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged, provided that the conditions leading to such disadvantagement are beyond the ability of the person to control.

*Id.* at 22.

[443]13 C.F.R. § 124.105(c)(1).

membership in a nondesignated group which could be considered socially disadvantaged.

(3) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(4) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(5) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world.[444]

*(2) Economic Disadvantage*—Once applicants have demonstrated that they are socially disadvantaged, they also must prove that they are economically disadvantaged. Economically disadvantaged individuals are defined as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[445] In determining economic disadvantage for purposes of 8(a) program eligibility, the SBA compares the applicant concern's business and financial profile with profiles of businesses in the same or similar line of work that are not owned and controlled by socially and economically disadvantaged individuals.[446]

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[444] *Id.* § 124.105(c)(1)(i)-(v). In assessing how an individual's social disadvantage has negatively impacted an applicant's entry into and/or advancement in the business world, the SBA will entertain any relevant evidence and will particularly consider and place emphasis on the following experiences of the individual:

(1) *Education.* The SBA shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(2) *Employment.* The SBA shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(3) *Business history.* The SBA shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

*Id.* § 124.105(c)(v)(A)-(C).

[445] 15 U.S.C. § 637(a)(6)(A).

[446] 13 C.F.R. § 124.106(a)(1)(i).

Requiring businesses to be both socially and economically disadvantaged demonstrates that the "[8(a)] program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets, and resources."[447] These individuals, although socially disadvantaged, would not be eligible for 8(a) program participation because they could not establish economic disadvantage.

In determining economic disadvantage relating to the degree of diminished credit and capital opportunities of a socially disadvantaged individual, the SBA considers factors relating to both the applicant concern and the individuals claiming disadvantaged status.[448] These factors fall into three general categories: personal financial condition of the individuals claiming disadvantaged status, including the individuals' access to credit and capital;[449] financial condition of the applicant concern;[450] and the applicant concern's access to credit, capital, and markets.[451]

*(3) Additional Eligibility Requirements*—Along with the eligibility requirements noted above, the SBA will consider several other factors in determining if a business concern is eligible for 8(a) program participation. These additional factors include, but are not limited to, the following: (1) review of the applicants' character;[452] (2) application of the SBA's standards of conduct regulations[453] when eligibility questions arise involving SBA employees and their

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[447] *Id.* § 124.106(a)(1)(ii).

[448] *Id.* § 124.106(a)(2).

[449] This measure is designed to assess the individual's relative degree of economic disadvantage, as well as the individual's potential to capitalize or otherwise provide financial support for the business. Factors to be considered include, but are not limited to, the following: the individual's personal income for at least the past two years; total market value of all assets; and the individual's personal net worth. *Id.* § 124.106(a)(2)(i).

[450] This measure is used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. Factors to consider include, but are not limited to, the following: business assets; revenues; pre-tax profit; working capital; and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status. *Id.* § 124.106(a)(2)(ii).

[451] This measure is used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. Factors to consider include, but are not limited to, the following: access to long-term financing; access to working capital financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability. *Id.* § 124.106(a)(2)(iii).

[452] *See id.* § 124.108(a).

[453] *See generally id.* at pts. 105 (prescribes standards of conduct for current and former SBA employees, relating to possible conflicts of interest between their official duties or the public interest and their private interests).

relatives;[454] (3) eligibility limitations concerning applicants who have previously participated in and exited from the 8(a) program;[455] (4) circumstances under which the SBA must determine that the applicant is a manufacturer or regular dealer in accordance with the Walsh-Healy Public Contracts Act regulations;[456] and (5) special consideration when family members in the same household own, manage, or control multiple businesses.[457]

Notwithstanding the eligibility requirements noted above, a small business concern will not be eligible for 8(a) program participation unless the SBA determines that with contract, financial, technical, and management support the small business concern will be able to successfully perform the 8(a) contracts awarded and has reasonable prospects for success in competing in the private sector.[458] To satisfy these conditions, the SBA's implementing regulations initially require that a business applying for 8(a) participation demonstrate that it has been in business in its primary industry classification[459] for two full years prior to the date of its 8(a) application.[460]

Once the business meets this threshold requirement, the SBA looks at several factors to determine whether the business has the potential for success in the 8(a) program. These factors include, but are not limited to, the following:

> the technical and managerial experience and competency of the individual(s) upon whom eligibility is based, the financial capacity of the applicant concern and the concern's record of performance on previous federal and private sector contracts in the primary industry in which the concern is seeking 8(a) certification.[461]

Only after the business meets both of these conditions will the SBA approve an application for 8(a) program participation.[462]

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[454] *See id.* § 124.108(b).

[455] *See id.* § 124.108(c).

[456] *See id.* § 124.108(d). The Walsh-Healy Public Contracts Act regulations are set out in 48 C.F.R. pt. 22, subpt. 22.6.

[457] *See id.* § 124.108(e).

[458] 15 U.S.C. § 637(a)(7)(A). Furthermore, certain businesses are ineligible for 8(a) program participation. These businesses include: brokers and packagers; franchises; debarred or suspended persons or concerns; nonprofit organizations; and concerns owned by other disadvantaged concerns. 13 C.F.R. § 124.109.

[459] "Primary industry classification" refers to the four digit Standard Industrial Classification (SIC) code designation which best describes the primary industry of the 8(a) applicant or participant. 13 C.F.R. § 124.100. The SIC codes and corresponding size standards, which are meant to cover the entire field of economic activities, are listed in tables located at 13 C.F.R. § 121.601.

[460] *Id.* § 124.107(a).

[461] *Id.* § 124.107(b).

[462] Applications for admission to the 8(a) Program are approved or declined by

*C. Ineffective 8(a) Program Graduation Standards*

Once the SBA approves a business for 8(a) program participation, the firm is expected to use 8(a) assistance to develop into a self-sufficient firm capable of competing in the marketplace without 8(a) support. Although 8(a) firms never were expected to remain in the program indefinitely, past regulations concerning 8(a) program graduation permitted many questionable firms to remain in the 8(a) program when graduation or some other form of termination from the program would have been appropriate. For example, in its 1979 internal audit, the SBA identified thirty-eight firms that had achieved established business plan goals or were otherwise considered viable, yet the SBA had failed to graduate them from the program.[463] This section will examine the development of 8(a) program participation and graduation.

*1. Ambiguous and Subjective Graduation Criteria*—Prior to the enactment of the BODRA, the SBA administratively set a limit of five years for initial 8(a) program participation terms.[464] The SBA's regulations also provided for an extension of this period, but in no event would the SBA allow a firm more than a total of seven years in the program.[465] These requirements, which established a Fixed Program Participation Term (FPPT) for 8(a) firms, represented a distinct change from the SBA policy existing at the time.[466]

The existing policy permitted firms to remain in the 8(a) program indefinitely, as long as the firms did not exceed certain size standards.[467] Additionally, firms that faced graduation had a right to a pretermination hearing to contest the action.[468] Consequently, a large number of 8(a) program participants avoided graduation through this administrative appeals process by proving that they were not ready to graduate because they were not yet viable, self-

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the Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD). *Id.* § 124.206(a). The SBA has established procedures governing protests and appeals of denials of 8(a) Program admission when based on certain findings. For example, if the AA/MSB&COD denies 8(a) Program participation based solely on a negative finding concerning social disadvantage, economic disadvantage, ownership or control, then the unsuccessful applicant may appeal the decision to the SBA's Office of Hearings and Appeals (OHA). *Id.* § 124.206(c)(2). The specific procedures for the SBA's handling of these protests and appeals are set forth in 13 C.F.R. pt. 124, subpt. B.

[463] *Eligibility Review*, *supra* note 327, at 19.

[464] *Final Report*, *supra* note 2, at 58. The program participation term began to run from the date of the first 8(a) contract award. *Id.*

[465] *Id.*

[466] Drabkin, *supra* note 197, at 452.

[467] *See* 13 C.F.R. § 124.1-1(d) (1982).

[468] *Id.* § 124.10-1.

sufficient firms.[469] These graduation criteria were criticized as being inadequate and vague.[470] Moreover, application of the SBA's graduation criteria required a subjective determination of a firm's viability, an extremely difficult task.[471]

In discussing the subjectivity of the graduation criteria, one SBA official observed that not only did the 8(a) program lack precise criteria relating to program graduation, but it also lacked rules for terminating firms that made no attempt to increase their commercial business.[472] Another official noted that the criteria were so "loose" that the SBA could always find a reason be found to retain a firm in the 8(a) program.[473] Consequently, firms implicitly were encouraged to avoid developing a commercial market to stay in the program.[474]

However, the SBA's Inspector General explained the use of subjective criteria by stating:

> The use of subjective graduation criteria, such as they are, is understandable. No definition of "viability" is specific enough to describe precisely what ingredients are necessary to make a firm competitive, nor sufficiently comprehensive to fit the situation of all firms in all industries under all market conditions. By making the criteria subjective and elusive, the problem of precisely defining "viability" is avoided, but the problem of evaluating a firm's status fairly and objectively remains. The [SBA] has evaded the issue by simply postponing a decision on the

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[469] Drabkin, *supra* note 197, at 452.

[470] *Id.* at 450. The SBA applied the following graduation criteria:

> In determining whether a concern has substantially achieved its approved business development objectives and has attained the ability to compete in the marketplace without 8(a) assistance, the following factors, among others, shall be considered:
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> a. Positive overall financial trends of the concern including, but not limited to, the following:
>
> (1) Profitability;
>
> (2) Level of non-8(a) sales;
>
> (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital; and
>
> (4) Ability to obtain bonding.
>
> b. A comparison of the 8(a) concern's business and financial profile with profiles of comparable non-8(a) small businesses in the same activity or similar business category.
>
> c. Management capacity and capability.

*Promise Unfulfilled*, *supra* note 20, at 30-31.

[471] *Promise Unfulfilled*, *supra* note 20, at 31.

[472] Drabkin, *supra* note 197, at 31.

[473] *Id.*

[474] *Id.*

graduation of 8(a) firms. SBA consequently graduates few firms, thus diminishing the possibilities of new firms entering the program.[475]

*2. Fixed Program Participation Term*—The Small Business Export Expansion Act of 1980 (SBEEA)[476] amended the 8(a) program in an effort to correct some of the abuses noted above.[477] This legislation required the SBA to negotiate graduation dates with 8(a) firms to establish mutually acceptable time periods during which the SBA would help the firms become competitive.[478] To carry out this directive, the SBA established an FPPT, which administratively limited 8(a) program participation to five years, with a one-time extension of up to two years.[479] Graduation at the end of the FPPT was automatic, and no right of appeal existed.[480] As a result, the FPPT eliminated the "vicious cycle by which firms stayed on the program indefinitely because they were not viable, and were not viable because they could stay in the program indefinitely."[481] The FPPT served as a signal to 8(a) program participants that they had to maximize the opportunities available to them during their tenure in the program.[482] Soon after its implementation, however, the FPPT came under serious challenge.

In 1982, the House Committee on Small Business challenged the SBA's FPPT claiming that it violated the provisions of the SBEEA that required the SBA to negotiate with the 8(a) firm concerning a point in time by which the firm thought it would overcome its economic disadvantage.[483] The House Committee also argued that implementation of the FPPT was arbitrary and capricious and could frustrate the Small Business Act's purpose—namely, the achievement of competitive viability—because the FPPT mandated that 8(a) firms be graduated regardless of whether they were able to compete in the marketplace.[484] In considering whether the FPPT would improve the effectiveness of the 8(a) program, one commentator noted that:

The five year cap on program participation is certain to

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[475] *Eligibility Review*, *supra* note 327, at 19.

[476] Pub. L. No. 96-481, 94 Stat. 2321 (1980) (codified at 15 U.S.C. §§ 633, 636, 637).

[477] Drabkin, *supra* note 197, at 451.

[478] *Id.*

[479] 46 Fed. Reg. 57,271 (codified at 13 C.F.R. § 124.1-1(f)(4) (1982)).

[480] *Id.* at 57,272 (codified at 13 C.F.R. § 124.1-1(f)(8) (1982)).

[481] Drabkin, *supra* note 197, at 452.

[482] *Id.*

[483] *Final Report*, *supra* note 2, at 58.

[484] Drabkin, *supra* note 197, at 453.

> hinder the development of section 8(a) firms and may result in a contraction of the program's reach. As a result, firms that are not viable within the graduation requirements of [the FPPT] may be terminated, and although more firms will receive section 8(a) assistance, fewer viable firms may be graduated than before. The FPPT may, therefore, further contribute to the section 8(a) program's demise and, as such, it is a failure of regulatory implementation.[485]

*3. 8(a) Program Participation Under the BODRA*—During consideration of the BODRA, both the House and the Senate Committees on Small Business attacked the FPPT's maximum seven-year fixed program term.[486] However, each committee had very different motivations for wanting to change the period of 8(a) program participation, as the following excerpt from the CMBD's final report demonstrates:

> [T]he concern of the House Committee focused on a time limit in the context of how long it should take to develop an economically disadvantaged firm with SBA assistance to a point where it would overcome its disadvantage. The Senate Committee, however, seemed more concerned with the infusion of administrative simplicity.[487]

The consequence of the debate surrounding these different views was a compromise that resulted in the current nine-year fixed program participation term for 8(a) firms.[488] However, even this program participation term has met with criticism. In its Interim Report, the CMBD concluded that

> the Commission finds it questionable to conclude that all firms, in all industries, under all circumstances, need exactly nine years of nurturing to counteract the perils of the marketplace and the effects of ethnic and racial discrimination. There is presently no method to determine length of participation in the 8(a) program that is based on the developmental needs of individual firms.[489]

The minority business community generally has been displeased that the nine-year program term appeared to be the product of political compromise without the support of economic data.[490]

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[485] *Id.* at 454 (citations omitted).

[486] *Final Report*, *supra* note 2, at 59.

[487] *Id.*

[488] *See* 15 U.S.C. § 636(j)(15).

[489] *Interim Report—1990*, *supra* note 1, at 20.

[490] *Final Report*, *supra* note 2, at 60.

Similarly, the minority community has not widely accepted the explanations offered by the Congress and the SBA—that the program term is necessary to "make room" for other potential program participants.[491]

Based on this evidence, the CMBD recommended in its final report that program participation terms should be approved on the basis of the individual firm's SIC Code.[492] The Commission believed that program terms would vary from as low as seven years to a maximum of fourteen years, depending on the industry in which the firm is engaged.[493] Although this recommendation presents an extremely difficult challenge, the effort is essential if the 8(a) program is to be true to its stated purpose of economic development.[494]

*4. Current 8(a) Program Participation and Termination Standards*—Notwithstanding the CMBD's recommendations, this section will describe the current 8(a) program participation terms and termination requirements.

*a. Stages of 8(a) Program Development*—Businesses certified for 8(a) program participation currently can receive contracts under the program for a period of nine years, measured from the date of the firm's certification.[495] Program participation is divided into two stages: a developmental stage and a transitional stage.[496]

*(1) Developmental Stage*—The developmental stage is designed "to assist the concern in its effort to overcome its economic disadvantage by providing such assistance as may be necessary and appropriate to access its markets and to strengthen its financial and managerial skills."[497] The statute provides that no more than four years may be spent in the developmental stage of program participation.[498]

During the developmental stage, program participants are eligible to receive the following assistance:

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[491] *Id.*

[492] *Id.*

[493] *Id.* For example, manufacturing firms engaged in high-tech or capital intensive industries generally would require more time to develop because of the economic concentration in such business areas and other significant market entrance barriers. *Id.* On the other hand, businesses that are in very competitive segments of the economy with relatively high "turnover rates" should be given terms at the lower end of the spectrum. *Id.*

[494] *Id.*

[495] 15 U.S.C. § 636(j)(15).

[496] *Id.* § 636(j)(12)(A).

[497] *Id.* § 636(j)(12)(B).

[498] *Id.* § 636(j)(15)(A).

(1) Sole source and competitive contract support;[499]

(2) Financial assistance in the form of direct SBA loans or loans from banks or other financial institutions in cooperation with the SBA;[500]

(3) A maximum of two exemptions from the requirements of section 1(a) of the Walsh-Healy Act, 41 U.S.C. § 35(a);[501]

(4) A maximum of five exemptions from the requirements of the Miller Act, 40 U.S.C. § 270a-270d;[502]

(5) Financial assistance from SBA for skills training or upgrading for employees or potential employees of program participants;[503]

(6) The transfer of technology or surplus property owned by the United States to the program participant;[504] and

(7) Training sessions conducted by the SBA to assist individuals and enterprises in the development of business principles and strategies to enhance their ability to compete successfully for contracts in the marketplace.[505]

*(2) Transitional Stage*—The transitional stage is designed "to overcome, insofar as practicable, the remaining elements of economic disadvantage and to prepare such concern for graduation from the program."[506] No more than five years may be spent in the transitional stage of program participation.[507]

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[499] *Id.* § 636(j)(13)(A); 13 C.F.R. § 124.303(c)(1).

[500] 15 U.S.C. § 636(j)(13)(B); 13 C.F.R. § 124.303(c)(2). See 15 U.S.C. § 636(a)(20) for conditions that must exist before loans will be made available for program participants.

[501] 15 U.S.C. § 636(j)(13)(C); 13 C.F.R. § 124.303(c)(3). Section 1(a) of the Walsh-Healy Act requires that if the contract is for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, then the contractor must be a manufacturer of, or a regular dealer in, the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract. 41 U.S.C. § 35(a). However, no exemption will apply if the contract to which it pertains has an anticipated value in excess of $10,000,000. 15 U.S.C. § 636(j)(13)(C).

[502] 15 U.S.C. § 636(j)(13)(D); 13 C.F.R. § 124.303(c)(4). The Miller Act provides that before any contract exceeding $25,000 for the construction, alteration, or repair of any public building or public work of the United States is awarded to any contractor, the contractor must furnish performance bonds for the protection of the United States and payment bonds for the protection of persons furnishing material and labor for the contract. 41 U.S.C. § 270a.

[503] 15 U.S.C. § 636(j)(13)(E); 13 C.F.R. § 124.303(c)(5).

[504] 15 U.S.C. § 636(j)(13)(F); 13 C.F.R. § 124.303(c)(6).

[505] 15 U.S.C. § 636(j)(13)(G); 13 C.F.R. § 124.303(c)(7).

[506] 15 U.S.C. § 636(j)(12)(C).

[507] *Id.* § 636(j)(15)(B).

During the transitional stage, program participants are eligible to receive some of the same assistance provided in the developmental stage in addition to other specific assistance for transitional participants. Specifically, program participants receive the same developmental assistance as noted above at paragraphs (1), (2), (6), and (7).[508] Additionally, the following assistance is available:

> (1) With the assistance of the SBA, procuring agencies assist program participants in forming joint ventures, leader-follower arrangements, and teaming agreements between the program participant and other program participants or other business concerns with respect to contracting opportunities for the research, development, full-scale engineering or production of major systems.[509]
>
> (2) Technical assistance and training in transitional management business planning.[510]

*b. 8(a) Program Terminations*—Program participants who are eligible for the assistance described in the previous section will be denied this assistance if the businesses leave the 8(a) program for any reason. Participants may leave the 8(a) program for several different reasons: (1) voluntary withdrawal from the program; (2) expiration of the time periods associated with the developmental and transitional stages of program participation; (3) graduation from the program; or (4) termination from the program based on good cause.[511]

*(1) Voluntary Withdrawal*—A business may withdraw from the 8(a) program voluntarily at any time during its term of program participation.[512] Even if an action to graduate or terminate a business from the 8(a) program is pending, the business may withdraw from the program voluntarily at any time prior to the actual issuance of the graduation or termination notice.[513]

*(2) Program Term Expiration*—As previously noted, participation in the 8(a) program currently is limited to nine years from the date of program participation certification. Once the program term has expired, the business no longer is eligible for 8(a) program assistance. However, the nine-year limitation only applies to businesses certified on or after November 15, 1988.[514] Small businesses

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[508] 15 U.S.C. § 636(j)(14); 13 C.F.R. § 124.303(d)(1).

[509] 15 U.S.C. § 636(j)(13)(H), (j)(14); 13 C.F.R. § 124.303(d)(2).

[510] 15 U.S.C. § 636(j)(13)(I); 13 C.F.R. § 124.303(d)(3).

[511] 15 U.S.C. § 636(j)(10)(E); 13 C.F.R. § 124.207(a)—(d).

[512] 13 C.F.R. § 124.110(a).

[513] *Id.*

[514] *Id.*

that were program participants as of September 1, 1988, or were approved for program participation between September 1, 1988, and November 15, 1988, are entitled to a revised Program Term.[515]

The revised Program Term is the greater of (1) nine years less the number of years since the award of the firm's first contract under the 8(a) program or (2) the participant's FPPT, including any extensions thereof, plus eighteen months.[516] Once the SBA has established or revised a program term, it is statutorily prohibited from extending the term beyond the specified expiration date.[517]

*(3) Graduation*—The term "graduation" means that the program participant has been recognized as "successfully completing the [8(a)] program by substantially achieving the targets, objectives and goals contained in the concern's business plan thereby demonstrating its ability to compete in the marketplace without assistance under [the 8(a) program]."[518] When the participant has met these criteria, the SBA may graduate the business from the 8(a) program.[519] After the effective date of program graduation, the firm no longer is eligible to receive 8(a) program assistance; however, the firm still is obligated to complete previously awarded 8(a) subcontracts, including any priced options that may be exercised.[520]

The SBA, in determining whether to graduate firms from the program, considers several factors. These include an examination of the firm's positive overall financial trends including, but not limited to, the following:

(1) Profitability;

(2) Sales, including improved ratio or non-8(a) sales to 8(a) sales;

(3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;

(4) Ability to obtain bonding;

(5) A positive comparison of the 8(a) concern's business and financial profile with profiles of non-8(a) businesses in the same area or similar business category; and

(6) Good management capacity and capability.[521]

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[515] 15 U.S.C. § 636(j)(10)(C)(i); 13 C.F.R. § 124.110(b).

[516] 15 U.S.C. § 636(j)(10)(C)(i); 13 C.F.R. § 124.110(c).

[517] 13 C.F.R. § 124.110(d).

[518] 15 U.S.C. § 636(j)(10)(H); 13 C.F.R. § 124.100.

[519] 13 C.F.R. § 124.208(a).

[520] *Id.* § 124.208(d).

[521] *Id.* § 124.208(b)(1)—(6).

The procedures established by the SBA for graduating firms from the 8(a) program are set forth in 13 C.F.R. § 124.208(c).[522]

*(4) Other Program Terminations*—Firms also may leave the 8(a) program because the SBA has taken action to terminate their participation. "Termination" is defined as the "total denial or suspension of assistance under [the 8(a) program] prior to the graduation of the participating small business concern or prior to the expiration of the maximum program participation term."[523] After the effective date of program termination, the firm is ineligible for further 8(a) program assistance.[524] However, just as with firms that graduate from the program, the firm still is obligated to complete previously awarded contracts, including options that may be exercised.[525]

The SBA must base a termination action on good cause which includes, but is not limited to, the following:

> (1) Failure of the firm to maintain its eligibility for 8(a) program participation;
>
> (2) Failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time;
>
> (3) Demonstrated pattern of failing to make required submissions or responses to the SBA in a timely manner;
>
> (4) Willful violation of any rule or regulation of the SBA pertaining to material issues;
>
> (5) Debarment of the firm or its disadvantaged owners by any agency; or
>
> (6) Conviction of the disadvantaged owner or an officer of the firm for any offense indicating a lack of business integrity.[526]

The SBA's termination procedures are set forth in 13 C.F.R. § 124.209(b).[527]

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[522]Program participants may appeal the SBA's determination concerning graduation to the SBA's Office of Hearings and Appeals (OHA). *Id.* § 124.210(a)(2).

[523]15 U.S.C. § 636(j)(10)(F); 13 C.F.R. § 124.100.

[524]13 C.F.R. § 124.209(c).

[525]*Id.*

[526]15 U.S.C. § 636 (j)(10)(F)(i)–(vi). *See also* 13 C.F.R. § 124.209(a), which lists several other examples of good cause terminations.

[527]Program participants may appeal any adverse termination decision to the SBA's OHA. 13 C.F.R. § 124.210(a)(3).

*D. Small Business Administration Comments Concerning Frauds and Abuses*

Small Business Administration officials are confident that the current regulatory provisions implementing the 8(a) program make it difficult for 8(a) firms to perpetuate frauds, fronts, and other abuses that were prevalent in the early 1970s. According to the SBA's Deputy Assistant Inspector General for Investigations, as of August 1992, fifteen to twenty percent of the firms under investigation were 8(a) firms.[528] Of the 8(a) firms under investigation, very few involved fronting as the only allegation.[529] Over the last two to three years, the SBA conducted only two successful front investigations.[530] The Deputy Assistant Inspector General also noted that of the 200 ongoing fraud investigations, fronts comprised a small percentage of these investigations.[531] Currently, the most common violation among fraud investigations involves false statements.[532]

The SBA's Deputy Assistant Inspector General for Auditing echoed these observations, indicating that the abuses associated with the proliferation of frauds and fronts were not as common as they had been in the past.[533] In conducting compliance audits[534] for the SBA, this official indicated that his investigations failed to uncover any evidence of fronts.[535] However, he did not rule out the possibility that the low number of fronts discovered by SBA audits and investigations may be the result of businesses becoming more sophisticated in concealing their illegal activities.[536]

The 8(a) program's Deputy Associate Administrator for Programs attributes the SBA's success in eliminating frauds and fronts to the SBA's meticulous review of all 8(a) program applications before admitting the firms to the program.[537] However, because of this intensive review, the SBA has been criticized for taking too long

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[528]Interview with David W. Hurd, SBA Deputy Assistant Inspector General for Investigations, in Washington D.C. (Aug. 12, 1992).

[529]*Id.*

[530]*Id.*

[531]*Id.*

[532]*Id.*

[533]Interview with Lester W. Garton, SBA Deputy Assistant Inspector General for Auditing, in Washington D.C. (Aug. 12, 1992).

[534]Several different factors can trigger compliance audits. These factors include, but are not limited to, the following: (1) the rapid growth of an 8(a) program participant; (2) suspicious behavior on the part of an 8(a) firm; and (3) observations of regional or district offices of the SBA. *Id.*

[535]*Id.*

[536]*Id.*

[537]Interview with Jane Butler, SBA Minority Small Business and Capital Ownership Development Program Deputy Associate Administrator for Programs, in Washington D.C. (Dec. 4, 1992).

in deciding on an applicant's eligibility for program participation.[538] The SBA has adopted several measures, however, in an effort to prevent future processing delays and backlogs.[539]

## V. Effectiveness of 8(a) Program Assistance

Congress established the Minority Small Business and Capital Ownership Development (MSB&COD), or 8(a), program specifically for business development purposes—to promote and assist socially and economically disadvantaged small business concerns to improve their ability to compete on an equal basis in the mainstream of the American society.[540] To accomplish the 8(a) program's stated goal, Congress authorized the SBA to enter into contracts with other government departments and agencies and subcontract the performance of these contracts to socially and economically disadvantaged business concerns.[541] The stated purposes of the program are to:

> (1) Foster business ownership and development by individuals in groups who control little production capital;
>
> (2) Promote the competitive viability of these firms in the marketplace by providing the available contract, financial, technical and management assistance as may be necessary; and,
>
> (3) Clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.[542]

According to information provided by the CMBD, the federal government procured about 2.17% of its goods and services through the 8(a) program in FY 1990, which represents $3.9 billion in contract activity.[543] Although 8(a) procurements were less than three

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[538] *See Problems in Restructuring*, *supra* note 17, at 4. Whereas the BODRA requires the SBA to process an application and decide on an applicant's eligibility within 90 days of receiving a completed application, between January and November 1990, the SBA's average processing time for these applications was 117 days. *Id.* As of October 4, 1991, about 17% of the applications being processed at the SBA headquarters already had exceeded the 90-day requirement. *Id.*

[539] *Id.* at 24. For example, the SBA's Division of Program Certification and Eligibility has increased its professional and clerical staff and has instituted a "buddy system," where a less experienced reviewer is paired with a more experienced one in hopes of improving the quality and timeliness of application review. *Id.*

[540] 13 C.F.R. § 124.1(a).

[541] SMALL BUSINESS ACT OF 1953, *as amended*, 15 U.S.C. § 637(a)(1)(A), (B) (1988).

[542] SOP, *supra* note 373, at q 1a–c.

[543] *Final Report*, *supra* note 2, at 36.

percent of the federal government's total procurement, in comparison with FY 1982 procurements, the amount procured in FY 1990 represented an increase of over ninety percent in the ratio of 8(a) procurements to total procurements.[544] Procurement data from FY 1992 show that 8(a) businesses received contract awards of $4.9 billion, representing 2.7% of total contract awards for that year.[545] From a statistical perspective, the 8(a) program remains the most important contributor to the award of prime contracts to small disadvantaged business concerns,[546] accounting for well over forty percent of all procurement dollars (both prime and subcontract) received by small minority firms.[547] As a result, the 8(a) program has provided many benefits to its participants. For example, the program has spurred the formation of many disadvantaged firms, helped participants gain experience in managing a business, and helped some firms get other commercial and non-8(a) government work.[548]

However, despite the benefits afforded through government assistance, the survival rate for small businesses in general has been extremely low.[549] According to the 1980 Business Failure Record, forty-five percent of small businesses fail within five years, and eighty percent fail to last ten years.[550] Another source indicates that more than half of newly established small businesses fail within the first two years of operation, and more than ninety percent fail within the first ten years.[551]

As compared to nonminority businesses, minority business failure rates are much higher.[552] For example, one study found that

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[544] *See GAO, Small Business Administration: Status, Operations, and Views on the 8(a) Procurement Program*, BRIEFING REP., GAO Rep. No. RCED-88-148BR, at 13 (1988) [hereinafter *8(a)* Program Status]. This statistical prominence appears to be on the rise, having increased from 1.81% of total federal prime contract awards in FY 1988 and 2.10% in FY 1989. *Final Report, supra* note 2, at 36.

[545] *DOD Surpasses 5% Goal on SDB Contracting*, 60 Fed. Cont. Rep. (BNA) 122 (Aug. 9, 1993) [hereinafter *DOD Surpasses Goal*].

[546] *Final Report, supra* note 2, at 36.

[547] *Id.* at 33. These results were based on statistics compiled between FY 1988 and 1990, which represented the most recent three-year study period for which complete data was available. *Id.*

[548] General Accounting Office, *Proposals for Minimizing the Impact of the 8(a) Program on Defense Procurement*, REP. TO CONG., GAO Rep. No. PLRD-83-4, at 4 (1982) [hereinafter *Proposals*].

[549] *See* Richard J. Lorette, et al., *A Proposal for Restructuring the SBA: Reducing Its Contracting Role and Providing High Technology Assistance to Small Business*, 19 NAT'L CONT. MGMT. J. 21 (Summer 1985).

[550] *Id.* at 21.

[551] *Id.*

[552] Gavin Chen & Richard Stevens, *Minority-owned Business Problems and Opportunities: A 1983 Update*, MBDA RESEARCH PROGRAM, at 17 (June 1984).

sixty-three percent of minority firms had gone out of business within five years of beginning their operations.[553] Research has identified several possible explanations for the higher failure rate of minority firms: (1) higher debt structure; (2) proportionately smaller size; (3) lack of business knowledge; and (4) unwillingness to share ownership/control.[554] In a recent survey[555] conducted by the CMBD, the 8(a) program received mixed reviews concerning its effectiveness in promoting the development of minority businesses and its impact on the procurement process. In January 1993, district offices of the SBA conducted a survey of the 565 firms that left the 8(a) program during FYs 1990, 1991, and 1992.[556] Of these firms, 301 were independently operational and twenty-four had curtailed operations, even though they were still in business.[557] On the other hand, five of the businesses had been acquired by other firms owned and controlled by nondisadvantaged individuals, and 235 had ceased operations completely.[558] This means that only 57.5% of the firms that exited the 8(a) program between these periods still were operational. One author has concluded that the 8(a) approach to business assistance generally has been as unsuccessful as other minority assistance programs have been in helping the truly deprived minority enterprises.[559]

This section will discuss the impact of 8(a) assistance on minority firms, specifically to determine whether this assistance makes the firms truly self-sufficient on program graduation.

*A. Selecting 8(a) Contract Opportunities*

Again, the mission of the MSB&COD program is to develop socially and economically disadvantaged small businesses to improve their ability to compete on an equal basis in the mainstream of American economy after completion of the program. The SBA's Standard Operating Procedures for the MSB&COD program[560] state:

> Business development is the utilization of all available internal and external resources to assist 8(a) concerns to progress toward competitive viability during their Pro-

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[553] *Id.*

[554] *Id.*

[555] To obtain data for the survey, the CMBD visited 22 federal sites representing 17 federal agencies. To acquire data from a broad base of program users, and to acquire a broad spectrum of perceptions, Commission representatives personally interviewed 104 individuals. *Final Report*, *supra* note 2, at app. E.

[556] *SBA Fiscal Year 1992 Report*, *supra* note 21, at 9.

[557] *Id.*

[558] *Id.*

[559] Bates, *supra* note 10, at 55.

[560] *See* SOP, *supra* note 373.

> gram Term. The complexities and sophistication of both government contracting and modern business techniques require that an 8(a) concern develop and apply requisite management skills if it is to be successful upon program completion or graduation. Therefore, it is necessary that the [SBA] conduct an on-going program of providing business development opportunities and assistance to benefit its 8(a) clients.[561]

To promote the business development of 8(a) program participants, the SBA provides participants with financial, management, and technical assistance, as well as contract support.[562] In theory, 8(a) firms use the SBA's assistance to attain self-sufficiency and then graduate from the program.

To achieve the goals set out for the 8(a) program, the SBA must seek, identify, reserve, and match 8(a) contract opportunities for approved 8(a) firms. The SBA, a particular 8(a) program participant, or the procuring agency may identify these contract opportunities.[563] The SBA is authorized to enter into contracts with other federal agencies and subcontract the performance of the contracts to firms eligible for program participation. The SBA's policy is to subcontract the performance at prices that will enable the 8(a) firms to perform the contracts and earn a reasonable profit.[564] The SBA and the federal agency match the agency's requirements with the capabilities of the 8(a) firm to establish a basis for the agency to contract with the SBA under the program.[565]

*1. Establishing Set-Aside Goals*—In an effort to increase the share of federal contract dollars to disadvantaged businesses, the BODRA amended[566] the Small Business Act to require the President to annually establish government-wide procurement goals for procurement contracts awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals.[567] This goal was established at not less than five percent of the

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[561] *Id.* ¶ 37a.

[562] 13 C.F.R. § 124.300.

[563] *Id.* § 124.308(b)(1).

[564] *Id.* § 124.307(a).

[565] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 19.803 (Apr. 1, 1984) [hereinafter FAR].

[566] BODRA, *supra* note 26, § 502(3).

[567] 15 U.S.C. § 644(g)(1). The BODRA also required government-wide goals for participation by all small business concerns without regard to the disadvantaged status of the concerns' owners. *Id.*

total value of all prime contract and subcontract awards for each fiscal year.[568]

Notwithstanding this government-wide goal, each federal agency is required to establish its own annual goal representing the maximum practicable opportunity for disadvantaged businesses to participate in the performance of contracts let by the particular agency.[569] This requirement was consistent with an earlier congressional mandate that required the head of each federal agency, after consultation with the SBA, to establish realistic goals for each FY for the award of contracts and subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals.[570] Congress tasked the Administrator of the Office of Federal Procurement Policy with insuring that the cumulative annual prime contract goals for all agencies met or exceeded the annual government-wide prime contract goal.[571]

Congress enacted the federal contract goal-setting procedures noted above to provide help to small and minority business enterprise. Congress predicted that this policy would provide a direct increase in the share of federal contract dollars to small and minority businesses without requiring any major increases in federal expenditures to support another social program.[572] Although economic and political rationales have been used to justify the implementation of federal contract set-aside goals, evidence exists that these forms of government intervention have not helped and, in many instances, have aggravated the situation.[573]

*a. Agency Impact*—One negative aspect of minority business set-asides has been the higher procurement costs incurred by agencies as a result of utilizing firms that may be less experienced relative to nonminority enterprises, especially when the contract recipients are not competitive.[574] A related and disturbing fact concerning 8(a) procurements is that these higher procurement costs

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[568] *Id.* Congress established the goal for all small businesses at not less than 20% of the total value of all prime contract awards for each FY. *Id.*

[569] *Id.*

[570] *Id.* § 644(g)(2). This congressional mandate resulted from the enactment of Public Law Number 95-507.

[571] *Id. See also* OFPP Policy Letter 91-1, Office of Fed. Procurement Policy, Government-Wide Small Business and Small Disadvantaged Business Goals for Procurement Contracts (Mar. 11, 1991) (providing uniform policy guidance to Executive branch departments and other agencies regarding the implementation of the BODRA).

[572] Dennis E. Black, *An Evaluation of Federal Contract Set-Aside Goals in Reducing Socioeconomic Discrimination*, 20 NAT'L CONT. MGMT. J. 89, 93 (Winter 1987) [hereinafter Black I].

[573] *Id.*

[574] Bates, *supra* note 10, at 63.

generally are coupled with lower quality and higher price.[575] One official has stated, "[w]e know that we are paying more for an item than is necessary, but we are doing it to help new small businesses."[576] However, to accept lower quality and higher prices from 8(a) contractors to accomplish procurement goals should not be necessary.[577]

*b. Factors Affecting Failure of Goal-Setting Efforts*— Several explanations have been provided as to why the implementation of set-aside goals generally has been unsuccessful. The following nine factors have been identified as reasons for predicting failure in implementing any new federal contract goal-setting policy:

(1) *Vague and ambiguous legislation.* Generally, federal agencies are required to implement procurement preference programs that are based on vague and ambiguous legislation.[578] For example, the national policy of assistance to disadvantaged businesses set forth in the BODRA requires federal agencies to establish goals representing the "maximum practicable opportunity" for disadvantaged businesses to participate in agency contracts.[579] Because the legislation fails to define "maximum practicable opportunity," the possibility is great that the federal agencies will interpret this standard differently.

(2) *Hard to measure output.* An agency's set-aside performance is difficult to evaluate because of hard-to-measure output in terms of both quantity and quality.[580] For example, even though an agency may demonstrate that it is meeting or exceeding a set-aside goal by measuring the annual total number of contract dollars awarded to a targeted group, the annual share of agency contract dollars going to that targeted group may not necessarily increase, making it difficult to determine when an agency has spent enough contract dollars to meet its goal.[581]

(3) *Creaming.* Agency's generally "cream" awards within a targeted group to those businesses who are most likely to succeed rather than to those businesses who are most in need.[582] This phenomenon exists because set-aside performance is monitored by the

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[575]Lorette, et al., *supra* note 549, at 23.

[576]*Id.*

[577]*Id.*

[578]Dennis E. Black, *Socioeconomic Contract Goal Setting Within the Department of Defense: Promises Still Unfulfilled*, 22 NAT'L CONT. MGMT. J. 67, 68 (Winter 1988) [hereinafter Black II].

[579]15 U.S.C. § 644(g)(1).

[580]Black II, *supra* note 578, at 68.

[581]Black I, *supra* note 572, at 94.

[582]Black II, *supra* note 578, at 68.

annual number of contract dollars awarded, and the targeted firms most in need of assistance generally pose the largest risk of failure to an agency in achieving its annual goal.[583] Consequently, some of the intended beneficiaries of set-asides do not receive benefits from the programs.

(4) *Goal displacement.* A related problem associated with measuring set-aside performance by the annual number of contract dollars awarded involves goal displacement. Goal displacement occurs when an agency's concern over the number of targeted firms reaching economic self-sufficiency becomes secondary to the agency's desire to achieve its monetary goal.[584] Consequently, no incentive exists for the targeted group, the SBA, or the federal agencies to encourage successful program graduation, particularly in the case of minority contract and subcontract programs like the 8(a) program.[585]

(5) *Incompatible policy goals.* Agencies are required to simultaneously implement the incompatible goals of full and open competition in contracting along with the goals of set-aside programs that restrict competition.[586] This policy contradiction is complicated in that the lowest-cost procurement to society usually is not the lowest-cost procurement to the agency.[587]

(6) *No budget.* Another factor leading to unsuccessful implementation of set-aside goals is that no special agency budget exists to accomplish nonprocurement objectives.[588] The program costs associated with implementing these socioeconomic programs are passed through the agency's existing contracting budgets which allows policy makers to take credit for addressing the issues of SDBs without increasing federal expenditures for additional social programs.[589] However, implementation of nonprocurement objectives raises an agency's contracting costs through increased contract prices and administrative costs.[590] Consequently, without direct budget support, an agency is not motivated to put maximum effort into implementing these programs.[591]

(7) *Multiple actors.* In the federal goal-setting process multiple

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[583] Black I, *supra* note 572, at 94.

[584] Black II, *supra* note 578, at 68.

[585] Black I, *supra* note 572, at 94.

[586] Black II, *supra* note 578, at 68.

[587] Black I, *supra* note 572, at 94.

[588] Black II, *supra* note 578, at 69.

[589] Black I, *supra* note 572, at 95.

[590] *Id. See also Final Report, supra* note 2, at app. E, tbl. 4-3 (identifying high contract costs as a problem area associated with contracting with SDBs).

[591] Black I, *supra* note 572, at 95.

actors cause responsibilities to be fragmented.[592] The agencies and various offices within the SBA, as well as offices within the General Services Administration, share the responsibility of negotiating agency goals.[593] The existence of various actors in the goal-setting process significantly reduces the probability that the desired implementation will occur.[594]

(8) *No incentive and enforcement mechanisms.* Procurement preference programs lack effective incentive and enforcement mechanisms to ensure and encourage agency performance.[595] Agencies are unlikely to comply with the goal-setting procedure unless incentives are offered to offset the effects of increased administrative costs and contract prices, especially in times of reduced budgets and cutbacks.[596] Additionally, goal-setting procedures as they currently exist provide no effective penalties against those agencies that fail to meet or exceed their stated goals which ultimately results in mediocre agency implementation.[597]

(9) *Lowballing.* The final factor that leads to unsuccessful implementation of federally imposed set-aside goals is the occurrence of lowballing. An agency lowballs by establishing soft goals that it is certain to meet or exceed.[598] An agency's goal-setting decision is influenced significantly by its previous year's achievements.[599] Because performance is measured by the annual level of federal contracts/subcontracts dollars awarded to a targeted group relative to the goal, agencies are implicitly encouraged to set soft goals that they are sure to meet based on previous year performance.[600]

Given the presence of these nine factors, one would expect that implementing federally directed set-aside goals would be ineffective. To the contrary, despite the possibilities for failure, federal agencies generally have met or exceeded their established set-aside goals.[601] However, as one author has noted, because the agencies

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[592] Black II, *supra* note 578, at 69.

[593] Black I, *supra* note 572, at 95.

[594] *Id.*

[595] Black II, *supra* note 578, at 69.

[596] Black I, *supra* note 572, at 95.

[597] *Id.*

[598] Black II, *supra* note 578, at 69.

[599] Black I, *supra* note 572, at 95.

[600] *Id.*

[601] *See id.* at 97–98. The author provides statistics indicating that from FY 1980 through FY 1984, four of seven federal procurement preference programs examined generally were successful in meeting or exceeding their established set-aside goals. *Id.* In particular, for 8(a) contract awards, federal agencies exceeded the total federal goals for each year during this period except for FY 1983. *Id.*

essentially establish the annual set-aside goals, insufficient evidence exists to conclude that the federal contract goal-setting procedure has been effective.[602] In reality, when using the annual percentage of total federal contract dollars as the measure for success in meeting the goals, entirely different implementation results are obtained.[603] These varied results have led some to conclude that federal goal setting procedures have been ineffectual because no significant increase in the annual share of contract dollars going to the groups targeted by the set-asides has occurred.[604]

*c. Department of Defense Set-Aside Goals*—The Department of Defense (DOD) annually awards the bulk of federal acquisition dollars, and undoubtedly any measurable government success at increasing the share of federal contract dollars to socio-economically disadvantaged groups depends on the DOD's performance.[605] Prior to the enactment of the BODRA, Congress actually had mandated to the DOD a specific five percent goal for contracting with SDBs.[606] Presently, the law requires the DOD, in each of FYs 1987 through 2000, to set a goal of awarding five percent of contract and subcontract dollars to SDB concerns, historically black colleges and universities, and minority institutions.[607] To meet its five percent goal, the DOD uses the 8(a) program, SDB set-asides and evaluation preferences, advance payments, outreach, and technical assistance.[608]

Prior to the most recent fiscal years, the DOD was just as unsuccessful in meeting its set-aside goals as other federal agencies. One author noted that the DOD's past performance indicated no significant increase in the annual share of DOD contract/subcontract dollars going to minority entrepreneurs.[609] Representative Cardiss

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[602] *Id.* at 97.

[603] *See id.* at 98-101. Contract awards under the 8(a) program showed a positive annual rate of change since FY 1980; however, these rates were not as high as they were before FY 1980. *Id.* at 99. Additionally, the annual 8(a) contract share of total federal contract dollars has been only slightly higher since FY 1980 then before, and has maintained a relatively constant annual rate ever since. *Id.*

[604] *Id.* at 101.

[605] Black II, *supra* note 578, at 67. Pursuant to Public Law Number 95-507, the DOD, like other civilian agencies, had been required since FY 1980 to establish annual goals for the award of contract dollars to specifically targeted socioeconomically disadvantaged groups. Congress mandated an additional procurement set-aside goal for the DOD in 1986 under § 1207 of the National Defense Authorization Act of 1987, which was designed to compel greater SDB participation in government contracting.

[606] *See* Pub. L. No. 99-661 § 1207.

[607] 10 U.S.C. § 2323(a)(1)(A)-(C).

[608] DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 219.201(a) (Apr. 1, 1984) [hereinafter DFARS]. With regard to evaluation preferences, the regulations provide that SDB concerns be given a 10% evaluation preference in certain unrestricted competitive acquisitions. *See generally* DFARS 219.70.

[609] Black II, *supra* note 578, at 80.

Collins (D-Illinois) attributed this failure of the DOD set-aside program to the Bush Administration's refusal to implement and enforce the program.[610] According to Representative Collins, the program's five-percent goal had consistently failed, resulting in only 1.5% to 3.5% SDB participation in government contracts per year.[611] Contrary to Representative Collins's assertion, recent statistics provided by the DOD Office of Small and Disadvantaged Business Utilization indicate that for FYs 1992 and 1993, the DOD awarded $7.0 billion and $8.1 billion, respectively, in prime contracts and subcontracts to SDBs.[612] These awards represent six percent and seven percent of DOD total awards for each respective fiscal year.

The prior failures of these set-aside programs led Representative Collins to describe the 1980s and early 1990s as "a period of great regression" for SDBs.[613] To correct this trend, one researcher suggested that Congress should legislate more incentives and less enforcement if attempts at achieving set-aside goals were to be accomplished.[614] On April 1, 1993, Representative Collins introduced House Bill 1609, the "Department of Defense Set-aside Enforcement Act of 1993," in an effort to change and clarify statutory provisions relating to the DOD's set-aside program for contracting with SDBs.[615]

If enacted, House Bill 1609 would convert the set-aside goal of the DOD set-aside program to a set-aside *requirement*, raising the five-percent goal to a requirement of ten percent of the DOD's contracting budget.[616] The bill also would require defense contractors to award at least five percent of their contract amount to SDB subcontractors.[617] To enhance enforcement of the set-aside, the bill would punish contractors that do not comply with the subcontract-

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[610] *DOD Set-Aside Enforcement Act Is Introduced In House*, GOV'T CONTRACTOR, ¶ 236, Vol. 35, No. 14, Apr. 7, 1993, at 12 [hereinafter *DOD Set-Aside Enforcement Act*].

[611] *Id.*

[612] Department of Defense, Office of Small and Disadvantaged Business Utilization, *DOD Small Disadvantaged Business Prime and Subcontract Performance* (statistics obtained from DOD Office of Small and Disadvantaged Business Utilization, The Pentagon, Washington D.C.). *See also DOD Surpasses Goal*, *supra* note 545, at 122.

[613] *DOD Set-Aside Enforcement Act*, *supra* note 610, at 12.

[614] Black II, *supra* note 578, at 81.

[615] *DOD Set-Aside Enforcement Act*, *supra* note 610, at 12.

[616] *Id.* at 13. For the first seven years, the DOD could satisfy up to five percent of the requirement by contracting with businesses formerly eligible for participation in the DOD's set-aside program or the 8(a) program. *Id.* When introducing this bill, Representative Collins told a congressional panel that in a nation where minorities total 25% of the population, it is a "pathetic illusion of fairness" to assert that the government need only do 5% of its business with them. *DOD Surpasses Goal*, *supra* note 545, at 122.

[617] *DOD Set-Aside Enforcement Act*, *supra* note 610, at 13. In addition, five percent of the contract amount would be withheld if the contractor did not comply

ing requirement by denying them awards of any price adjustments or any other defense contracts.[618] The bill attempts to improve the DOD's outreach efforts to SDBs by modifying the rules concerning eligibility for DOD set-asides. Currently, the recipient of the contract must perform at least fifty percent of each contract awarded under the DOD's set-aside program.[619] Under House Bill 1609, the performance of a contract would be acceptable if seventy-five percent of it was attributable to the combined effort of the contracting SDB and other SDBs.[620]

Although the fate of Representative Collins's legislation is unknown, set-aside goals will undoubtedly remain the primary method by which the federal government attempts to increase the share of contract dollars to minority businesses. On April 23, 1994, the House Small Business Committee began consideration of House Bill 4263, a bill promoting the participation of small and small minority businesses in federal procurement.[621] The Committee's Chairman, Representative John J. LaFalce (D-New York), introduced the bill, which includes a provision to extend the five-percent goal for minority small business contracts and subcontracts under the DOD's § 1207 program.[622]

*2. 8(a) Contracting Methods*—Selecting acquisitions for 8(a) contracts can be initiated in several different ways:

> (1) The SBA advises an agency contracting activity through a search letter[623] of an 8(a) firm's capabilities and asks the agency to identify acquisitions to support the firm's business plans.[624]
>
> (2) The SBA identifies a specific requirement for a particular 8(a) firm or firms and asks the agency contracting activity to offer the acquisition to the 8(a) program for the firm(s).[625]

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with the subcontracting requirement. *Id.* Moreover, a contractor would be required to provide the DOD with information concerning outreach efforts, including why it chose not to subcontract with specific SDBs and the contractor's future plans for compliance. *Id.*

[618] *Id.*

[619] *Id.*

[620] *Id.*

[621] *LaFalce's Committee Considers Small Business-Specific Reforms*, GOV'T CONTRACTOR, ¶ 246, vol. 36, No. 18, May 4, 1994, at 10.

[622] *Id.*

[623] A search letter is a general request by the SBA that a procuring agency identify and reserve requirements to support a particular firm's business plan. This letter outlines the 8(a) firm's capabilities, which assists the agency in providing an acquisition that matches the firm's abilities. SOP, *supra* note 373, at 201.

[624] FAR, *supra* note 565, at 19.803(a).

[625] *Id.* at 19.803(b).

(3) Agencies also may review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA.[626]

(4) The contracting opportunity may be marketed by the individual 8(a) firm.[627]

A contract requirement will only be accepted for an 8(a) firm if the requirement is classified under one of the approved SIC codes in the 8(a) firm's business plan as accepted by the SBA.[628] Subcontracts awarded under the 8(a) program may be either sole source awards or awards achieved through competition limited to eligible program participants.

*a. Sole Source Awards*—Procurement agencies may identify a particular 8(a) firm for a sole source award, as long as the procuring agency is not using the SBA's authority under the 8(a) program in an attempt to avoid the statutory or regulatory constraints applicable to sole source awards.[629] If the agency makes a valid sole source request, the SBA must determine whether an appropriate match exists.[630]

Once the procurement is accepted as an 8(a) contract, the SBA normally will accept it on behalf of the program participant recommended by the procuring agency, provided that the following factors are satisfied:

(1) The procurement is consistent with the participant's business plan;

(2) The SBA determines that the participant is a responsible contractor with respect to performance of the contract; and

(3) The award of the contract would not result in the participant exceeding its approved 8(a) business support level or business mix requirements.[631]

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[626] *Id.* at FAR 19.803(c). Where agencies independently, or through the self-marketing efforts of an 8(a) firm, identify a requirement for the program, they may offer on behalf of a specific 8(a) firm, for the 8(a) program in general, or for 8(a) competition. *Id.*

[627] 13 C.F.R. § 124.308(b)(1).

[628] *Id.* § 124.308(b). If the SBA and the contracting officer who selects the SIC code disagree as to the proper SIC code designation for the requirement, the SBA may refuse to accept the requirement for the 8(a) program, or appeal the contracting officer's determination to the head of the procurement agency, or the AA/MSB&COD may file an SIC code appeal to the SBA's OHA. *Id.* § 124.308(b)(2).

[629] SOP, *supra* note 373, q 63b.

[630] 13 C.F.R. § 124.308(e).

[631] 15 U.S.C. § 637(a)(16)(A)(i)—(iii); 13 C.F.R. § 124.308(e)(1)(i)—(iii). Business

If the SBA determines that an appropriate match with the nominated 8(a) firm does not exist based on these factors, the SBA must select a participant for possible award from among two or more eligible and qualified participants.[632] The SBA also will select the 8(a) firm when the procuring agency does not nominate a particular firm for a sole source award.[633] In these cases, the SBA must base its selection on certain factors concerning each eligible participant, to include its business plans and procurement history; business development needs; compliance with competitive business mix requirements (if applicable); and financial conditions, management abilities, and technical capabilities.[634]

In making sole source contract awards, the SBA must, to the maximum extent practicable, equitably distribute these sole source awards throughout the various geographic regions.[635] As will be discussed, the SBA has had difficulties in meeting this requirement.

*b. Competitive Awards*—A contract opportunity offered to the 8(a) program for award must be awarded on the basis of a competition among eligible program participants as long as the following conditions are met:

> (1) A reasonable expectation exists that at least two eligible program participants will submit offers and that award can be made at a fair market price; and
>
> (2) The anticipated award price of the contract (including options) will exceed $5,000,000 in the case of a contract opportunity assigned an SIC code for manufacturing and $3,000,000 (including options) in the case of all other contract opportunities.[636]

The procedures established for the competitive award of 8(a) contracts are set forth in 13 C.F.R. § 124.311(f), which states that the procuring agencies must conduct these competitions in accordance with the *Federal Acquisition Regulation* (*FAR*).

The AA/MSB&COD, on a nondelegable basis, is authorized to approve, on a limited basis, a request from a procuring agency to award a contract opportunity based on a competition even if the

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support levels and business mix requirements are established to ensure that 8(a) firms do not develop an unreasonable reliance on 8(a) contracts and to ease the transition of these firms into the competitive marketplace after leaving the 8(a) program. See 13 C.F.R. § 124.312 for the SBA regulations governing these requirements.

[632] 13 C.F.R. § 124.308(f)(3).

[633] *Id.* § 124.308(f).

[634] *Id.*

[635] 15 U.S.C. § 637(16)(B); 13 C.F.R. § 124.308(f)(4).

[636] 15 U.S.C. § 637(a)(1)(D)(i)(I)—(II); 13 C.F.R. § 124.311(a)(1)—(2).

anticipated award price is not expected to exceed the dollar amounts specified above.[637] The AA/MSB&COD uses this authority primarily in areas where technical competitions are appropriate or when a large number of responsible 8(a) firms exists.[638]

If the contract opportunity exceeds the applicable dollar threshold amount, and the SBA determines that a reasonable expectation does not exist that at least two eligible program participants are competent to perform the contract, then the SBA may award the contract on a sole source basis.[639] In these cases, the SBA must ensure that the 8(a) firm selected to perform the contract is capable of performing the requirement at a fair price.[640]

*B. Efforts to Develop Viable Firms*

Once accepted into the 8(a) program, participants are eligible for a myriad of financial, technical, and management assistance aimed at improving their ability to compete with other firms on an equal basis after leaving the 8(a) program. This section will examine the 8(a) program's success in accomplishing this goal.

*1. Graduation Rates of 8(a) Firms*—Between 1968, the inception of the 8(a) program, and FY 1987, 1287 firms graduated from the program.[641] Between FY 1987 and 1989, an additional 645 firms graduated from the program.[642] In 1986, the Senate Committee on Small Business conducted a survey of the 1287 firms that graduated through FY 1987,[643] the purpose of which was to assess the effectiveness of the business development aspects of the 8(a) program in preparing these firms for the competitive marketplace.[644] The survey's results indicated that the 8(a) program had not met its objec-

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[637] 15 U.S.C. § 637(a)(1)(D)(ii); 13 C.F.R. § 124.311(d).

[638] 13 C.F.R. § 124.311(d)(1).

[639] *Id.* § 124.311(e).

[640] *Id.*

[641] *8(a) Program Status*, *supra* note 544, at 10. Of the 1287 graduating firms, 76%, or 976, graduated during the previous three fiscal years. This was a result of Public Law Number 96-481, which required the SBA to establish a graduation date for each firm. *Id.*

[642] Office of Minority Small Business and Capital Ownership Development Program, United States Small Business Admin., *A Report to the United States Congress on Minority Small Business and Capital Ownership Development*, at 10 (1991) [hereinafter *Report on Minority Small Business*].

[643] *8(a) Program Status*, *supra* note 544, at 18. The Senate Committee sent a mail survey to 461 firms that had completed their fixed program participation term during the period October 1982 through February 1986. The Committee received responses from 38% of the firms and admitted that a higher response rate may have resulted in different findings. *Id.*

[644] *Id.*

tive of preparing firms for the competitive market after graduation.[645] The committee reported the following:

> (1) Between twenty-one and thirty percent of the firms no longer were in business.
>
> (2) While twenty-two percent of the owners reported that their firms were doing very well, forty-two percent indicated that their firms were doing just well enough to get by, and twenty-two percent stated that their firms were not doing well.
>
> (3) About forty-four percent of the respondents believed that their businesses would be in better condition in about one year, about nineteen percent believed that their condition would be the same, thirteen percent believed that their condition would be worse, and twenty-four percent were not sure.
>
> (4) About seventy-five percent of the respondents rated government contracts as very helpful to the development of their businesses, but only about twenty-four percent rated management assistance as helpful to the development of their businesses. Another thirty-four percent rated management assistance as somewhat helpful, and forty-two percent rated management assistance as not helpful.
>
> (5) In response to a question concerning the impact of graduation, fifty-eight percent of the respondents reported that graduation had a devastating effect on their businesses. However, sixty-one percent of the respondents indicated that they were becoming competitive in the private sector.[646]

In 1991, the district offices of the SBA investigated the 645 businesses that graduated from the 8(a) program between FY 1987 and 1989.[647] Consistent with the results of the previous survey, the SBA's investigation found that forty-two percent of the firms graduating from the program during this period no longer were in business, while fifty-eight percent remained operational.[648]

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[645] *Id.*

[646] *Id.* With respect to finding (5), the committee concluded that the contradictory results were only indicators and did not provide a clear basis for determining the actual impact of graduation on firms. *Id.*

[647] *Report on Minority Small Business*, *supra* note 642, at 10.

[648] *Id.* Of the firms that were operational, 48% were independently operational, 7% had seriously curtailed operations, and 3% had been acquired by other firms owned and controlled by a nondisadvantaged individual(s). *Id.*

*2. Failure to Develop Viable Firms*—The SBA has faced long-standing difficulties in its administration of the 8(a) program. Several explanations have been proposed to explain why the SBA has not been more successful in developing viable firms through the 8(a) program. For example, commentators have asserted that: (1) the SBA has not been effective with direct aid programs; (2) rather than build businesses, SBA programs support marginal performers; and (3) the services provided by the SBA are neither generally known nor widely used.[649] The GAO also has identified several problem areas that have prevented the SBA from achieving 8(a) program objectives. Some of the major problem areas included:

> (1) Too much emphasis on increasing the volume of 8(a) contracts, rather than developing viable competitive disadvantaged business firms.
>
> (2) Inadequate business development plans by which to judge the firms' successes or failures.
>
> (3) Inadequate management assistance and monitoring by SBA.[650]

The following sections will examine these problem areas individually.

*a. Volume over Viability*—Limited 8(a) program achievements have occurred because the SBA has been pursuing two competing goals: maintaining the volume of 8(a) contracts and developing competitive disadvantaged businesses.[651] In the GAO's opinion, the SBA has assigned a low priority to business development, concentrating instead on achieving government-wide 8(a) contract volume goals established by the President.[652] The award of increasing amounts of 8(a) contracts has become the single most important measure of the 8(a) program's success.[653] In effect, the SBA functions as nothing more than a "contract broker" merely acting as a link between the federal buying agency and the 8(a) firms.[654] The SBA, in assessing program success in terms of the number and dollar value of contracts awarded, is measuring the resources committed to

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[649] Lorette, et al., *supra* note 549, at 22.

[650] *Proposals*, *supra* note 548, at 3-4. The GAO identified additional problems that included the 8(a) program's (1) vulnerability to fraud and abuse and (2) the failure to terminate firms after prolonged program participation. *Id.* Both of these problems have been discussed *supra*.

[651] *Promise Unfulfilled*, *supra* note 20, at 6. The problem associated with contradicting goals has been highlighted in prior GAO reports and studies on the 8(a) program. *See, e.g.*, *Questionable Effectiveness*, *supra* note 74.

[652] *Promise Unfulfilled*, *supra* note 20, at 6, 34.

[653] *Id.* at 27.

[654] *Id.* at 6-7.

the program rather than the actual benefits derived from program participation.[655]

As a result of its focus on contract volume, the SBA has been reluctant to graduate firms from the program—especially firms that get large contracts—because doing so would be counterproductive to the goal of increasing the 8(a) contract volume.[656] This reluctance to graduate 8(a) firms has led to additional problems that hamper the effectiveness of the 8(a) program.

*(1) Program Exclusion*—One problem caused by the SBA's failure to graduate 8(a) firms was that many disadvantaged small business applicants applying for entry into the 8(a) program were rejected and, thereby, denied an opportunity for 8(a) contract assistance.[657] Many of these rejected firms were denied admission into the 8(a) program because the SBA did not have potential contracts to support the firms' specialties or skills; however, according to one SBA official, some applications were rejected because 8(a) contract support was only enough to satisfy the needs of active 8(a) firms having similar capabilities.[658] Assuming that the SBA wrongfully elected to keep otherwise competitive firms that should have been graduated from the 8(a) program, the rejected applicants potentially could have been approved for the 8(a) program.[659] Without 8(a) program turnover, the doors of the program will remain closed for these rejected firms.[660]

*(2) Inequitable Contract Distribution*—Another problem associated with the SBA's focus on 8(a) program contract volume has been that a small group of 8(a) firms have received the bulk of 8(a) contract dollars. The distribution of contract awards among relatively few 8(a) firms has been a long-standing phenomenon,[661] prompting one SBA official to characterize the situation as "the rich get[ting] richer and the poor get[ting] poorer."[662] The GAO claims that the primary reason that certain firms receive the bulk of 8(a) contract dollars is to help the SBA meet its contract goal.[663]

In 1981, the GAO reported that, on average, the top fifty 8(a) firms annually received about thirty-one percent of all contract

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[655] *Questionable Effectiveness*, *supra* note 74, at 33.

[656] *Id.* at 6.

[657] *Id.* at 22.

[658] *Id.*

[659] *Id.*

[660] *Id.* at 23.

[661] *Problems in Restructuring*, *supra* note 17, at 30.

[662] *Promise Unfulfilled*, *supra* note 20, at 10.

[663] *Id.* at 11.

awards over a twelve-year period.[664] Prior to that, in a 1988 report, the GAO reported that fifty firms received about $1.1 billion, or about thirty-five percent of the 8(a) contract awards during FY 1987.[665] The SBA's most recent data indicate that of the 3645 firms in the 8(a) program at the end of FY 1990, fifty, or less than two percent, received about $1.5 billion, or forty percent of the nearly four billion dollars in total contracts awarded during FY 1990.[666]

Conversely, many 8(a) firms receive no contracts at all. Some SBA reports show that about fifty-five percent of the firms in the 8(a) program at the end of FY 1991 did not receive any contracts through the program during the fiscal year.[667] Fifty-four percent of 8(a) firms in FY 1992 did not receive any 8(a) contracts.[668] A similar situation existed in FYs 1989 and 1990, when fifty percent and fifty-three percent, respectively, of the firms in the program received no contracts.[669]

In an effort to correct this inequitable situation, Congress, through the BODRA, directed the SBA to promote the equitable geographical distribution of noncompetitive contracts to the maximum extent possible.[670] However, neither the BODRA, nor the SBA in its implementing regulations, have defined the term "equitable geographical distribution."[671] Consequently, the SBA has experienced problems in complying with this requirement.

8(a) program officials point to several factors that have affected the agency's ability to equitably distribute 8(a) contracts geographically. First, if certain conditions are met, the BODRA directs the SBA to award noncompetitive contracts to the 8(a) firm recommended by the agency offering the contract.[672] According to the SBA, procuring agencies recommend specific 8(a) firms to the SBA for approximately ninety-five percent of all contract offerings.[673] Given the requirements of the BODRA, that the SBA exercises limited control over the geographical distribution of 8(a) contracts is apparent.

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[664] *Id.* at 10.

[665] *8(a) Program Status*, *supra* note 544, at 16.

[666] *Problems in Restructuring*, *supra* note 17, at 30.

[667] *Id.* at 31.

[668] *Problems Continue*, *supra* note 22, at 10.

[669] *Problems in Restructuring*, *supra* note 17, at 31. During FY 1987 about 42% of the active 8(a) firms did not receive any 8(a) contracts, while another 19% did $100,000 or less in 8(a) business. 8(a) Program Status, *supra* note 544, at 2.

[670] *Problems in Restructuring*, *supra* note 17, at 28. *See* 15 U.S.C. § 637(16)(B); 13 C.F.R. § 124.308(f)(4).

[671] *Problems in Restructuring*, *supra* note 17, at 28.

[672] *See* 15 U.S.C. § 637 (a)(16)(A)(i)-(iii); 13 C.F.R. § 124.308(e)(1)(i)-(iii).

[673] *Problems in Restructuring*, *supra* note 17, at 28.

A second factor contributing to inequitable distribution of 8(a) contracts is the uneven distribution of program participants across the country.[674] For example, many high-technology firms are located in the District of Columbia metropolitan area, while many construction firms are located in the southern United States.[675] It follows that equitable distribution of contracts during any particular fiscal year would depend primarily on the type and amount of contracts awarded rather than the SBA's willingness to implement the statutory directive.

8(a) program officials also claim that the requirement to equitably distribute contracts geographically directly conflicts with the mandate that the 8(a) program promote self-marketing as a means of developing 8(a) firms.[676] The SBA believes that it would be unfair to have an 8(a) firm successfully market itself to a procuring agency and lose a particular contract offering to another firm in the interest of equitable geographical distribution, because such an award would unfairly penalize the 8(a) firm that is trying to develop itself for successful competition after 8(a) program graduation.[677]

Some SBA officials have offered additional explanations for inequitable 8(a) contract distribution, to include the following:

> (1) Poor management by the SBA results in 8(a) firms being helped unevenly.
>
> (2) 8(a) firms have strong political connections that they are quick to use if any of their contracts are in jeopardy.
>
> (3) Federal procurement agencies prefer to stick with the same 8(a) firms.
>
> (4) Federal procurement agencies believe adding quantities to existing 8(a) contracts is easier than negotiating new contracts with other 8(a) firms.[678]

*b. Inadequate Business Development Plans*—To assist the SBA in determining the business needs of each program participant, each 8(a) firm must develop a comprehensive business plan.[679] The business plan is the cornerstone of the 8(a) program, because it is the

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[674] *Id.*

[675] *Id.* During FY 1990, nine states and the District of Columbia accounted for about 71% of the total value of all contract awards. *Id.* Additionally, the four top states and the District of Columbia, which together account for about 42% of the 8(a) firms that received contracts, accounted for about 60% of the contract awards. *Id.*

[676] *Id.* at 30.

[677] *Id.*

[678] *Promise Unfulfilled, supra* note 20, at 10.

[679] 13 C.F.R. § 124.301(a).

primary means by which the SBA monitors the development of 8(a) firms. A properly constructed business plan can be the single most important element in directing an 8(a) firm toward successful operations.[680] However, as will be seen, the SBA continues to violate the guidelines established for these business plans.

Firms in the 8(a) program have always been required to have business plans. Prior to the BODRA, the SBA used the business plan (which was a part of the application package) to determine whether the firm had the capability to perform an 8(a) contract.[681] Each firm was required to submit a business plan projecting the amount of 8(a) contract support and the growth in commercial and other government business needed to reach self-sufficiency.[682] Over time, these plans were expected to reflect a reduced dependence on 8(a) contract support and increased reliance on non-8(a) sales.[683] With the passage of the BODRA, the business plan's objective changed. The plan is now prepared and submitted after a firm's admission to the 8(a) program and is used to chart a firm's development and guide it towards a successful transition from the 8(a) program to the private sector.[684]

As noted above, once admitted to the 8(a) program, the small business concern must submit its business plan in final form to the SBA servicing field office.[685] The business plan sets forth the participant's business targets, objectives, and goals.[686] This comprehensive document identifies the resources needed for the firm to become a self-sustaining profit-oriented small business and enables the SBA to identify the types of assistance the firm needs to help it overcome its business deficiencies.[687] Pursuant to the BODRA, the initial business plan must contain, at a minimum, the following information:

> (1) An analysis of market potential, competitive environment, and other business analyses estimating the program participant's prospects for profitable operations during the term of program participation and after graduation;
>
> (2) An analysis of the program participant's strengths and weaknesses, paying particular attention to the means of correcting any financial, managerial, technical, or labor conditions that could impede the participant from receiv-

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[680] *Final Report*, *supra* note 2, at 61.

[681] *Problems in Restructuring*, *supra* note 17, at 26.

[682] *Promise Unfulfilled*, *supra* note 20, at 4.

[683] *Id.*

[684] *Problems in Restructuring*, *supra* note 17, at 26.

[685] 15 U.S.C. § 636(j)(10)(D)(i); 13 C.F.R. § 124.301(a).

[686] 15 U.S.C. § 636(j)(10)(A)(i); 13 C.F.R. § 124.301(a).

[687] *Promise Unfulfilled*, *supra* note 20, at 3.

ing contracts other than those awarded through the 8(a) program;

(3) Specific targets, objectives, and goals for the participant's business development during the next two years, utilizing the results of the analyses conducted pursuant to paragraphs [1 and 2 above];

(4) Estimates of contract awards pursuant to section 8(a) and from other sources that the participant would need to meet the specific targets, objectives and goals for the years covered by the business plan; and

(5) Such other information as the SBA may require.[688]

The participant may modify the business plan as appropriate, but must submit the modified plan to the Business Opportunity Specialist (BOS) for approval.[689] The BOS is the SBA field office employee responsible for providing business development assistance to 8(a) program participants.[690] Each participant is required to review its currently approved business plan annually with the BOS.[691]

During the annual review, participants must make a contract support forecast that projects their needs for contract awards for the next program year and the succeeding program year.[692] Additionally, participants may make requests for changes in SIC code designations during the annual review.[693] Having an accurate SIC code is imperative because participants will only be permitted to perform 8(a) contracts that are classified under the approved SIC codes that appear in their business plans.[694] If a program participant has begun its first year of the transitional stage of program participation, it also must submit a transition management plan during the annual business plan review.[695] This plan outlines the specific steps that the business will take to promote profitable business operations after graduation from the 8(a) program.[696]

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[688] 15 U.S.C. § 636(j)(10)(D)(ii)(I)—(V); 13 C.F.R. § 124.301(c)(1)—(5).

[689] 13 C.F.R. § 124.302(a). Until the modified plan is approved in writing, the currently approved plan will be considered the applicable plan for all 8(a) program purposes. *Id.*

[690] *Id.* § 124.100.

[691] *Id.* § 124.302(a).

[692] *Id.* § 124.302(b).

[693] *Id.* § 124.302(c).

[694] *Id.* § 124.301(b). However, an 8(a) concern may receive a contract classified under a SIC code not contained in its business plan when the contract is not awarded through the 8(a) program. *Id.*

[695] *Id.* § 124.302(d).

[696] *Id.*

In the absence of an SBA approved business plan, the participant will not be eligible for 8(a) program benefits, including the award of contracts.[697] However, an incumbent firm's approved business plan remains valid—and the firm can continue to receive contracts—until the SBA approves a modified plan.[698]

As a result of the BODRA, the SBA developed a new business plan form and began distributing it in January 1990 to all new firms entering the 8(a) program.[699] Approximately seventeen months later, in April 1991, the SBA directed its field offices to furnish the new business plan forms to all incumbent firms.[700] The SBA then directed the incumbent firms to complete their new business plans and submit them to the SBA for approval.[701] The BODRA requires the SBA to withhold contracts from 8(a) firms until the SBA approves their business plans. However, during FY 1992, the CMBD discovered that the SBA had been violating this requirement by awarding 8(a) contracts to firms lacking approved business plans.[702]

According to SBA officials, some incumbent firms are reluctant to submit revised business plans because of the time and cost involved in preparing the plans.[703] Furthermore, firms that are in the program but have not yet received 8(a) contracts have no incentive to revise their plans.[704] Instead of withholding contracts from these firms—as required by the BODRA—the SBA allowed its regional offices to work with these incumbent firms in an effort to get them to submit their revised plans.[705] The SBA has had some success in obtaining approved business plans. However, although the number of 8(a) firms with approved plans has increased, the SBA is not annually reviewing the plans as required by the BODRA.[706]

Because business plans are the primary means by which the SBA determines the business needs of each 8(a) firm, violations of

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[697] *Id.* § 124.301(a).

[698] *Id.* § 124.302(a).

[699] *Problems in Restructuring*, *supra* note 17, at 26.

[700] *Id.* According to a schedule established by the SBA, the field offices would provide each incumbent firm with the form 90 days prior to the firm's anniversary date in the 8(a) program. *Id.*

[701] *Id.* The incumbent firm had 60 days to complete its new business plan and return the plan to the SBA, who then had the remaining 30 days to approve or disapprove the plan. *Id.* As of October 1, 1991, the SBA had received business plans from 2700, or 69%, of the 3922 new and incumbent firms in the 8(a) program. *Id.* at 27. The SBA approved 2250, or 83%, of the plans received. *Id.*

[702] *Final Report*, *supra* note 2, at 30.

[703] *Problems in Restructuring*, *supra* note 17, at 27.

[704] *Id.*

[705] *Id.*

[706] *Problems Continue*, *supra* note 22, at 6–7.

the provisions concerning these plans makes it difficult, if not impossible, for the SBA to adequately monitor and evaluate the performance of 8(a) firms and ensure that the business development goals outlined in the plans remain realistic. Consequently, the SBA is unable to identify the management and technical assistance these firms need to become self-sufficient. This critique of the SBA's management of business plans is not new;[707] however, despite the repeated criticism in this area, the SBA has not taken adequate corrective actions to address the problem, thereby impeding the effectiveness of the 8(a) program.

*c. Inadequate Management Assistance*—In the conference report accompanying the bill that eventually became the BODRA, both the House and Senate Committees on Small Business made it clear that the purpose of the 8(a) program was business development.[708] Contract support is only one of a variety of methods at the SBA's disposal to develop the competitive strength of 8(a) contractors. Other methods of support provided to 8(a) businesses include financial, management, and technical assistance.

*(1) Financial Assistance*—The SBA provides financial assistance to 8(a) firms through 8(a) direct loans,[709] SBA-guaranteed

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[707] *See, e.g., 8(a) Program Status*, *supra* note 544, at 22; *Promise Unfulfilled*, *supra* note 20, at 32; *Questionable Effectiveness*, *supra* note 74, at 32.

[708] *Final Report*, *supra* note 2, at 60. In quoting language from H.R. REP. No. 1070, the CMBD stated:

> The House and Senate conferees affirm that the purposes of H.R. 1807 shall be to ensure that the Capital Ownership Development Program and the Section 8(a) authority be used exclusively for business development purposes to help small businesses owned and controlled by socially and economically disadvantaged individuals to compete on an equal bases [sic] in the mainstream of the American economy. In so doing, the goals of the program shall be to increase the number of competitive firms that exit the program by providing both meaningful business development services and fair and equitable distribution of federal contracting opportunities to such firms while discouraging unreasonable reliance on section 8(a) contracts.

*Id.*

[709] The Small Business Act authorizes the SBA to make loans either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis to small business concerns participating in the 8(a) program. 13 C.F.R. § 122.59-1. To be eligible for the loan, the small business concern must be receiving assistance under the 8(a) program. As such, firms that are eligible to apply for the program but are not actually participating are not eligible for 8(a) loan assistance. *Id.* This loan assistance may be provided only if the SBA determines that:

> (1) The type and amount of such assistance requested by the business concern is not otherwise available on reasonable terms from other sources;
>
> (2) With such assistance the business concern has a reasonable prospect for operating soundly and profitably within a reasonable period of time;

loans, 8(a) advance payments,[710] and capital from Small Business Investment Companies (SBIC).[711] While the 8(a) direct loans and advance payments are available only to 8(a) firms, the other forms of financial assistance are available to any small business eligible for financial assistance from the SBA.[712] The extent of financial assistance provided to 8(a) firms is not fully known because the SBA does

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(3) The proceeds of such assistance will be used within a reasonable time for plant construction, conversion, or expansion; and

(4) Such assistance is of such sound value as reasonably to assure that the terms under which it is provided will not be breached by the small business concern and there is reasonable assurance that the loan can be paid from the earnings of the business.

*Id.* § 122.590-2(a)(1)-(4). No loan can be made under this program if the total amount outstanding and committed to the borrower would exceed $750,000. *Id.* § 122.59-2(b).

[710]Advance payments are cash disbursements made by the SBA to an 8(a) firm prior to, or during performance of, a specific 8(a) subcontract, based on the 8(a) firm's anticipated performance under the subcontract. 13 C.F.R. § 124.401(a)(1). The authorizing official for advance payments on 8(a) contracts is the Regional Administrator or the Associate Regional Administrator/MSB&COD. *Id.* § 124.401(c)(4). The SBA makes these payments to assist the program participant in meeting the financial requirements of the subcontract. The payments are authorized only after all other forms of financing have been considered and determined to be either unavailable or unacceptable to support performance of the subcontract. *Id.* Advance payments are available only in connection with sole source 8(a) awards and are not authorized in connection with competitive awards. *Id.* § 124.401(a)(3).

Advance payments may be approved for a program participant only when all of the following requirements and conditions exist:

(1) An 8(a) concern does not have adequate working capital to perform a specific 8(a) subcontract.

(2) *Adequate and timely private financing is not available on reasonable* terms to provide necessary capital.

(3) Progress payments based on costs at customary rates will not satisfy the working capital requirements of the 8(a) concern to perform the 8(a) subcontract.

(4) When applicable, loan guarantees for defense production are not available.

(5) Progress payments based on costs with unusual terms will not satisfy the working capital requirements of the 8(a) concern to perform the 8(a) subcontract.

(6) The 8(a) concern has established or agrees to establish and maintain financial records and controls that will provide for complete accountability and required reporting of advance payment funds.

(7) The 8(a) concern has no unliquidated advance payments outstanding on another 8(a) subcontract that is completed, terminated or in default, unless such unliquidated advance payments are due only to the contracting agency's delay in making final payment to the 8(a) concern after it has successfully completed the 8(a) subcontract.

*Id.* § 124.401(b)(1)(i)—(vii).

[711]The SBA licenses, regulates, and provides financial assistance to privately owned and operated SBICs. The SBIC's major function is to make investments by supplying equity and venture capital to small enterprises for their growth, expansion, and modernization. *Problems in Restructuring, supra* note 17, at 40.

[712]*Id.* at 39.

not keep information on the amount of assistance provided to 8(a) firms through the guaranteed loan and SBIC program.[713]

*(2) Management and Technical Assistance*—Management and technical support is supplied through the Development Assistance Program (DAP) and the SB&COD Program. This section will address the SBA's success in providing management and technical assistance to 8(a) firms.

*(a) History of Management Assistance*—Estimates have shown that nine out of every ten business failures in the small business community are due to managerial deficiencies.[714] It is readily apparent that the SBA should place emphasis on management assistance, especially when one considers that 8(a) firms generally have had little practical experience in operating a business.[715] However, the SBA has had a long history of failing to meet the management and technical needs of its 8(a) program participants. Accordingly, the SBA has not been successful in the area of business development.[716]

As far back as 1975, the GAO reported that the lack of management assistance provided to 8(a) firms, especially in their early stages of development, had limited the 8(a) program's success.[717] The GAO also observed that because the SBA had no system for evaluating the assistance it provided to these firms, when the SBA did provide assistance, there was no way of determining whether the assistance was of any value to the firms.[718]

Four years later, in 1979, the SBA's management and technical assistance still was inadequate. Studies found that 8(a) program participants were not receiving the management and technical assistance needed to ensure viability.[719] Although the SBA recognized that all 8(a) firms had a critical need for management assistance, the SBA had no systematic method for ensuring that the firms needing assistance received it.[720]

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[713] *Id.* at 8.

[714] *Questionable Effectiveness*, *supra* note 74, at 33.

[715] *Id.*

[716] *Final Report*, *supra* note 2, at 61.

[717] *Questionable Effectiveness*, *supra* note 74, at 33. The GAO interviewed officials from 183 8(a) firms and found that the SBA had not provided management assistance to about 52% of the firms. *Id.* Some of the firms that requested management assistance from the SBA did not receive it. *Id.*

[718] *Id.*

[719] General Accounting Office, *Ways to Increase the Number, Type, and Timeliness of 8(a) Procurement Contracts*, REP. TO CONG., GAO Rep. No. CED-78-48, at 16 (1978) [hereinafter *Ways to Increase 8(a) Contracts*].

[720] General Accounting Office, *Efforts to Improve Management of the Small Business Administration Have Been Unsatisfactory-More Aggressive Action Needed*, REP. TO CONG., GAO Rep. No. CED-79-103, at 42 (1979) [hereinafter *Efforts to Improve Management*].

During this time period, the responsibility for all areas of 8(a) firm development fell on the Office of Business Development, which provided management and technical assistance through the SBA's management assistance group.[721] The management assistance available included counseling, training, and management assistance publications and training materials.[722] The procuring agency and 8(a) firm officials indicated that this assistance was neither effective nor helpful in the development of 8(a) firms.[723] Additionally, whenever the SBA provided this assistance, it was not very timely.[724] The SBA attributed these difficulties to staffing problems that hindered its efforts at monitoring the business development of 8(a) program participants.[725]

*(b) SBA's 7(j) Program Assistance*—In response to criticism concerning the inadequate level of assistance provided to 8(a) firms, Congress, pursuant to Public Law 95-507, modified the SBA's management and technical assistance programs,[726] which were provided under section 7(j) of the Small Business Act.[727] In enacting Public Law 95-507, one of Congress's primary objectives was to improve the SBA's administration of the 8(a) program.[728]

The goal of the 7(j) program is to develop a firm's entrepreneurial and managerial self-sufficiency.[729] The SBA attempts to

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[721] *Ways to Increase 8(a) Contracts*, *supra* note 719, at 16-17.

[722] *Id.* at 17.

[723] *Id.* at 18.

[724] *Efforts to Improve Management*, *supra* note 720, at 42. In one region, an average of five months elapsed between the request for assistance and the consultant's final report specifying what was necessary to improve the firm's operation. *Id.* Consequently, a firm could be in very serious trouble by the time the consultant's report reached the SBA and the 8(a) firm. *Id.*

[725] *Promise Unfulfilled*, *supra* note 20, at 27.

[726] General Accounting Office, *SBA's 7(j) Management Assistance Program: Changes Needed to Improve Efficiency and Effectiveness*, REP. TO CONG., GAO Rep. No. CED-81-149, at 20 (1981) [hereinafter *SBA's 7(j) Program*].

[727] 15 U.S.C. § 636(j). The SBA sponsors other programs designed to provide management and technical assistance to 8(a) firms. These additional sources of assistance include management counseling and training provided by (1) retired business executives under the SBA's Service Corps of Retired Executives; (2) the private sector, educational community, and state and local governments under the SBA's Small Business Development Center Program; and (3) qualified college-level business students under the SBA's Small Business Institute Program. *Problems in Restructuring*, *supra* note 17, at 35.

[728] *SBA's 7(j) Program*, *supra* note 726, at 1.

[729] *Problems in Restructuring*, *supra* note 17, at 35. The 7(j) management assistance programs represent an expansion of the Call Contracting Program established in 1967. The purpose of the Call Contracting Program was to help socially and/or economically disadvantaged individuals establish and maintain small businesses by improving their technical and management skills. *SBA's 7(j) Program*, *supra* note 726, at 1. Under this program, the SBA awarded both competitive and noncompetitive contracts to management consulting firms that agreed to be "on call" to provide

accomplish this goal through two programs—the Development Assistance Program (DAP)[730] and the Small Business and Capital Ownership Development Program.[731]

*(i) Development Assistance Program*—The DAP is available to 8(a) program participants, firms located in areas of high unemployment and low income, and firms owned by low-income individuals.[732] The DAP provides financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or enterprises eligible for assistance under the 8(a) program.[733] The financial assistance authorized for these projects includes assistance advanced by cooperative agreements, grants and contracts[734] which can be placed with qualified individuals, profit-making and nonprofit corporations, educational institutions, and state and local governments that provide the actual technical and management assistance.[735]

The financial assistance is provided for projects that may include any or all of the following:

> (1) Planning and research, including feasibility studies and market research;
>
> (2) The identification and development of new business opportunities;
>
> (3) The furnishing of centralized services with regard to public services and federal government programs to include programs authorized under the 8(a) program;
>
> (4) The establishment and strengthening of business service agencies, including trade associations and cooperatives; and
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> (5) The furnishing of business counseling, management training, with special emphasis on the development of management training programs using the resources of the business community, including the development of man-

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business counseling and general management assistance to eligible recipients referred to them by the SBA. *Id.*

[730] 15 U.S.C. § 636(j)(1)—(9).

[731] *Id.* § 636(j)(10).

[732] *Problems in Restructuring*, *supra* note 17, at 35.

[733] 15 U.S.C. § 636(j)(1); 13 C.F.R. § 124.1(b)(2).

[734] 15 U.S.C. § 636(j)(5).

[735] SOP, *supra* note 373, ¶ 172c. The AA/MSB&COD is responsible for coordinating and formulating policies relating to the dissemination of this assistance to 8(a) program participants. 15 U.S.C. § 636(j)(11)(A); 13 C.F.R. § 124.403(a).

agement training opportunities in existing business, and with emphasis in all cases on providing management training of sufficient scope and duration to develop entrepreneurial and managerial self-sufficiency on the part of the individuals served.[736]

The SBA also encourages businesses to place subcontracts with 8(a) program participants by providing these businesses with incentives and assistance that will aid in the training and upgrading of 8(a) program participants who may be potential subcontractors.[737] Additionally, the SBA, in coordination and cooperation with the heads of other federal departments and agencies, must ensure that contracts, subcontracts, and deposits made by the federal government, or with programs aided with federal funds, are placed in a manner that furthers the purposes of the 8(a) program.[738]

*(ii) Small Business and Capital Ownership Development Program*—In addition to the assistance that the DAP provides, the SB&COD program provides assistance exclusively for 8(a) program participants.[739] Congress established the SB&COD program in 1978 with the enactment of Public Law 95-507.[740] Congress created this program to supplement the assistance already available to 8(a) firms with the expectation that these firms would begin to receive the intensive professional management and technical assistance needed to develop into viable businesses.[741]

The program provides two fundamental types of management and technical assistance. The first involves seminars and meetings that provide general training.[742] The second involves sixteen categories of specialized assistance[743] that perform the following functions for 8(a) program participants:

(1) Assist in developing comprehensive business plans that

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[736] 15 U.S.C. § 636(j)(2)(A)—(E); 13 C.F.R. § 124.403(b)(3)(i)—(v).

[737] 15 U.S.C. § 636(j)(3); 13 C.F.R. § 124.403(b)(4)(i).

[738] 15 U.S.C. § 636(j)(9); 13 U.S.C. § 124.403(b)(4)(ii).

[739] *Problems in Restructuring, supra* note 17, at 35.

[740] Public Law Number 95-507 also assigned responsibility for the management and oversight of the SB&COD program to the AA/MSB&COD. 15 U.S.C. § 636(j)(10); 13 C.F.R. § 124.404.

[741] *SBA's 7(j) Program, supra* note 726, at 20.

[742] *Problems in Restructuring, supra* note 17, at 36.

[743] This specialized assistance consists of the following categories: (1) accounting services; (2) production, engineering, and technical assistance; (3) feasibility studies, market analyses, and advertising; (4) government contracts assistance; (5) specialized assistance; (6) financial counseling; (7) business plan assistance; (8) construction management assistance; (9) loan packaging; (10) computer programming services; (11) data processing services; (12) international trade services; (13) service contracts assistance; (14) management training; (15) seminars/workshops; (16) surety bond assistance. *Id.*

> set forth the participant's specific business targets, objectives, and goals;
>
> (2) Provide for other nonfinancial services deemed necessary for the establishment, preservation, and growth of the participant;
>
> (3) Assist in obtaining equity and debt financing;
>
> (4) Establish regular performance monitoring and reporting systems to ensure compliance with business plans;
>
> (5) Analyze and report the causes of success and failure of program participants; and
>
> (6) Provide assistance necessary to help in procuring surety bonds.[744]

*(iii) Effectiveness of 7(j) Assistance*—In FY 1990, the SBA spent approximately $2.34 million providing assistance under the 7(j) program to 1204 8(a) firms.[745] Although the SBA used these funds to provide the types of management and technical assistance described above, the SBA did not track by category the amount of assistance actually provided to 8(a) firms.[746] Consequently, the SBA does not know the total amount of assistance provided in each category to 8(a) firms, nor whether the amount is too much or too little. These findings are similar to those reported by the GAO in its 1975 report.[747]

According to the Director of the SBA's Division of Management and Technical Assistance, the SBA does not have a computer network that allows it to collect this information from field offices.[748] The CMBD indicated that data collection is essential to measure progress, redirect resources, correct or eliminate failed policies, and bolster and replicate efforts that have proved successful.[749] Without

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[744]15 U.S.C. § 636(j)(10)(A)(i)—(vi); 13 C.F.R. § 124.404(a)—(f).

[745]*Problems in Restructuring*, *supra* note 17, at 37. In describing the assistance under the 7(j) program, the GAO reported the following:

> In fiscal year 1990, the Congress appropriated $8.73 million for the 7(j) program. The SBA awarded 129 contracts to provide management and technical assistance to eligible firms. Forty-five, or 35 percent, of the contracts were solely for assistance to 8(a) firms. The SBA expended about $7.3 million of the 1990 appropriation on 7(j) contracts, giving assistance to 2,056 small businesses. About $2.34 million, or 32 percent of the total expenditure, was used solely for the 8(a) program. In total, 7(j) assistance was provided to 1,204 8(a) firms.

*Id.* at 36–37.

[746]*Id.* at 6.

[747]*Id.*

[748]*Id.*

[749]*Final Report*, *supra* note 2, at 64.

this information, the SBA lacks the ability to accurately measure the effectiveness of the assistance provided under the 7(j) program.

The SBA currently uses other methods to evaluate the effectiveness of 7(j) assistance. These methods include: (1) reports prepared by the contractors providing the assistance; and (2) evaluation surveys from the 8(a) firms receiving the assistance.[750] Additionally, after the assistance is provided, a conference—that includes the BOS assigned to the 8(a) firm, the provider of 7(j) assistance, and the 8(a) firm—is held to discuss the effectiveness of the assistance provided.[751]

Notwithstanding these efforts, the SBA recognizes that objective criteria are necessary to measure the effectiveness of 7(j) program assistance.[752] As such, the SBA has several initiatives planned to improve data collection and correct weaknesses in the 8(a) program's management information system.[753] The most recent GAO report concluded, however, that although the SBA has made some progress in managing the program, more must be done. The GAO reported that the SBA did not plan the redesign of the management information system in accordance with federal regulations and guidelines.[754] Without an adequate information system in place, the Congress and 8(a) program managers cannot accurately assess the assistance being provided to 8(a) firms, the effectiveness of the assistance, or the 8(a) program's overall effectiveness in developing 8(a) firms.[755]

## VI. Conclusion

Minority business enterprise programs have had a long history within the federal government. The socioeconomic programs implemented through the federal procurement process have created the opportunity for many minority businesses to develop the knowledge, skills, and abilities necessary to compete in the economic marketplace, especially in areas where the presence of minority-owned firms traditionally has been minimal, if not nonexistent.

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[750] *Problems in Restructuring*, *supra* note 17, at 37.

[751] *Id.* Because the BOS generally is familiar with the 8(a) firm's problems and the reasons the assistance is needed, the BOS plays a major role in deciding whether 7(j) assistance is provided and, if assistance is provided, in measuring its effectiveness in solving the firm's problems. *Id.*

[752] *Id.*

[753] *Id.* at 11.

[754] *Problems Continue*, *supra* note 22, at 2. The SBA's latest estimate for completing the redesign work on the management information system is late 1995, which is five years later than the original estimate. *Id.*

[755] *Id.*

Minority business set-aside programs have been the primary method by which the federal government has fostered minority business enterprises while attempting to address the effects of past discrimination. The SBA's 8(a) program probably has the greatest impact on the government's efforts in this area, accounting for well over forty percent of all procurement dollars received by small minority firms.[756] Because minority set-aside programs necessarily impact nonminority businesses, these programs have been subject to judicial scrutiny, especially when a state or local government entity has enacted the set-aside program. Recent Supreme Court decisions have unambiguously stated that minority business set-aside programs are a constitutional means by which federal, state, and local governments can confront the effects of past discrimination. However, while race-conscious programs designed by state and local governments are subject to a very strict standard of review, the same programs enacted by the federal government enjoy a more deferential standard of review. Consequently, state and local governments face a difficult—if not impossible—task in formulating and justifying minority business set-aside programs. Without delegation of authority from Congress, which would give local governments the flexibility needed to deal with local problems without strict judicial scrutiny, these local programs soon may disappear. Because underutilization of minority owned businesses has been recognized as a national problem, legislative action in this area is appropriate.

The federal government's primary means of assisting small minority businesses to become self-sufficient is the SBA's 8(a) program, which has been evaluated many times over the years by the GAO, the SBA's Inspector General, and other internal organizations of the SBA. Additionally, congressional committees have held hearings to determine whether the program is successful in developing viable businesses. These studies and hearings have criticized the SBA's administration of the 8(a) program. Although the SBA has long known of problems associated with the administration of the program, problems still exist. During recent congressional hearings, the Administrator of the SBA, Erskine B. Bowles, actually admitted that the "8(a) program is a mess."[757] The SBA has undertaken several measures to address problems in the program; however, as a result of longstanding program difficulties, the continued operation of the 8(a) program within the SBA is in serious jeopardy.

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[756] Joshua I. Smith, Chairman, United States Commission on Minority Business Development, Statement before the United States House Committee on Small Business 4 (Sept. 24, 1992).

[757] Erskine B. Bowles, Administrator for Small Business Administration, Statement before the United States House Committee on Small Business 4 (Sept. 22, 1993).

If the SBA is to avoid implementing of the CMBD's recommendation to remove the SBA's authority to administer the 8(a) program, and vest this authority within the Department of Commerce, then the SBA must undertake drastic measures. The SBA has demonstrated its ability to implement corrective procedures designed to address problems in the 8(a) program, as evidenced by the SBA's success in reducing the problems associated with fraud and other eligibility abuses within the program. The SBA must utilize these same efforts to shift the emphasis of the 8(a) program away from providing procurement opportunities to providing meaningful business development to program participants. By shifting this emphasis, the SBA will greatly enhance the 8(a) program's effectiveness. It is well on its way to attaining this goal, as it has already proposed broad initiatives aimed at deregulating and redefining the program. The proposed revisions will streamline the program to increase efficiency and broaden participation.[758] Some of the major program changes—which were outlined by the Associate Administrator for the 8(a) program during congressional hearings[759]—include the following:

> (1) Improving access to the 8(a) program by removing impediments to program entry by simplifying some of the key requirements for program eligibility, particularly the "potential for success" criterion and the definition of economic disadvantage;[760]
>
> (2) Increasing access to the federal procurement market for small and disadvantaged businesses and 8(a) firms by removing the SBA from 8(a) contract award and administration processes, thus allowing agencies to deal directly with 8(a) contractors;[761]

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[758]SBA, Office of Minority Small Business & Capital Ownership Development, *Proposed Revision of the 8(a) Program*, at 1 [hereinafter *Proposed Revision*] (handout obtained from Jane Butler, SBA Minority Small Business & Capital Ownership Development Program Deputy Associate Administrator for Programs).

[759]*See generally* Watts, *supra* note 23.

[760]*Id.* at 5. *See* 13 C.F.R. §§ 124.107, 124.106, for current eligibility requirements concerning the "potential for success" criterion and definition of economic disadvantage. In testimony concerning this issue, the Associate Administrator for the 8(a) program stated that:

> Adopting this proposal [to revise the "potential for success" criterion and the definition of economic disadvantage] would open the door to 8(a) eligibility for hundreds of small disadvantaged businesses which have been declined program certification based on present regulations. This would not only benefit these new companies, it would increase the incentive for federal agencies to use the program since the pool of companies and the variety of their expertise would be enormously enhanced.

Watts, *supra* note 23, at 6.

[761]*Id.* at 7. The SBA's duties with regard to acceptance of a procurement for the

> (3) Enhancing the technical and management assistance 8(a) firms receive during program participation by establishing an 8(a) Graduate Assistance Program (GAP)—a mentoring program under which 8(a) graduates would advise and counsel current 8(a) participants;[762] and
>
> (4) Targeting the management and technical assistance available to 8(a) firms under the 7(j) program to the four specific areas most important for sustained business operations: marketing assistance, proposal preparation, accounting systems, and industry-specific expertise.[763]

During recent hearings before the House Committee on Small Business, Administrator Bowles reaffirmed the major program changes noted above.[764]

With these and other initiatives proposed by the SBA,[765] the 8(a) programs's ability to accomplish its business development goal will be greatly enhanced. Of course, to achieve many of these initiatives, new legislation will be required; therefore, the SBA must work

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8(a) program would be limited to determining that the SIC code assigned to the procurement was appropriate, and that the contractor was both eligible for, and responsible to perform, the requirement. *Proposed Revision, supra* note 758, at 2. In addition, as part of the overall business development assistance it provides to a firm, the SBA would provide any needed advice regarding bid/proposal preparation or assistance with contract negotiations. *Id.* at 2-3.

[762] Watts, *supra* note 23, at 8. This program would be similar to the DOD's Pilot Mentor-Protege program established under section 831 of Public Law Number 101-510, the National Defense Authorization Act for Fiscal Year 1991, as amended. See 48 C.F.R. pts. 219, 233, and 252 for implementing regulations for the DOD's Pilot Mentor-Protege Program. The GAP would differ from the DOD's program in that the GAP would be limited to 8(a) firms and graduates. Under the GAP, 8(a) graduates would assist 8(a) participants and could receive benefits by way of subcontracting opportunities, joint ventures, waivers, and limited ownership interest in a protege firm. *Proposed Revision, supra* note 758, at 3.

[763] Watts, *supra* note 23, at 9.

[764] Administrator Bowles stated that the 8(a) program changes were conceived with the following four goals in mind:

> (1) eliminating unnecessary paperwork and regulations to reduce program application processing time;
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> (2) reducing burdensome reporting requirements;
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> (3) improving technical assistance so businesses have a better chance for survival, growth and prosperity; and
>
> (4) encouraging other Government agencies to provide greater contracting opportunities for 8(a) firms and other small disadvantaged businesses.

Bowles, *supra* note 757, at 5.

[765] Additional initiatives proposed by the SBA include the following: (1) increased credit for 8(a) firms to ensure their ability to obtain financing; (2) elimination of program stages within the 8(a) program; (3) making *all* program benefits available to 8(a) participants throughout the entire nine-year term of program participation; and (4) allowing all procurements awarded under the 8(a) program to be made on a sole source basis. *Proposed Revision, supra* note 758, at 3-4.

closely with Congress to gain their support and cooperation to ensure that the proposed changes will be implemented.

It is apparent that the 8(a) program, as currently administered, does not accomplish its goal of producing self-sufficient viable businesses. However, the SBA has shown that it has the ability to redirect its efforts to correct problems which hinder the accomplishment of its stated goals. Administrator Bowles has pledged his commitment to making the 8(a) program work and has outlined the steps he feels will accomplish this goal.[766] As such, it is not necessary to remove the 8(a) program from the SBA. Instead, the SBA must maintain aggressive action to implement the far-reaching initiatives proposed in restructuring the 8(a) program. Continuous review and reexamination of the program is also necessary to identify and correct future problems that will arise during program administration.

The 8(a) program is essential for the future development of small disadvantaged minority businesses. In most urban and many rural areas of the country, these small and minority owned firms are the primary employers of other minorities living within these communities.[767] Increasing the viability of these businesses would create more jobs, enhance tax revenues, decrease government subsistence payments, and contribute to an improved quality of life and standard of living for all Americans.[768] In terms of jobs created, neighborhoods revitalized, and economic growth spurred, the benefits to our society of fostering the growth of small disadvantaged minority businesses through the 8(a) program are apparent and must be preserved.

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[766] *See generally* Bowles, *supra* note 757. Administrator Bowles told the congressional panel that if the SBA failed to improve the 8(a) program within a certain time frame, he would replace his management staff. He added that if it failed a second time, then the President should replace him. *Id.* at 8.

[767] *Final Report, supra* note 2, at xiii.

[768] *Id.*

# GERMANY'S ARMY AFTER REUNIFICATION: THE MERGING OF THE *NATIONALE VOLKSARMEE* INTO THE *BUNDESWEHR*, 1990–1994

CAPTAIN KENNETH S. KILIMNIK*

*If you lay open and clear the past you make today truly free, and you can hope for a future no less happy than yesterday.*

*Johann Wolfgang Goethe*[1]

*It is necessary to take care to fry a pancake on both sides. We Germans always cook it on one side only, which is why it always tastes so burnt.*

*Wilhelm Röpke* (1935)[2]

## I. Introduction

### *A. The End of the Cold War*

For forty-four years following World War II, Germany was the European flashpoint where United States and Soviet forces faced each other, the former supported by the Federal Republic of Ger-

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[1]JOHANN WOLFGANG GOETHE, GOETHES SÄMTLICHE WERKE [GOETHE'S COMPLETE WORKS] 140 (1869) (from Zahme Xenien, part IV—Epigrams).

[2]WILHELM RÖPKE BRIEFE-DER INNERE KOMPASS [THE INNER COMPASS] 1934–1966, at 23–24 (Eva Röpke, ed., Eugen Rentsch Verlag, 1976).

many (popularly called West Germany) and the latter by the German Democratic Republic (East Germany). Many scenarios existed for ending this stalemate, yet none supposed that the *Nationale Volksarmee* (NVA), the military of the former East Germany, could be absorbed peacefully into the *Bundeswehr*, the West German military.

What occurred has been a classic merger: not an integration of forces but rather a dissolution of one army. The recruits and a small segment of the officers and noncommissioned officers (NCOs) of the dissolved army were carried over into the surviving army.[3] The *Bundeswehr* officers who oversaw the initial transition had instructions to treat the former NVA soldiers not as vanquished enemies but as soldiers of a single army of a reunified country.[4] This merger of two armies was possible only in a larger political context in which East Germans discarded their forty-year governing institutions, including the NVA, and embraced the *Bundeswehr* with the same enthusiasm that they exhibited in adopting the West German currency and legal system.

This new East German attitude is as remarkable as was the ideological collapse of the communist parties in eastern Europe and the Soviet Union. No westerner was prepared for this occurrence. Reunification of East Germany and West Germany was a faint prospect from the onset of the Cold War in 1947 through the East's erection of the Berlin Wall on August 12-13, 1961, and thereafter an even fainter prospect until November 9, 1989, the day that the Berlin Wall came tumbling down without a shot being fired.

*B. A New Era*

How the NVA merged into its former opponent has yet to be told in print, apart from a few personal reminiscences.[5] The Gulf

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[3]In a merger of companies, one disappears and the other is designated as the surviving corporation. In a consolidation, both companies dissolve and a new one emerges. *See, e.g.*, 15 PA. STAT. ANN. TIT. 15, § 1929(a) (Supp. 1994) (effect of merger or consolidation—single surviving or new corporation).

[4]JÖRG SCHÖNBOHM, ZWEI ARMEEN UND EIN VATERLAND—DAS ENDE DER NATIONALEN VOLKSARMEE [TWO ARMYS AND ONE FATHERLAND—THE END OF THE NATIONAL PEOPLES ARMY] 61 (1992) (Jörg Schonbohm was the general who headed the Bundeswehr Command East from the day of Unification, October 3, 1990, until July 1991. The commander of the Bundeswehr Command East reported directly to the federal Ministry of Defense. He commanded all the armed forces in the five new states comprising the former East Germany).

[5]*See, e.g., id.*; ABENTEUER EINHEIT, ZUM AUFBAU DER BUNDESWEHR IN DEN NEUEN LÄNDERN [VENTURE IN UNITY: THE BUILDING OF THE *BUNDESWEHR* IN THE NEW STATES] (H. Peter von Kirchbach et al. eds., 1992); FRITHJOF H. KNABE, UNTER DER FLAGGE DES GEGNERS: WERTWANDEL IM UMBRUCH IN DEN STREITKRÄFTEN-VON DER NATIONALEN VOLKSARMEE ZUR BUNDESWEHR [UNDER THE ADVERSARY'S FLAG: VALUE SHIFT IN THE ARMED FORCES—FROM THE NVA TO THE *BUNDESWEHR*] (1994). Rolf Thiemann describes the legal

War, the breakup of the Soviet Union, and subsequent budget cuts for the *Bundeswehr* buried its significance as one of the first successes in integrating the new German states.[6]

The *Bundeswehr's* experience in retraining soldiers from a totalitarian army can be applied to training the soldiers of emerging democratic countries. It also can be applied to training soldiers to serve in peacekeeping missions around the globe.

Furthermore, from a geopolitical perspective, the *Bundeswehr's* experience of integrating formerly antagonistic armies may be of use in considering how to reshape, in the post-Cold War era, multilateral institutions and alliances so that they reflect democratic societies of eastern and western Europe and address the disintegrative tensions that have supplanted the Cold War.

## II. Background

### *A. Gorbachev*

Germans generally credit Mikhail Gorbachev, who came to power in the Soviet Union after Andropov's death in 1985, with setting into motion the events that led to German reunification.[7] With the introduction of *Glasnost* (transparency) and *Perestroika* (transformation), Gorbachev unleashed long pent-up psychological forces in the Soviet Union and eastern Europe that he could not contain. One by one, the eastern European countries concluded that Soviet armed intervention—as had occurred in Hungary in 1956, in Czechoslovakia in 1968, and less successfully in Afghanistan beginning in 1979--no longer was likely.

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framework for former NVA soldiers who remained with the *Bundeswehr* in his article, *Die ehemaligen Soldaten der Nationalen Volksarmee und ihre Rechtsverhaltnisse zum Dienstherrn Bundesrepublik Deutschland [The Former Soldiers of the NVA and Their Legal Relationship to Their Service Employer, The Federal Republic of Germany]*, 35 NEUE ZEITSCHRIFT FUR WEHRRECHT [NEW JOURNAL FOR MILITARY LAW], no. 4, at 147–68 (1993) (quarterly publication).

[6]The Federal Republic created five new *Bundesländer* (federal states) from East Germany: Sachsen, Sachsen-Anhalt, Thüringen, Mecklenburg-Vorpommern, and Brandenburg.

[7]The gratitude that Germans show Gorbachev is apparent from newspaper articles appearing in 1990. *See, e.g., Gorbatschow gibt den Weg zur Einheit frei [Gorbachev opens the road to Unification]*, FRANKFURTER ALLGEMEINE ZEITUNG [hereinafter F.A.Z.], Feb. 12, 1990, at 1. This feeling also was expressed in interviews with *Bundeswehr* officers. Interview with Lieutenant Colonel Reinhard Luschert, headquarters officer for press relations, *Bundeswehr Korps und Territorialkommando Ost*, in Potsdam, Germany (Feb. 4, 1993) [hereinafter Luschert Interview]. Interview with Captain Harald Hennen, Youth Relations Officer, *Bundeswehr Korps und Territorialkommando Ost*, in Potsdam, Germany (Feb. 4, 1993) [hereinafter Hennen Interview]. Unless otherwise noted, this 13 paragraph overview provided in section II, entitled, "Background," is based on the author's interviews with these two officers.

*B. Honecker*

Compared to its neighbors to the east—Poland and southeast Hungary—East Germany maintained an orthodox Communist Party line until late in 1989. The government and the party, over which Erich Honecker presided as president and general secretary, respectively, ignored all reform stirrings. Honecker's state of mind then was reflected in his remark, "Why should I repaper my apartment just because someone else does his?"

Honecker invited Gorbachev to East Germany for the fortieth anniversary of East Germany on October 7, 1989. This was one day after Hungary and Czechoslovakia had allowed about 6000 East German refugees—crowded in western embassies in Budapest and Prague—to leave for West Germany on special trains. Because East Germany did not require its citizens to obtain visas to visit its Warsaw Pact allies, Hungary or Czechoslovakia, their decisions concerning the refugees threatened to empty East Germany like a filled bathtub with the plug removed.

Instead of strengthening Honecker, Gorbachev warned him, "History punishes he who arrives late." Hardly were Gorbachev's words in print when the small protests in Leipzig, Dresden, and other East German cities turned into marches by thousands, holding lighted candles and chanting, "We are the people, Germany is one."

*C. First Changes*

Typical for nondemocratic states was the lack of change in East Germany's political leadership, which remained the same from inception until dissolution. After ten days of turbulent but peaceful demonstrations, Honecker resigned both of his positions as president and party chief. Honecker appointed Egon Krenz as his successor on October 18, 1989, but the demonstrations continued.

On November 9, East Berliners breached the wall dividing Berlin in several places, without resistance from East German border guards, police, or soldiers. Other breaches followed along the previously impenetrable border between East and West Germany.

Hans Modrow replaced Egon Krenz on November 18. That large majorities in East Germany and West Germany favored reunification was becoming clear. Helmut Kohl, West Germany's chancellor and head of the Christian Democratic party, pledged that he would only negotiate reunification with East Germany after its government had been legitimated by elections. Modrow ushered in the first free elections in East Germany, held on March 18, 1990, in which East Germans elected a parliament and a president, Lothar de Maziere.

*D. The Currency Union*

Negotiations on reunification began almost immediately. The two sides promptly reached an agreement on a currency union that took effect on July 1, 1990. The West German mark replaced the East German mark on a one-to-one basis for private savings. East Germans rushed to West Berlin and other western cities to buy goods that had been available in the East only for high ranking Communist Party officials and tourists in special, western currency stores.

This initial euphoria contained the seeds for later disappointment. By encouraging East Germans to select western goods over their own, the currency union placed East Germans' future jobs at risk. Psychologically, however, the currency union created the perception of unity between Germans in East and West, reduced migration from East to West by establishing financial parity, and enhanced sentiment in East Germany in favor of immediate integration into West Germany rather than coexistence or selective adaptation.

*E. International Talks*

Kohl met Gorbachev on the Crimean peninsula in July, 1990, and won Gorbachev's support for German reunification. Kohl pledged to reduce German military strength from nearly 500,000 to 370,000[8] soldiers by December 31, 1994, and Gorbachev agreed to withdraw the 400,000 Soviet soldiers in East Germany by the same date, a date that also marked the withdrawal of western allied forces from Berlin.

In the summer of 1990, sensitive international negotiations occurred among East Germany, West Germany, and the four World War II allied powers—the United States, Great Britain, France, and the Soviet Union. These "two plus four" talks were necessary because the four allied powers retained veto power over fundamental changes in the status of East Germany and West Germany. In Berlin, the four allied powers still had military control.

Poland, concerned about whether a reunified Germany would make claims to regain territories lost in World War II, was admitted as an additional party. In September 1990, West Germany formally rec-

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[8]This figure represents a political rather than strategic decision. It does not include civilians who work for the *Bundeswehr*, of whom there were approximately 250,000 in 1990.

The government plans to reduce the *Bundeswehr's* strength by an additional 30,000 soldiers in 1996. These soldiers will remain subject to duty for two months after their service, thus allowing an expansion to 370,000 without mobilizing reservists. *See Wehr und Zivildienst sollen um zwei Monate kurzer werden [The Obligation to Serve in the Force is to be Shortened by Two Months]*, F.A.Z., July 9, 1994, at 1.

ognized that the eastern border of Germany was the Oder-Neisse Rivers.

Simultaneously with the "two plus four" negotiations, East Germany and West Germany negotiated an agreement for political and social union, to take effect on October 3, 1990. World press coverage of German reunification subsided in the fall of 1990 with Iraq's invasion of Kuwait and the start of the war in the former Yugoslavia in the spring of 1991. The coverage resumed in 1992, with less intensity and more criticism than praise. After a wave of firebomb attacks on residences for refugees,[9] many asked whether reunification was creating a new German nationalism.

## III. The *Nationale Volksarmee* Before Reunification

### *A. Psychological State—General*

East Germany kept the passive loyalty of many inhabitants because it promised them, in unending ideological tirades, a better future. Those who opposed the restrictions of the one-party state tried to reach West Germany or abstained from politics.

The downfall of East Germany came when the people realized that the system could not deliver on the promises, and lost the fear that had kept them passive for so long. Necessity forced East Germans to make many sacrifices that they now, in a free society, reject.

### *B. Physical Conditions—Equipment*

The NVA was no exception. Well equipped for attack, the NVA was indifferent to the soldiers' living conditions. The NVA stored tanks in heated buildings but housed soldiers in unheated barracks. The NVA permitted showers only once or twice a week and then always in large groups. Soldiers' kitchens and lavoratories were caked with grime and grease; only command officers had access to separate dining rooms (with tablecloths) and private toilets.

At the time of reunification, the NVA possessed approximately 300,000 tons of ammunition, approximately the same as the *Bun-*

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[9]The German Constitution (*Grundgesetz*) guarantees asylum to the politically prosecuted. GRUNDGESETZ [Constitution] [hereinafter GG] art. 16a. Germany also has admitted approximately 250,000 war refugees from Bosnia and Croatia for limited periods. Asylum applicants and other refugees receive no work permit and generally must reside in specially designated housing. The Federal Office of Constitutional Protection reported 2285 violent acts with proven or believed right wing motivation in 1992, 90% of which were directed against foreigners—a 50% increase from 1991. *See Bericht uber den Rechtsextremismus [Report about Right-wing Extremism]*, F.A.Z., Feb. 8, 1993, at 4.

*deswehr*. However, the *Bundeswehr* was three times as large in personnel strength. The NVA also had more than 1.2 million hand weapons, 8000 armed vehicles, and hundreds of airplanes and ships.[10]

*C. Physical Conditions—Personnel*

The NVA was laden with officers and NCOs. They normally comprised about one third of the NVA's total strength. However, by October 3, 1990, these ranks comprised over half of the NVA's 94,000 uniformed personnel. The NVA promoted its officers faster than did the *Bundeswehr* and the NVA's officers and NCOs had far less responsibility than their contemporaries in the *Bundeswehr*.[11]

Until 1988, NVA soldiers were taught that the Soviet bloc faced an aggressive, imperialist western coalition, always referred to as the enemy. With the development of Soviet reforms, the hostile attitude toward the West was eroded and the enemy then was referred to as the North country or, interestingly, the East country.[12]

The NVA's internal restrictions remained, however, until the end—no freedom to express political opinions, no listening to western media, and troop units had to maintain eighty-five percent readiness at all times, including weekends. The only "safe" hobbies for NVA officers were fishing and gardening; even stamp collecting could damage a career because it might reflect an interest in non-socialist countries.[13]

*D. The Lawyers' Role*

Lawyers had a limited role in the NVA, serving only as uniformed military prosecutors. They did not advise commanders or offer instruction. Independent lawyering and judging rarely existed: NVA prosecutors and military judges alike received instructions on handling cases from the communist party. Party advocacy in East Germany was a very singular affair.[14]

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[10]Defense Minister Volker Rühe cited these facts and figures in a speech in Leipzig on October 2, 1992, reprinted under the title, *Zwei Jahre Bundeswehr in den neuen Bundesländern [Two years of the* Bundeswehr *in the New Federal States]*, in STICHWORTE ZUR SICHERHEITSPOLITIK [KEY STATEMENTS ON SECURITY POLICY] 27, Oct. 1992 (press compilation from the Press and Information Office of the *Bundesregierung*) [hereinafter Rühe Speech].

[11]SCHÖNBOHM, *supra* note 4, at 43–44, 46.

[12]FRANK BUCHHOLZ, ARMEE FÜR FRIEDEN UND SOZIALISMUS—DIE GESCHICHTE DER BEWAFFNETEN ORGANE DER DDR [ARMY FOR PEACE AND SOCIALISM—THE HISTORY OF THE ARMED ORGANS OF THE GDR] 67 (University of the *Bundeswehr*, Munich 1991).

[13]Classroom discussion with members of the 8th Supplementary Training Course, *Offizierschule des Heeres*, in Hannover, Germany (Feb. 23, 1993) [hereinafter Hannover Interview].

[14]*Id.*

*E. Military Discipline*

The NVA had military trial courts composed of professional judges—selected by East Germany's executive body, its state council—and lay judges elected from the NVA. The vice minister of defense and the chief of the NVA's political administration selected the candidates for lay judge.[15]

In cases involving murder, crimes with a particular significance, or defendants with the rank of major or above, the military court of appeals had initial jurisdiction. The military crimes division of the highest civil court of East Germany reviewed protests of prosecutors, appeals of defendants, and complaints filed by individual soldiers. It also had initial jurisdiction for especially significant criminal matters and for crimes committed by persons with the rank of brigadier general or with the position of division commander or above.[16]

Company commanders could decide, without review, disciplinary measures including confinement. The NVA disciplinary regulations permitted company commanders to order arrest in a holding facility up to three days, battalion commanders up to five days, and regiment and division commanders up to ten days each.[17]

Public humiliation was used to punish minor offenses; the accused was presented in front of fellow soldiers where he had to give a public confession. The accused had no advocate. At most, soldiers from the same unit commented on the accused's conduct but did not act in a representative capacity for him.[18] Not the accused but the party, the party's youth group, and the accused's unit sent representatives to be heard in formal disciplinary matters. The military judge determined the extent of these representatives' participation; their duty was to express an opinion on the conduct and personality of the accused.[19]

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[15]G. Kalwert et al., *Die Rechtspflegung in der NVA und den Organen des Wehrersatzdienstes in* SOZIALISTISCHES RECHT UND NATIONALE VERTEIDIGUNG: LEITFADEN FÜR DIE ANGEHÖRIGEN DER NVA [SOCIALIST LAW AND NATIONAL DEFENSE: MANUAL FOR THE MEMBERS OF THE NVA] 219, 234, 244 (G. Kalwert et al., eds., 1967). *See also* THOMAS FOSTER, DIE NVA: KERNSTÜCK DER LANDESVERTEIDIGUNG DER DDR [THE NVA: LINCHPIN OF NATIONAL DEFENSE OF THE GDR] 335–59 (6th ed. 1983); ULRICH RÜHMLAND, NVA—NATIONALE VOLKSARMEE DER DDR IN STICHWORTEN [NVA—A SYNOPSIS OF THE NATIONAL PEOPLE'S ARMY OF THE GDR] 128–29 (5th ed. 1977).

[16]Kalwert et al., *supra* note 15, at 251–52.

[17]*See* MINISTRY OF NATIONAL DEFENSE, MINISTERIAL COUNCIL OF THE GERMAN DEMOCRATIC REPUBLIC, DISZIPLINARBEFUGNISSE UND DISZIPLINARISCHE VERANTWORTLICHKEIT, DISZIPLINARVORSCHRIFT [DISCIPLINARY AUTHORITY AND DISCIPLINARY RESPONSIBILITY, DISCIPLINARY REGULATION] DV 010/0/006 21–24 (1982) (disciplinary regulation from the Ministry of Defense).

[18]Hannover Interview, *supra* note 13.

[19]Kalwert et al., *supra* note 15, at 231.

*F. The SED and Stasi Controls*

*1. The communist party*—The communist party subjected the NVA to the same controls that affected civil institutions in East Germany. Each unit with more than fifty soldiers had a shadow political officer, with rank and authority equal to that of the commanding officer. The political officer reported to the communist party—the *Sozialistische Einheitpartei Deutschlands* (SED).[20]

Formal membership in the SED was nearly universal for officers and common for NCOs. An officer who was not a candidate to join the party had to attend ideology classes nearly every night.[21]

*2. The Stasi*—In addition to the ties between the SED and the NVA, the Ministry of State Security—the *Ministerium für Staatssicherheit* (*Stasi*)—placed its own officers in every battalion, regiment, and division. It attached three *Stasi* officers to each border regiment. Commanding officers were aware of the *Stasi* officers in their units but lacked authority over them. Every contact between an NVA soldier and a political officer or *Stasi* officer was recorded in a certification book maintained for each soldier.[22]

The *Stasi* also encouraged soldiers to file reports against others. The *Stasi* did not disclose the reporting or the identities of informants to the soldiers spied on. Individuals threatened with career difficulties or other blackmail usually cooperated. The *Stasi* referred to them as its unofficial cooperators. The *Stasi* spun its spying net so finely that often the unofficial cooperators were also subjects of reports from those they reported on, making it difficult to determine who was spied on and who was a spy.[23]

The *Stasi* even had its own law school in Potsdam with 761 full-time employees in the fall of 1989. This school trained *Stasi* officers and had three departments: Marxism-Leninism, law, and "special disciplines." From 1966 through 1989 the school accepted 174 dissertations written by 478 *Stasi* employees. Most of the dissertations were written collectively. The law degrees of this school are not

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[20]Interview with a *Bundeswehr* officer who served in the NVA, *Bundeswehr Korps und Territorialkommando Ost*, in Potsdam, Germany (Feb. 5, 1993) [hereinafter Potsdam Interview] (the name of this officer is withheld at his request and is on file with the author).

[21]Hannover Interview, *supra* note 13.

[22]*Id.*

[23]Interviews with officers of the *Bundeswehr Korps und Territorialkommando Ost*, in Potsdam, Germany (Feb. 4 & 5, 1993) [hereinafter Potsdam Interview II] (the names of these officers are withheld at their request and are on file with the author).

recognized for purposes of admission as a lawyer in the state of Brandenburg, the location of the former school.[24]

The *Stasi* background has proven to be one of the aspects of the East German legacy most difficult to confront. Along with the shootings or imprisonment of people attempting to flee across the border between East Germany and West Germany, concern with *Stasi* files and acts has become a focus for redressing injustices of the German Democratic Republic.[25] Unfortunately, the media and public prosecutors have largely left unexamined the *Stasi's* training of, and logistical support for, terrorist groups and East Germany's military involvement abroad.[26]

Dislike for the *Stasi* and the SED came to the forefront during the tumultuous spring of 1990. The de Maziere government dismissed all political officers in the NVA and the *Stasi* itself.[27] One of

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[24]Peter Jochen Winters, *Jura-Diplome aus Potsdam-Euche werden nicht anerkannt [Law Degrees from Potsdam-Euche will not be recognized]*, F.A.Z., Jul. 11, 1994, at 2.

[25]The cases against border police accused of shooting Germans trying to flee to the West, and Erich Honecker and former *Stasi* officials, are some examples of recent criminal prosecutions against former East German officials. *See, e.g., Offiziere der Stasi verurteilt—27 Monate fur den Leiter der Magdeburger Staatssicherheit [Officers of the Stasi sentenced—27 months for the Leader of the Magdeburg Ministry of State Security]*, F.A.Z., Jan. 23, 1993, at 5; *BGH hebt erstes Urteil gegen Mauerschützen auf—Ehemaliger DDR—Grenzsoldat jetzt freigesprochen [Federal Civil Supreme Court overturns the first conviction of a former GDR Border Guard for Shooting that occurred along the Wall Separating the GDR and West Germany]*, F.A.Z., Mar. 26, 1993, at 16. Compensation also is expected for those individuals unjustly imprisoned in East Germany. In the first such case, one woman received 6600 DM (about $3500) for her one-year imprisonmment under the false allegation that she had intended to cross the border. *Thüringen entschädigt erstes DDR—Opfer [Thuringia compensates first GDR victim]*, F.A.Z., Jan. 23, 1993, at 5.

The prosecution against Erich Honecker for incitement and aiding and abetting manslaughter of persons fleeing across the border was suspended on the grounds that Honecker was not expected to live more than five years due to cancer. Honecker was allowed to leave for Chile where he died in 1994. Three other high East German officials—Heinz Kessler, Defense Minister from 1985 to 1989; Fritz Streletz, Assistant Defense Minister from 1979 to 1989; and Hans Albrecht, the SED Party Secretary in the border area from 1968 to 1989—received prison terms ranging from four-and-one-half to seven-and-one-half years for their roles in issuing rules to shoot persons attempting to flee from East Germany. *Kessler, Streletz, und Albrecht sind des Totschlags schuldig [Kessler, Streletz, and Albrecht have been found guilty of murder]*, F.A.Z., June 27, 1994, at 1. Erich Mielke, former head of the *Stasi*, was tried and sentenced to five years imprisonment, not for actions related to the *Stasi*, but for the murder of a police officer in 1931. Mielke's trial for his role in the killing of East German citizens attempting to flee East Germany was suspended due to his advanced age of 85 years. Marcus Wolf, head of the *Stasi's* spying apparatus outside of East Germany, was tried and sentenced to six years imprisonment for coordinating spying activities against West Germany.

[26]A recent exception is the trial of a former *Stasi* officer on charges of complicity in murder and assisting in a bomb explosion at the French Cultural Center in West Berlin on August 25, 1983. *See Anklage gegen Stasi Oberst wegen Beihilfe zum Mord [Charges Against Stasi Colonel for Facilitating Murder]*, F.A.Z., Jan. 13, 1994, at 15.

[27]SCHÖNBOHM, *supra* note 4, at 45.

the loudest demands of demonstrators in East Germany in late 1989 and early 1990 was to preserve the *Stasi* files.[28]

*G. The NVA's Status*

The NVA was not the target of popular wrath as was the *Stasi*. The border police, assigned to prevent persons from fleeing East Germany to West Germany, were organized separately. The NVA had no official body to tap phones, open private mail, or use undercover informants on civilians, as did the *Stasi*, which pursued these actions within and outside of the NVA. The NVA won sympathy by remaining in the barracks in the fall of 1989 despite rumors that they would be mobilized to suppress the demonstrations.[29]

Indoctrination without the freedom to dissent tends to produce the opposite view, however passive, among many. In 1972, a survey of schoolchildren in East Germany reported that ninety percent of sixth graders, as opposed to fifty percent of ninth graders, agreed with the statement, "The Bonn government and the West German *Bundeswehr* are the biggest enemy of the German people and a danger for all peaceloving people. Therefore, I hate the West German powerholders." Twelve years later, in 1984, another survey found that only one half of eighth to tenth graders believed that socialism would be victorious in the world. This figure declined to nine percent in 1988 and three percent in October 1989.[30]

The isolation enforced on NVA officers contributed to a higher acceptance of party ideology among them than in the general East German populace. The SED prohibited officers and their families from watching Western media and required that they live in separate apartment complexes. Additionally, the constant readiness requirement further shielded officers from exposure to other ideas.[31]

## IV. The *Nationale Volksarmee* at the Time of Reunification

*A. Early Debate*

From March until July 1990 a spirited political debate emerged in Germany concerning the structure of the *Bundeswehr* and the

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[28] BUCHHOLZ, *supra* note 12, at 72-73.

[29] *Id.*

[30] KARL-GÜNTER SCHIRRMUSTER, ERZIEHUNG ZUM HASS—GEISTIGE MILITARISIERUNG IN DER DDR [EDUCATION TO HATE—SPIRITUAL MILITARIZATION IN THE GDR] 100 (Bonn Aktuell GmbH, 1987) (results of initial survey); Dr. Phil. Wilfried Schubarth, *Zur politischen Sozialisation der Schuljugend in Ostdeutschland* [On Political Socialization of School Youth in East Germany]), 25 POLITISCHE BILDUNG 21, 23 (1992) [hereinafter *Political Education*] (results of second survey).

[31] Potsdam Interview, *supra* note 20; Halvor Adrian, *Von der NVA zur Bundeswehr; Handlungsfelder fur den Integrationsprozeß [From the NVA to the Bundeswehr; Action Areas for the Integration Process]* at 2 (Materials and Manuscripts of the *Führungsakademie der Bundeswehr*, discussion paper 29, June 1992).

NVA after reunification. Some in the West argued for dismissing all NVA soldiers. In the East, Rainer Eppelman, East Germany's first and only minister of defense and disarmament, proposed keeping the two armies, with separate uniforms, command and oaths, until an unspecified time when tensions in eastern Europe had sufficiently eased.[32]

In late July, the decision was reached in Bonn to maintain only one army, the *Bundeswehr*. The *Bundeswehr* would offer East German officers and noncommissioned officers the opportunity to serve in the *Bundeswehr* for two years, after which the *Bundeswehr* would decide how many to accept as career soldiers. This decision surprised many officers in the NVA and *Bundeswehr* alike.[33]

*B. Morale Declines*

By August, NVA officers started to visit *Bundeswehr* installations and schools in the West. Discipline in the NVA deteriorated rapidly by early fall as soldiers ignored their commanding officers' orders and apathy took hold. Any soldier could leave the NVA without regard to term of service or military need. Entire regiments were left without commanders or headquarters staff. Control over weapons no longer could be assured. The electrified fences used by the NVA around munitions and weapons depots protected against accidental trespassers with deadly effect, but could be circumvented easily.[34]

*C. Transition*

The size of the NVA—including army, navy, and air force—decreased from 178,000 uniformed soldiers in early 1990 to 94,000 on October 3, 1990, the day on which the remaining NVA soldiers became part of the *Bundeswehr*. The policy was to treat them as equals in the *Bundeswehr*; they were required to wear the *Bundeswehr* uniform and the prevailing theme was unity, not victory.[35]

In September, a small group of NVA officers at the East German Ministry of Defense and Disarmament prepared a general overview of NVA personnel strength for Gerhard Stoltenberg, the West German Minister of Defense. This report was incomplete due to the unmonitored loss in ranks. A second report gave an inventory of installations, training areas, weapons, and munitions.[36]

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[32]SCHÖNBOHM, *supra* note 4, at 25-31.

[33]*Id.*

[34]Potsdam Interview, *supra* note 20; BUCHHOLZ, *supra* note 12, at 77.

[35]Potsdam Interview II, *supra* note 23; SCHÖNBOHM, *supra* note 4, at 33.

[36]Luschert Interview, *supra* note 7.

By October 2, 1990, about 2000 *Bundeswehr* officers had been dispatched to serve as commanders of regiments, divisions, and headquarters staffs. A new *Bundeswehr* "East Command" was formed, with Lieutenant General Jorg Schönbohm assuming command.[37]

Unlike the other commands in Germany, which did not include naval or air force detachments, this command would directly control all army, navy, and air force units in its area, the five new federal states and unified Berlin. General Schönbohm reported directly to the Deputy General Inspector of the *Bundeswehr*, who, in turn, reported to the Minister of Defense. For managing the transition from NVA to *Bundeswehr*, General Schönbohm received a centralized command with direct access to the Minister of Defense. This command channel continued until July 1991 when the Minister of Defense established a regular chain of command as used in the western part of Germany.[38]

## V. The *Bundeswehr* at the Time of Reunification

### *A. Ideological Foundations*

West Germany created its armed forces ten years after the end of World War II, following the French decision not to participate in a European defense community.[39] The *Bundeswehr* developed the notion of "internal leadership" (*Innere Führung*) as its fundamental ideological premise. Internal leadership took three lessons from the Nazi experience and the Weimar Republic. First, never again is aggression to be launched from German soil.[40] Second, the *Bundeswehr* is under civilian command within a parliamentary democracy.[41] Third, the soldier is a citizen in uniform supplying an essential

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[37] *Id. See also supra* note 4.

[38] Luschert Interview, *supra* note 7. The name then changed to the *Bundeswehr* Corps and Territorial Command East. On January 1, 1995, it was renamed IV Corps. Telephone interview with Captain Warda, officer for press relations at IV Corps, Potsdam, Germany (Mar. 1, 1995).

[39] West Germany created the *Bundeswehr* as a voluntary army on November 12, 1955. East Germany established the NVA on February 10, 1956—although the police (*Kasernierten Volkspolizei* or KVP) and border police (*Grenzpolizei* or *Grepo*) had started in 1948—and numbered over 60,000 men a year later. BUCHHOLZ, *supra* note 12, at 14, 23.

[40] This principle is illustrated by the Constitution's establishment of armed forces for defensive purposes. GG art. 87a.

[41] The *Bundestag*, the legislative body of parliament, creates military law. The civilian Minister of Defense issues administrative rules that are approved in certain instances by the *Bundesrat*, the body of parliament consisting of representatives of the sixteen states, or *Bundesländer*. A defense ombudsman (*Wehrbeauftragter*) is chosen from within the *Bundestag* to review *Bundeswehr* activities. *Id.* arts. 73(1), 45b, and 87b.

link between the armed forces and civilian society.[42]

*B. The Draft*

The draft constitutes one of the few sacrifices that young men have to make for society. In keeping with the third principle of internal leadership, the Constitution of Germany, since at least 1968, has permitted a mandatory military service obligation for men over eighteen. Those who refuse to bear arms can be obligated to perform substitute civilian service.[43] The length of military service is currently twelve months, fifteen months for civilian service.[44] At present, no more than half of all men of draftable age actually serve in the *Bundeswehr*.[45]

Civilian service provides a substantial part of the staff in German hospitals, old age homes, and other social service facilities. The Law on Civilian Service of Military Service Objectors recognizes civilian service outside of Germany that is performed for at least two years in development aid programs or at least seventeen months in other programs promoting peaceful international cooperation.[46]

Women are not drafted. They can volunteer in the medical corps and music corps. The Constitution permits drafting women in cases of national defense where necessary for the medical corps, but prohibits them from service with weapons.[47]

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[42]This principle has two aspects. First, a soldier is entitled to rights similar to those of a civilian, within necessary military limitations. Second, when civilians regularly serve in the military, the assumption is that the military will be less likely to overreach. Viewed initially as an indispensable tenet related to internal leadership, many now consider the draft to be unnecessary and financially insupportable. *See generally* Ulrich Hunat, *Innere Führung—gut fur das Jahr 2000 [Internal Leadership: Good for the Year 2000]*, DER MITTLER-BRIEF INFORMATIONSDIENST ZUR SICHERHEITSPOLITIK [THE MODERATE LETTER INFORMATION SERVICE ON SECURITY POLICY], vol. 7, no. 4, 4th qtr. 1992, at 6; Wolfgang Mecklenburg, *Markenzeichen Innere Führung—Historische Daten und aktuelle Bezüge [Trademark Internal Leadership—Historical Data and Current Topics]*, 35 INFORMATIONEN FÜR DIE TRUPPEN [INFORMATION FOR THE TROOPS], Nov. 1990, at 44.

[43]GG art. 12a.

[44]*Wehrpflichtgesetz* § 1(1). The government plans to reduce the mandatory service to 10 months in the *Bundeswehr* or 13 months of substitute civilian service. This change will be implemented by January 1, 1996. Excluding 22 days vacation, mandatory service in uniform in the *Bundeswehr* will be nine months.

[45]Of 370,000 draft age men, only 185,000 actually serve in the *Bundeswehr*. Almost 90,000 (24%) perform substitute civilian service or serve in the police, border guards, or civil emergency service, and the rest obtain medical waivers. Eckart Lohse, *Wie steht es um die Gerechtigkeit [What about Fairness]*, F.A.Z., Feb. 22, 1994, at 12 (citing statistics from the federal Ministry of Defense).

[46]GESETZ ÜBER DEN ZIVILDIENST DER KRIEGSDIENSTVERWEIGERER [LAW ON CIVILIAN SERVICE OF MILITARY SERVICE OBJECTORS] § 14a & b (1986).

[47]GG art. 12a(4).

*C. Use of the* Bundeswehr

The Constitution allows armed forces for defensive purposes and otherwise only as expressly provided for in the Constitution.[48] Defensive purposes arise in the event of an attack or a directly threatened attack, and the federal government can apply to the legislature for permission to use the armed forces. A two-thirds majority of votes cast in the *Bundestag*, including at least an absolute majority of the members of the *Bundestag*, is necessary to approve the application. The *Bundesrat's* consent also is required. Because the *Bundesrat* casts votes by state, this means that a majority of the state governments must agree.[49]

Where immediate action is required, and the *Bundestag* cannot be convened in time, the "common committee" of both chambers may approve the application with a two-thirds vote and no less than a majority of its members.[50]

The Constitution, responding to perceived weaknesses in the Weimar Republic, includes two additional situations in which the armed forces may be used: to assist the police and border service in times of tension in protecting civilian targets and regulating traffic, or to defend the democratic order where a threat exists to the continuation of a free, democratic system in a state or the entire country and the police and border service are incapable of providing this defense.[51] Authority over the armed forces shifts from the Minister of Defense to the Chancellor only in the event that the federal government elects to use the armed forces and obtains the necessary legislative approval.[52]

In July 1994, in a major decision, the Federal Constitutional Court held that the Constitution did not prohibit the German military from participating in multilateral military actions outside the borders of Germany.[53]

The Social Democratic Party (SPD) challenged Germany's participation in three multilateral missions: dispatching naval forces to

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[48]*Id.* art. 87a(1),(2).

[49]*Id.* art. 115a(1); *see also supra* note 41 (describing the *Bundestag* and *Bundesrat*).

[50]GG art. 115a(2). Two thirds of the members of the Common Committee (*Gemeinsamer Auuschuß*) are *Bundestag* members and the other one third are *Bundesrat* representatives with at least one representative from each state. *Id.* art. 53a(1).

[51]*Id.* arts. 87a(3),(4); 91.

[52]*Id.* art. 115b.

[53]Judgment of July 12, 1994, 2 BV E 3/92, *Bundesverfassungsgericht* (federal constitutional court). *See* 47 NEUE JURISTISCHE WOCHENSCHRIFT [NEW LEGAL WEEK BULLETIN] [hereinafter N.J.W.] (1994), at 2207–18 (this popular weekly legal periodical is known as the NJW and prints abridged versions of significant court decisions).

enforce the United Nations embargo against Serbia and Montenegro; participating in the AWACS observation planes' mission to enforce the NATO-imposed no-fly zone over Bosnia; and sending soldiers to Somalia as part of the United Nations humanitarian force.[54] The German government had taken action by cabinet decision on July 15, 1992 (UN embargo), April 2, 1993 (NATO no-fly zone), and April 21, 1993 (UN humanitarian mission). The SPD argued that the Constitution's defense limitation prevents foreign military missions, and that a constitutional amendment was needed before Germany could participate in United Nations peacekeeping operations or NATO missions outside of its members' boundaries.

The Federal Constitutional Court used a "first in time" argument, subordinating the defensive purposes caveat of the Constitution[55] to the original constitutional provision that allows Germany to join a system of mutual security aimed at maintaining peace.[56]

The Federal Constitutional Court further ruled that decisions to participate in multilateral military actions must receive the approval of the *Bundestag* by a majority of votes cast either before, or immediately after, the action is undertaken. If not, German participation in the action must terminate. The Federal Constitutional Court found the basis for this judge-made rule in the parliament's constitutionally mandated role in approving the budget of the armed forces, its size, and basic organization, as well as in a historically based constitutional tradition—dating to the Weimar Republic and even earlier—of parliamentary control over the armed forces.[57]

In the event of multilateral missions, command authority remains with the Minister of Defense in the absence of a declaration

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[54]The Constitution gives one third of the members of the *Bundestag* the right to obtain a decision of the Federal Constitutional Court when differences of opinion or doubts exist as to the conformity of federal or state law with the Constitution. GG art. 93(1), § 2.

[55]*Id.* art. 87a; *see supra* note 48 and accompanying text (explanation of defensive purposes caveat).

[56]Judgment of July 12, 1994, 2 BV E 3/92, *reprinted in part in* 47 N.J.W. 2207 (1994). *See also* GG art. 24(2). This constitutional provision permits the federal government to consent to limitations on national sovereignty to create and secure a peaceful and longlasting order in Europe and among the people of the world. The Constitution defines the "defense caveat" as a finding by the *Bundestag* that the country is under attack or that an attack is imminent. GG art. 115a(1). *See supra* notes 49 & 52 and accompanying text for a definition of the defense caveat.

[57]Judgment of July 12, 1994, 2 BV E 3/92. The court split four-to-four on the question of whether the North Atlantic Treaty Organization (NATO) and the Western European Union (WEU) had undergone a transformation from self-defense alliances to maintenance of peace and security such that de facto new treaties existed that required the consent of the *Bundestag*. Where votes are even, the court cannot make a determination concerning a constitutional violation—thus, no parliamentary reconfirmation of the NATO and WEU treaties was required.

of the defense case. The Ministry of Defense plans to have two separate commanders of future missions, each to have his own staff. One commander is to lead the German contingent tactically and operationally as an integrated part of the multilateral mission; the other commander is to represent the political-military interests of Germany in the host country and the organizations sponsoring the mission, in coordination with the German Ambassador in the guest country.[58]

*D. Composition*

The nonofficer ranks are composed of draftees serving for twelve months, enlistees who choose longer terms of service usually with later promotion, and NCOs—*Unteroffizeriere* (Junior Officers) and *Feldwebel* (sergeants). Men in the rank of *Feldwebel* or above can serve without fixed term or under contracts lasting generally twelve to fifteen years. The officer ranks occasionally include draftees who stay for an extra year or two, but generally they serve, like the NCOs, under either long-term contracts or contracts without fixed term.[59]

Nominally each person completing military service becomes a reservist until age forty-five, however, very few are actually required to train. With 3000 training slots, about 100,000 tours each year are available. Reserve officers must have at least two years of active military service.[60]

*E. Training*

During the first three months of their service, recruits get basic training in military survival and fighting. The next three months are dedicated to learning a particular job—such as tank driver. The remaining six months are used for training in other positions, usually within the same platoon so that the recruit can assist his fellow soldiers as needed.[61]

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[58]Gunther Gillessen, *Erleichterung in der Bundeswehr—Reaktionen auf das Karlsruher Urteil [Relief in the Bundeswehr—Reactions to the Karlsruhe Decision]*, F.A.Z., July 29, 1994, at 4 (the Federal Constitutional Court is located in Karlsruhe).

[59]The *Bundeswehr* 1994 plan, which requires further reductions, envisions 40,000 officers, 133,000 NCOs, and 155,000 recruits. The plan also envisions an additional 38,000 positions for NCOs and officers with limited term contracts. *Brief zur Truppeninformation [Troop Information Letter], No. 2/92*, Dec. 16, 1992, at 27 (press release from the Ministry of Defense). Under the 1994 plan, 58% of the *Bundeswehr's* strength is to be derived from professional soldiers, not draftees.

[60]Ministry of Defense, Information Office, INFORMATIONEN ZUR SICHERHEITSPOLITIK—ECKWERTE KONZEPTION FÜR DIE RESERVISTEN DER BUNDESWEHR 1994 [INFORMATION ON SECURITY POLICY—BASIC CONCEPT FOR THE RESERVES OF THE BUNDESWEHR 1994], at 4 (brochure published in Sept. 1994).

[61]Hennen Interview, *supra* note 7.

All soldiers receive instruction in international duties and rights governing conduct in time of war and peace. They also receive instruction in civic duties and rights (including the principles of internal leadership). Officers receive more detailed instructions in these subjects as well as in human relations, political science, and military history.[62]

*F. The Lawyers' Role*

Approximately one hundred and fifty lawyers serve the *Bundeswehr* as civilian employees of the federal Ministry of Defense.[63] Two-thirds serve as legal advisors to division and corps commanders as well as headquarters staff. The legal advisor reports directly to the commander and is responsible for prosecuting military disciplinary offenses. The legal advisor is not a part of the headquarters staff. Fifty lawyers instruct officers and NCOs at *Bundeswehr* schools.[64]

More psychologists (160) than lawyers serve the *Bundeswehr*. There is one lawyer for every 3500 soldiers. This surprising situation cannot be attributed to a weak legal profession, because almost 80,000 lawyers practice in Germany.[65] The explanation lies elsewhere: lawyers serve in many departments of the civilian administration of the Ministry of Defense without being organized as a separate branch of lawyers; and the *Bundeswehr* does not provide lawyers to represent individual soldiers. Until recently (1991), the *Bundeswehr* never had an operational mission outside of Germany,[66] so legal instruction and advice on international issues was not in great demand.

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[62] *Id.*

[63] The border service has lawyers as officers. Interview with Heinz F. Brüntgens, Legal Instructor at the *Offizierschule des Heeres*, in Hannover, Germany (July 25, 1994).

[64] HANS-JÜRGEN WIPFELDER, WEHRRECHT IN DER BUNDESREPUBLIK DEUTSCHLAND [MILITARY LAW IN THE FEDERAL REPUBLIC OF GERMANY] 215-16 (Walhalla u. Praetoria Verlag, 1991); Brüntgens Interview, *supra* note 63.

[65] Axel Wermelskirchen discusses the *Bundeswehr*'s psychologists in his article, *Vor einem Sieg im Gefecht der Sieg uber den Stress [Before a Victory in Battle is the Victory over Stress]*, F.A.Z., Apr. 21, 1994, at 11. The number of lawyers given does not include lawyers in government service or most lawyers employed by corporations. Martin W. Huff, *Hausanwalt und Law Firm—Der Markt für Anwaltsleistungen [House Counsel and Law Firm—the Market for Legal Services]*, F.A.Z., Feb. 22, 1995, at 15.

[66] The German government sent a *Bundeswehr* minesweeper to the Persian Gulf and helicopter crews to Turkey for observation missions over northern Iraq after the Gulf War. A *Bundeswehr* medical detachment served in Cambodia as part of the United Nations forces observing the elections in 1993. *See Internationale Einsätze der* Bundeswehr [*International Missions of the* Bundeswehr], *in* STICHWORTE ZUR SICHERHEITSPOLITIK, *supra* note 10, at 33-34. No political party challenged the legality of these actions before the Federal Constitutional Court.

Keeping lawyers out of uniform is an attempt—historically rooted as a reaction to the Nazi experience—to keep the lawyer's advice independent of control by the armed forces, and to keep the armed forces under the civilian command of the Minister of Defense or the Chancellor. The legal advisor who accompanied German troops to Somalia deployed in uniform. A reservist, he was called to active duty, yet he remained responsible to the civilian administration of the Ministry of Defense.[67] Whether Germany will follow this course in future missions is not settled, and probably will be determined on a case-by-case basis.

Because there are so few legal advisors and instructors, most recruits are unaware of their existence (unless the soldier commits a disciplinary offense). As the *Bundeswehr* prepares for multilateral missions abroad, the lawyers' role is sure to grow.

*G. Military Justice*

Germany has separate laws dealing with military disciplinary procedures and military criminal offenses.[68] Although disciplinary charges and criminal proceedings may be brought simultaneously, they are brought in different fora—the former in a military forum and the latter in a civilian forum.

The "troop service court"[69] decides disciplinary charges with a direct appeal to the Federal Supreme Court for administrative law. The civilian prosecutor for the district in which the accused soldier resides is responsible for investigating, charging, and prosecuting military criminal offenses.[70] Prosecution occurs in the criminal division of the civil courts. Soldiers can appeal to the appellate civil court and the criminal division of the Federal Supreme Court for civil matters has discretionary review.[71]

The accused does not receive legal representation from the *Bundeswehr*; he may retain civilian counsel in disciplinary cases and generally is required to have civilian counsel represent him in crimi-

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[67] Brüntgens Interview, *supra* note 63.

[68] WEHRDISZIPLINARORDNUNG [MILITARY DISCIPLINARY REGULATION]; SOLDATENGESETZ [SOLDIERS LAW] § 23 (violations of service prosecuted as disciplinary violations); WEHRSTRAFGESETZ [MILITARY CRIMES LAW] (all of the foregoing are statutes passed by the *Bundestag*).

[69] Known as the *Truppendienstgericht*.

[70] General criminal law provides a basis for a military criminal offense to the extent that no criminal offense specified in the Military Crimes Law applies to the conduct in issue. WEHRSTRAFGESETZ § 3(1).

[71] STRAFPROZESSORDNUNG [CRIMINAL PROCEDURE LAW] §§ 312-13; GERICHTSVERFASSUNGSGESETZ [JUDICIAL CODE] § 133.

nal cases. If the accused has not hired a lawyer to represent him in a criminal matter, the court will appoint a defense counsel.[72]

The rules governing allocation of costs of trial, including attorney's fees, are not very different from similar rules in civil matters in Germany. In disciplinary offenses, if the soldier is vindicated or the proceeding is terminated without a conviction, the soldier bears only the costs that he caused by his own fault.[73] This means that the *Bundeswehr* reimburses the soldier for his lawyer's fee only if the soldier is successful.

If the soldier loses the disciplinary case, he not only pays his own costs but also must reimburse the *Bundeswehr* for its costs of trial, including any travel costs incurred by the government and the military judge.[74] The court can waive the obligation of a draftee to reimburse the *Bundeswehr* for trial costs. Furthermore, the appellate court can waive the reimbursement obligation for any accused if it would be an unfair burden.[75]

The rules governing allocation of costs in criminal cases are similar, except that the government, not the accused, pays the court-appointed defense counsel.[76]

Commanders may order disciplinary arrest—lasting from three days to three weeks—only with the approval of the military judge responsible for the unit where the soldier serves or, where that is not possible, with the approval of the next closest judge.[77]

If the military judge does not consent to the disciplinary arrest or orders arrest for a shorter period than requested, the commander can apply to the troop service court within one week after issuance of the judge's decision. The court must hold a hearing before making its decision. A decision that upholds the requested arrest or allows it for a shorter period is final. A decision that disciplinary arrest is inappropriate leaves the commander free to impose another disciplinary measure.[78]

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[72]STRAFPROZESSORDNUNG § 141.

[73]WEHRDISZIPLINARORDNUNG § 130(3).

[74]*Id.* § 130(1).

[75]*Id.* §§ 130(4); 131(1),(2).

[76]STRAFPROZESSORDNUNG §§ 465 (accused pays prosecution's costs if convicted); 467 (government pays defendant's costs if no conviction is obtained). For the mandatory appointment of a defense counsel by the court, *see* STRAFPROZESSORDNUNG §§ 140–42 (circumstances of selection); BUNDESRECHTSANWALTSGEBUHRENORDNUNG [FEDERAL FEE REGULATIONS FOR LAWYERS] § 97 (payment of mandatory defense counsel by the government).

[77]WEHRDISZIPLINARORDNUNG § 36(1).

[78]*Id.* § 36(4).

Soldiers in the *Bundeswehr* elect representatives.[79] These representatives enjoy varying degrees of codetermination. Concerning transfers, training, and vacations, a representative may only speak on a soldier's behalf if specifically requested to do so by the affected soldier.[80] Subsequently, if the representative and the responsible commander fail to agree on welfare measures, a conciliation committee chosen by the judge of the troop service court will make a final determination.[81]

Before a disciplinary punishment is imposed or a judicial disciplinary proceeding is instituted, the representative from the accused soldier's unit must be heard.[82] Conversely, in the NVA's military justice system, the unit representative had no role in the actual disciplinary proceeding or in a criminal case.

Troop service courts—eighteen exist at present—are comprised of one professional judge, a civil servant appointed by the Minister of Defense, and two lay judges who are appointed by the troop commander. At least one of the lay judges must have the *same* rank as the accused, and neither of the lay judges may serve in the same battalion or troop unit as the accused.[83]

The Federal Supreme Court for administrative law—in panels of three professional judges and three lay judges—hears appeals of military disciplinary cases and reviews complaints filed by soldiers.[84] The Federal Constitutional Court may review questions, at any stage in disciplinary or criminal matters, on accepting a constitutional complaint filed by the accused.[85]

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[79] SOLDATENBETEILIGUNGSGESETZ [SOLDIERS PARTICIPATORY INVOLVEMENT LAW] §§ 1–2. The German term for this representative, *Vertrauensperson*, means "trusted person." This figure is a common institution in labor-management relations in the public employment sector in Germany.

[80] *Id.* § 23(1).

[81] *Id.* §§ 22(2), 25.

[82] *Id.* § 27(1), (2).

[83] WEHRDISZIPLINARORDNUNG §§ 62–63, 65, 68–69.

[84] *Id.* §§ 109–10. The Federal Republic of Germany has a unitary system of courts, with one general branch (for civil and criminal cases) and five specialized courts—for labor, social welfare, finance and taxes, patents, and administrative law matters. A Federal Constitutional Court is the highest court for resolving constitutional issues. Each court at the highest level consists of a large group of judges. They are assigned to specialized divisions, called senates, from which the hearing panels are drawn. The senate in the *Bundesverwaltungsgericht [Federal Administrative Law Court]*, for military discipline and complaints filed by soldiers, is called the military service senate (*Wehrdienstsenat*).

[85] GG art. 93(1), § 4a.

## VI. Issues After Reunification

### *A. Reduction in Force—Officers and NCOs*

*1. Departures*—The *Bundeswehr* had announced, before reunification, that it would not accept any NVA officers in the rank of colonel or above, any political officers, or any officers who had assisted the *Stasi*.[86] Voluntary resignations and early retirements from the NVA before October 3, 1990, gave the *Bundeswehr* a group of officers and NCOs that were younger and more favorably disposed to the *Bundeswehr* than the *Bundeswehr* had expected.[87]

Those who did not join the *Bundeswehr* did not receive any pension, although on request they could receive information on job opportunities from job banks or from the *Bundeswehr* veterans' association. The *Bundeswehr* retained a few high-ranking NVA officers, as civilians, to assist with the transition. Others volunteered their services.[88]

On October 3, 1990, some 25,000 officers and 32,000 NCOs from the NVA joined the *Bundeswehr*. Each officer and NCO who did not fall within one of the prohibited categories was entitled to serve in the *Bundeswehr* until at least December 31, 1990.[89]

Those who were fifty-five or older were promised a 7500 deutsche mark (DM) severance pay (approximately $5000) and a pension if they retired before December 31, 1990. They were informed that they would receive far less if they retired later. Similar

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[86]Anyone who knowingly provided information to the *Stasi* was considered to have actively assisted it and thereby was disqualified for service in the *Bundeswehr*. The Unification Treaty between West Germany and East Germany provides for the dismissal of former NVA soldiers from the *Bundeswehr* for *Stasi* activity as well as for violation of the principles of humanity or due process (*Rechtsstaatlichkeit*)—in particular those set forth in the International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, *entered into force* Mar. 23, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), and the Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217, 3 GAOR, U.N. Doc. 1/777 (1948). However, dismissal is required only where this conduct makes continued service undesirable. *See Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag [Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of the Unity of Germany—Unification Treaty]* [hereinafter Unification Treaty], app., ch. 19, subsec. BII, no. 2, § 7(2), *Federal Gazette of the F.R.G.*, BGBl II, Aug. 31, 1990, at 889, 1144.

[87]Potsdam Interview II, *supra* note 23.

[88]*Id.*

[89]*Id.* The Unification Treaty states that soldiers of the former NVA become soldiers of the *Bundeswehr* on the effective date of the Treaty. Unification Treaty, *supra* note 86, § 1.

terms were offered to officers and NCOs between fifty and fifty-five years of age if they retired between January 1 and June 30, 1991.[90]

*2. The Integration Process*

*a. Officers and NCOs*—Officers and NCOs who remained in the *Bundeswehr* until December 31, 1990, could apply for a two-year contract to extend their service until December 31, 1992. Those officers and NCOs who had remained until December 31, 1990, but then left the *Bundeswehr*, received a vocational training grant up to 1300 DM (about $800) and a separation allowance of 2500 DM (about $1400), the same amount then given to *Bundeswehr* recruits leaving after their one-year of service in West Germany.[91] They also were entitled to use a job bank organized by the *Bundeswehr*. Officers and NCOs dismissed for failing to reveal cooperation with the *Stasi* received no payment.[92]

About 12,000 officers submitted applications to extend their service and the *Bundeswehr* accepted approximately half of these,[93] placing 5000 of them into the army. Because many had higher rank than their contemporaries in the *Bundeswehr* without responsibility comparable to their higher rank as used in the *Bundeswehr*, the new officers were accepted with a rank that was one or more grades lower than their rank in the NVA.[94]

At the end of the two-year contracts, the 6000 officers that were initially accepted were eligible to apply for acceptance as a professional soldier with the *Bundeswehr* under an indefinite or long-term contract and all but 600 applied. However, the former NVA officers still received different treatment; their pay is approximately seventy-five percent of that of other *Bundeswehr* officers with the same rank.[95]

The *Bundeswehr* continued its review of these applicants and dismissed about one in five for concealing cooperation with the

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[90]Potsdam Interview II, *supra* note 23.

[91]The budget amendments of 1993 reduced the separation allowance for *Bundeswehr* recruits to 2000 DM.

[92]Potsdam Interview II, *supra* note 23.

[93]The Unification Treaty permits dismissal of former NVA soldiers in the *Bundeswehr* for inadequate technical qualification, inappropriate personal qualifications, lack of need for the soldier, a reduction in force, or other essential change that makes different use of the soldier not possible. Unification Treaty, *supra* note 86, § 7(1).

[94]Potsdam Interview II, *supra* note 23.

[95]This wage differential is typical for the civilian sector, too. Paying western-level salaries to politicians holding offices in the new states has toppled at least one state government; however, in the case of *Bundeswehr* officers, most leave their families in the West and thus continue to have expenses at levels above the new states. *Id.*

*Stasi*. By June 1994, the *Bundeswehr* had accepted just 3000 officers (2100 of these for the army) and approximately 7800 former NVA NCOs as professional soldiers.

Rejecting applicants with a *Stasi* background commonly occurred for those positions that required public trust—such as judges and teachers. The *Bundeswehr* feared that any official tie between the Federal Republic and persons who had cooperated with the *Stasi* would undermine the public's confidence in the government.[96]

In one particular area this prohibition adversely affected the *Bundeswehr*'s strength. Many doctors in the NVA were *Stasi* informants, perhaps because the *Stasi* saw a use for exploiting their confidential relationship with patients. Unfortunately for the *Bundeswehr*, doctors in the western part of Germany are leaving the army at a rapid rate. Scheduled restrictions on the right to establish a new medical practice encouraged many younger doctors to leave the *Bundeswehr* before the restrictions came into effect in 1993.[97]

Altogether, somewhat less than 11,000 former NVA officers and NCOs found a professional career with the *Bundeswehr*. Less than one in five officers and NCOs who joined at the time of reunification remain with the *Bundeswehr* today. An even smaller proportion of the NVA's regular officer and NCO strength is part of the *Bundeswehr* today. Looked at another way, former NVA officers and NCOs comprise barely five percent of total *Bundeswehr* officers and NCOs.[98] These slim selection rates show the minimal overall personnel impact of the NVA on the *Bundeswehr*.

*b. Recruits*—The 39,000 NVA recruits performing service on October 3, 1990 were sworn into the *Bundeswehr* and continued to serve until they completed their twelve-month terms.[99] They, along with former NVA officers and NCOs remaining in service, helped to

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[96]In Berlin, for example, 15% of the 195 judges and 86 prosecutors who were active in East Berlin on October 2, 1990 have been retained in service. *See Die Berliner Justiz und die Schatten der Vergangenheit* [*Berlin's Judiciary and the Shadow of the Past*], F.A.Z., Feb. 4, 1993, at 4. Teachers of military science in the former East Germany can be dismissed from current teaching positions as "unsuitable for teaching," according to decisions of the federal court of labor law (*Bundesarbeitsgericht*). *See* F.A.Z., July 22, 1994, at 13 (case nos. 8A2R 679192, 340193).

[97]The right to establish a medical practice accepted by statutory health insurance plans is now dependent on the number of doctors already practicing in the locality. *See 60 Prozent der Zulassungsbezirke für Kassenärzte Gesperrt* [*60% of Localities are Closed to Doctors Participating in Medical Insurance Plans*], F.A.Z., Jan. 4, 1994, at 14.

[98]Potsdam Interview II, *supra* note 23.

[99]Recruits in the new states receive a separation allowance of 500 DM on completion of their service rather than the 2000 DM paid to recruits in the western part of Germany.

clean and renovate the dilapidated barracks and to guard ammunition dumps and weapons sites. The *Bundeswehr* disbanded some troop units and released the recruits from duty or transferred them to other locations for training.[100]

For the recruits then in service, and the ones following them, the *Bundeswehr* provided the same instruction as offered to recruits in West Germany. Because the *Bundeswehr* assigns recruits as close to their home as possible, few companies contain recruits from both East and West Germany—except in Berlin and other areas near the former border.[101]

*B. Retraining*

*1. Officers and NCOs*—Retraining former NVA officers and NCOs who joined the *Bundeswehr* took place in three phases. In the first phase, specialists were taught to perform basic aspects of their jobs to *Bundeswehr* standards. This training, which lasted from two to four weeks, was designed for those positions involving food handling and preparation, sanitation, communications, and transport.[102]

Only officers given two-year contracts after December 31, 1990, participated in the next phase of training. Their training took place on a rotating basis beginning in January 1991, with an eight-to-twelve-week course at *Bundeswehr* schools; some training also took place at troop units in West Germany. The curriculum consisted primarily of instruction in military tactics, leadership skills, civics and political science, military law, and military history. The officers received only two hours of instruction in the law of war, and six hours each in logistics and the leadership system of the army.[103]

Completing this second phase enabled the officers to begin studies required for promotion to major in the *Bundeswehr*. It also provided these officers the knowledge and skills necessary to perform their duties. Many of them were company commanders, responsible for instructing recruits on the same subjects.

For most former NVA officers, this course offered their first opportunity to use primary source material—such as the German Constitution, treaties, and statutes. In the NVA, few dared to ask for a copy of a law for fear that it would be interpreted as an intention

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[100] SCHÖNBOHM, *supra* note 4, at 104–07.

[101] Hennen Interview, *supra* note 7.

[102] Potsdam Interview II, *supra* note 23.

[103] *See, e.g.*, AUSBILDUNGSBEFEHL FÜR DEN OFFIZIERERGÄNZUNGSLEHRGANG 2 (1993) (Training Order for the Officer Supplementary Training Course, *Offizierschule des Heeres, Anlage* (appendix)).

to file a complaint. Also new to these officers was the encouragement to express one's own ideas orally and in writing.[104]

The third phase, conducted simultaneously with the second phase, involved training officers and NCOs to *Bundeswehr* standards in using the *Bundeswehr's* military equipment. Most of this equipment uses systems different from those used in the NVA's Soviet equipment.[105]

*2. Recruits*—In terms of attitudes, training, and capability, *Bundeswehr* trainers report no difference between East and West German soldiers. Recruits from East Germany tend to be more optimistic than their western contemporaries, perhaps because they look forward to material improvements that westerners already have. Some *Bundeswehr* officers see more disciplinary problems among recruits from the new states, which they attribute to the social insecurity that many of these families are experiencing.[106]

Surveys report disturbingly parochial attitudes among youth from the new states, particularly those with lesser education. According to one survey, two-thirds of vocational trainees, one-half of elementary and high school students, and one-third of college students in the new states tend to believe that there are too many foreigners in Germany. (The percentage of foreigners in the population of the new states is less than one percent, compared to six percent for Germany as a whole.)[107]

The same study finds that about fifteen to twenty percent of male youth in the new states without university education have an "authoritarian and nationalist syndrome" that relativizes the Nazi era, accepts violence as a means of solving conflicts, and yearns for more discipline and order.[108]

However, according to *Bundeswehr* trainers, the vast majority of youth, including most so-called "skinheads," do not agree with violent acts such as the firebombings of shelters for asylum seekers in Germany. Related problems include poorly trained police in the new states and the media's focus on sensational, violent acts committed by comparatively few numbers of misguided youths.[109]

The uncertainty, and at times hostility, expressed by youths in the new states is related to the economic and psychological diffi-

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[104]Hannover Interview, *supra* note 13.

[105]Potsdam Interview, *supra* note 20.

[106]Potsdam Interview II, *supra* note 23.

[107]*See Political Education*, *supra* note 30, at 30.

[108]*See id.*

[109]Potsdam Interview II, *supra* note 23.

culties that their parents and teachers are experiencing in adopting a democratic, capitalist system. East Germany glorified communism, but vilified capitalism and fascism. A discussion of these subjects never took place in the schools or media of East Germany. Now, communism is vilified, capitalism glorified, and many students without role models or guides easily draw the conclusion that fascism, too, should be glorified.[110]

The training that the *Bundeswehr* gives to new recruits should help to change these opinions and instill in their place a desire to participate in a democratic society.

### *C. Environmental Aspects*

Within the first three years after reunification, the *Bundeswehr* addressed numerous issues unrelated to personnel, many of which involved environmental concerns. The *Bundeswehr* destroyed ammunition and military equipment of the NVA, including aircraft, tanks, and SS-23 rockets; continued to heat schools and other public facilities using NVA facilities; subcontracted environmental cleanups at former NVA sites at a cost of $600 million a year (projected to continue for sixteen years); and released about sixty percent of land formerly used by the NVA to the federal government (1400 of 2250 NVA sites).[111]

### *D. Redefining the* Bundeswehr's *Mission*

Like all other militaries of the West and former East blocs, the *Bundeswehr* has had to completely reconsider its mission since the revolutionary events of 1989. Accompanying this process are the uncertainties and economic turmoil in the former countries of the Soviet Union.

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[110]Eike Libbert, a researcher in Rostock, Germany, made this observation in her article, *Nachdenken über das wiedervereinigte Deutschland [Thoughts Over the Reunited Germany]*, *in* HANS RISSEN-RISIENER RUNDBRIEF, no. 2, Feb. 1993, at 1, 4. A counterpoint is noteworthy: in early 1994, the Party of Democratic Socialists (PDS) won on the average one in five votes in local elections in the new states. The PDS's leaders are former communist party leaders, but include party reformists of 1989–90, too. Profiting from nostalgia and resentment, the PDS, like similar parties in Hungary and Poland, illustrates that a swing back to once rejected ideology is always a possibility, especially during economic hardship.

[111]*See* 40 EUROPÄISCHE SICHERHEIT [EUROPEAN SECURITY], Dec. 1991, at 699 (magazine). The federal government received more than 2 billion DM (about $850 million) from the sale of former military property in both East and West Germany between 1990 and 1993, with the majority of parcels going to local public entities. Soviet forces will leave another large group of buildings and lands for the federal government. *See Militärgrundstücke—Verkäufe füllen die Bundeskasse [Military Property—Sales Fill the Federal Coffers)*, HANDELSBLATT, Dec. 27, 1993, at 5 (business periodical). Proposals to return this and other land to their expropriated owners or at least to compensate these individuals have failed to become law.

The initial question concerning whether the *Bundeswehr* will participate in multilateral missions out of the area of the NATO countries has been answered in the affirmative—through the *Bundeswehr*'s participation in United Nations peacekeeping missions in Cambodia, Somalia, off the coast and over Bosnia in 1993, and by the Federal Constitutional Court's approval of the continuing Bosnia mission in July 1994.

The remaining issue is the extent of this involvement in NATO multilateral missions. Concern has arisen over the type of troops to be sent (volunteers or not), the geographical location of the missions (there is special sensitivity to involvement in areas occupied by Nazi Germany in World War II, such as the former Yugoslavia), and the mission and command of *Bundeswehr* units abroad.[112]

The *Bundeswehr*'s experience in absorbing and retraining a previously hostile military force can offer lessons for United Nations or other multilateral missions as well as for regions reconciling previously hostile elements or reducing and retraining their armed forces. Nevertheless, its experience cannot be considered directly transferable to regions emerging from a period of violence and instability. The NVA, while always a potential opponent, was never a foe at war with the Federal Republic. Moreover, no significant political instability or terrorism disrupted Germany during the early 1990s.

## VII. Unresolved Matters

### *A. The Draft and Foreigners Growing Up in Germany*

An issue left unresolved in the wake of the merger of the two armies is the military draft and its impact on foreigners residing in Germany. The relationship among military recruits, the entitlement to citizenship, the recognition of double citizenship, the children of guestworkers growing up in Germany, and German attitudes towards foreigners has also been explored inadequately. The draft is restricted by statute (not by the Constitution) to men of German nationality.[113] Even if, as some advocate, the draft is eliminated, the

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[112] *See* KLAUS NAUMANN, DIE BUNDESWEHR IN EINER WELT IM UMBRUCH [THE BUNDESWEHR IN A WORLD UNDER CHANGE] 180–82 (1994). Klaus Naumann is the General Inspector of the *Bundeswehr* and its military commander in times of peace. *See also Anregungen Schulz für die Bundeswehr [Suggestions of Scholz (a former Minister of Defense) for the* Bundeswehr]. F.A.Z., Feb. 9, 1994, at 4.

[113] WEHRPFLICHTGESETZ [MILITARY DRAFT LAW] § 1(1). The definition of German nationality is not determined by territory or where one is born, as it is in the United States, among other criteria, but solely by blood line. Thus, those individuals growing up in Germany whose parents are guestworkers from other countries lack German nationality. At the same time, individuals outside the borders of Germany can demand

question remains whether non-Germans who grow up in Germany may serve voluntarily in the *Bundeswehr*. Many "resident aliens" might prefer this arrangement to a longer and possibly more dangerous service in the country of their parents' or grandparents' origin—such as Turkey.[114]

Potential problems exist if German nationality were to be offered to resident aliens, while allowing them to keep their existing citizenship. These problems include conflicting loyalty, double military drafts, rigid inheritance laws in some countries that take away all rights to inherit property on gaining another nationality, and sometimes conflicting goals of maintaining cultural identity while integrating ethnic minorities.

If Germans are committed to relaxing legal and social barriers against the children of guestworkers, then a serious debate should occur over citizenship and nationality, including whether the *Bundeswehr's* draft or civilian service obligation should extend to foreigners who grow up in Germany.[115]

Drafting international agreements that would provide for some recognition of choice or priority for military service obligations is desirable (to avoid duplicate service) but unlikely with countries engaged in armed conflict. Should Germany move toward recognizing dual citizenship, mutual recognition of military service will become critical to prevent simultaneous or consecutive military service obligations.

Service in multinational units at a European or broader level is another way to expose military recruits, officers, and NCOs to foreigners. Assignment to European multinational units is not new for

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a German passport if they or their spouse or descendant are accepted (by Germany) as a refugee or persecutee from a region within the borders of Germany as of December 31, 1937. GG art. 116(1). This latter provision enabled millions of ethnic German refugees from Eastern Europe and the former Soviet Union to immigrate to Germany and obtain citizenship there.

[114]Germany rejects dual citizenship (citizenship in more than one country). *See Einbürgerungsrichtlinien [Naturalization Guidelines]*, printed in *Gemeinsames Ministerialblatt [Common Ministerial Gazette]*, § 5.3, GMBl., Dec. 15, 1977, at 16, corrected to 27 as amended.

[115]The Turkish population of over two million is the largest foreign resident group in Germany. Because citizenship is a requirement of any public employment—extending not just to police officers and teachers but even to bus drivers—the children of guestworkers face tangible employment discrimination. Moreover, most are not entitled to vote in German elections. Nationals of another member state of the European Union (EU) who reside in Germany are allowed to vote in municipal elections in Germany under a directive of the EU, however, this has yet to be implemented by most of the German states (*Länder*) and municipalities. Council Directive 94/80, 1994 O.J. (L368) at 38. The German text is published in the *Amstblatt der Europäischen Gemeinschaften (Official Journal of the European Communities)* at the cited page; the exact page in the English language edition may differ slightly.

the *Bundeswehr*: the first multinational NATO division, in Mönchengladbach, Germany, has one air brigade each from Germany, Belgium, The Netherlands, and Great Britain; the European Corps in Strasburg, France, will have German, French, Belgian, Spanish, and Luxembourg units before reaching its targeted strength of 50,000 men. Only a small number of *Bundeswehr* recruits will serve in multinational units; however commendable this integration of units is in the international setting, it does not promote the needed social integration of Germany's "resident aliens."[116]

To invest the *Bundeswehr* with the primary task of inculcating tolerance and democratic values in German youth is unfair and unwise; however, the shared experience of military service has a significant impact on young minds. Including children of guest-workers in the *Bundeswehr* on a voluntary basis and increasing participation in multinational units will contribute to an integrated rather than segregated Europe.

*B. The NVA's Role Abroad*

The NVA's foreign military support, including its role as a haven and training base for German and foreign terrorist groups from the 1960s to the 1980s, has received insufficient public attention. Instead, domestic concern in Germany has focused on who spied on whom in East Germany, a matter which has more direct, personal interest for Germans than the acts of the NVA or *Stasi* whose effects were felt abroad. By contrast, the discussion about possible *Bundeswehr* involvement in multilateral peacekeeping missions abroad precipitated a furor of public discussion, largely concerning the physical risks to which *Bundeswehr* soldiers would be exposed and whether the Constitution permits such involvement.

The *Stasi* may have aided these German and foreign terrorist groups under cover of the NVA. Unlike other domestic and border crossing incidents, however, the NVA's potential assistance to these groups remains out of the public eye. When asked about these activities, a former NVA officer undergoing training in the *Bundeswehr* recited a poem by Wolfgang Bittner:

> Wir haben es nicht gewußt. Keiner hat es gewußt. Keiner hat es wissen wollen. Selbst wer es hätte wissen können, hat es nicht wissen
>
> We did not know it. No one knew it. No one wanted to know it. Even whoever could have known it should not want to know it. Even

[116]Günther Gillessen, *Die erste multinationale Nato-Division wird in Dienst gestellt [The First Multinational NATO Division is Placed in Service]*, F.A.Z., Jun. 22, 1994, at 6.

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|---|---|
| sollen. Selbst wer es wissen konnte, wollte es nicht wissen. | whoever could have known it did not want to know it.[117] |

During the 1980s, East Germany maintained military contact with approximately forty third-world countries.[118] The NVA reportedly participated in battles against Somalia on behalf of Ethiopia; sent 1000 troops to Algeria, trained Cuban soldiers in Guinea-Biassau, built army depots and communication systems in Libya, sent 500 officers to train guerrillas fighting in Zimbabwe, supplied officers who served in tanks in Egypt, and built bunkers in Iraq.[119] That the *Stasi* trained and gave refuge to members of the West German Red Army group also has been alleged.[120]

These activities ceased long ago and have lost their relevance in geopolitical terms. Publicizing the results of this involvement, however, would be instructive for the *Bundeswehr* and the public and may discourage Germany from offering military cooperation to countries that support terrorist groups.

*C. Social Insecurity in the New States*

*1. Former NVA Officers and NCOs*—The *Bundeswehr* undertook little retraining or reemployment assistance for the approximately 80,000 former NVA officers and NCOs who left the military shortly before reunification. For these men the *Bundeswehr* assumed no official responsibility. The approximately 40,000 officers and NCOs who joined the *Bundeswehr* on October 3, 1990, but left service on December 31, 1990, received some retraining and job assistance, often on an informal basis.[121]

The NVA soldiers joining the *Bundeswehr* report social insecurity as their primary concern[122] and the same ranking can be expected among those who never joined. The level of social insecurity—blamed largely on unemployment and reductions or shutdowns of East German companies—may be related to violent incidents against foreigners and the self-doubts of many in the new

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[117]Hannover Interview, *supra* note 13.

[118]VOLKER KOOP AND DIETER SCHÖSSLER, ERBE NVA, EINDRÜCKE AUS IHRER GESCHICHTE UND DEN TAGEN DER WENDE [THE LEGACY OF THE NVA, IMPRESSIONS FROM ITS HISTORY AND THE DAYS OF CHANGE] 284 (*Akademie der Bundeswehr für Information und Kommunikation*, 1992).

[119]*Id.*

[120]*See, e.g.*, *Schacher mit Killern—Donald Koblitz uber Versäumnisse der Deutschen bei der Terrorfahndung [Haggling with Killers—Donald Koblitz on the Omissions of the Germans in the Pursuit of Terrorists]*, DER SPIEGEL 56–57 (No. 2, 1994) (*Der Spiegel* is a popular weekly news magazine).

[121]Potsdam Interview II, *supra* note 23.

[122]Adrian, *supra* note 31.

states comprising the former East Germany about the benefits of a democratic system. Similar—although more severe—manifestations of insecurity and violence are occurring in the newly independent countries of the former Soviet Union. Russians face discrimination as new minorities and extremists in Russia respond with old calls for renewed hegemony.

The *Bundeswehr* is not to be blamed for social unrest in the new states; it had neither the resources nor the mission to offer assistance or retraining to all former officers and NCOs and had it done so, the chances of their finding civilian jobs would hardly have improved. Nevertheless, one wonders whether the mass exodus of NVA officers and NCOs contributed to a social climate of bitterness. Who were the parents of the youths throwing rocks or Molotov cocktails at asylum homes in the new states? Were any of them bitter over a lost military career in the NVA? Did former NVA officers or NCOs who joined the police or other public service agencies carry with them their resentment about the loss of a secure military career? The answer to these speculative questions is unknown and, unfortunately, it appears that they were never asked.

From the first day of reunification, the *Bundeswehr's* immediate responsibilities were to ensure that NVA weapons and munitions did not disappear and to create a functioning army in the new states.[123] These overriding objectives, coupled with budgetary limits, prevented the *Bundeswehr* from accepting all former NVA officers and NCOs who wished to join. The officers and NCOs who declined to join the *Bundeswehr* or who were later released from service were not the first level of concern for the *Bundeswehr*. In retrospect, civilian authorities should have given more assistance to departing NVA officers and NCOs who were not connected with the *Stasi*.

*2. The Military's Image*—The *Bundeswehr* has an advantage over public services in the new states—such as teachers and police—because the latter could not rely so assuredly on immediate aid and supervision from the "old states" of West Germany, nor could they reduce the size of their staff as drastically as the *Bundeswehr* was able to do in the new states. It is reasonable, therefore, to expect that other public institutions will require more time than the *Bundeswehr* did to achieve a well-functioning system.

East Germans tended to view the *Bundeswehr* as the successor of the NVA, especially in the beginning, because attitudes are not easily changed. Where permissible and feasible, however, the *Bun-*

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[123] SCHÖNBOHM, *supra* note 4, at 61-62, 66-67.

*deswehr* has attempted to provide technical assistance to local churches, public authorities, and social organizations in the new states in an effort to nourish a different image of the military than that of the NVA.

*VIII. Lessons Learned*

The fundamental message emanating from the integration of the NVA into the *Bundeswehr* is that there is no substitute for a moral compass[124]—a principled sense of direction that is recognized as sincere and fair and is applied consistently. A political and military policy must be perceived as possessing a moral compass to achieve long-term success.

Military might is a necessary but not sufficient condition for winning a war and keeping the peace. When the moral compass internally weakens, this psychological state erodes the will to fight. The West's greatest asset after World War II was not its military equipment, but the psychological recognition that western political systems and values were preferable to those offered by the Soviet communist party and its associates.

The roles of individual leaders and the military strength of one's opponent cannot be underestimated. The American military buildup, Gorbachev's new style, and Honecker's indecisiveness notwithstanding, had East German military officers believed in the superiority of their moral compass, they would not have allowed the Berlin Wall to be breached. Similarly, whether Soviet military officers would have allowed two attempted coups in Moscow to fail had they held to their learned values is doubtful. In short, the key to whether a war will occur, or once begun how hard it will be fought, is the strength of the moral compass—the conviction of right—shared by leaders and followers.

The strength of the moral compass of a potential opponent does not address whether national interest favors involvement, but an accurate assessment can help assess the risks and the need for engaging armed force abroad.

From the *Bundeswehr's* experience in absorbing the NVA, three lessons can be drawn.

*(1) Enlarging the Alliance*—The first lesson relates to the continental European debate over whether to continue with the military draft. The proponents of a continued draft fear that abolishing it

[124]This phrase is borrowed from the title of a collection of letters of the economist Wilhelm Röpke, who left Germany in 1933. RÖPKE, *supra* note 2.

would sever the military's link with society and perhaps lead, through self-selection, to a more politically right-wing military.

Given the present opportunity for civilian service, this fear probably is exaggerated; the military recruits are already a self-selected group, and the elimination of the draft hardly will affect the existing professional corps of officers and NCOs.

A moral compass can be best followed through multinational military units, training exercises, and exchange of personnel. Draftees of a country of the European Union should be permitted to choose in which member state's military or multinational unit they will serve. The use of European defense forces outside of a NATO framework will continue to be problematic without more effective direct political democracy at the European level.

As the European Union expands, the influence of any single member state such as Germany will be reduced; California would be a much more powerful center if the western part of the United States were an independent country. Whatever the shape of the future *Bundeswehr*, a way must be found to continue to offer a moral compass to the German citizenry and to the enlarged alliance that is emerging in Europe. Care must be taken to ensure that it reflects democratic aspirations, includes effective enforcement measures, and prevents misuse by one or more participants to achieve questionable objectives.

*(2) A Model for Reconciliation*—The second lesson from the *Bundeswehr's* experience cautions against accepting the remaining one-party states, and gives optimism that their integration into an increasingly free world is feasible. The problem actually may lie more in how to brake rather than accelerate such integration.

Germany's integration of two formerly hostile armies and people is comparable to Lincoln's intent to reconcile Southerners and Northerners as the Civil War drew to a close. The German experience could serve as a model for many other divided areas of the world—such as North and South Korea; China, Taiwan, and Hong Kong; South Africa; Central America; and the Middle East. Each region has different leaders, values, and history that will lead to unique political outcomes—that is, whether one or more states will remain after reconciliation will depend on the particular circumstances.

It is in this process of reconciling former foes in which the most recent German experience offers a refreshing contrast to the two world wars in this century. The *Bundeswehr's* moral compass, crystallized in its concept of internal leadership, is in principle adoptable by other countries' militaries to reduce domestic tensions and reconcile former opponents.

The true test for the *Bundeswehr* is yet to come: whether Germany can preserve its moral compass in a world that demands not political abstinence but humanitarian intervention with real risk to German soldiers. The United States objective should be to assist Germany and other countries to find responsible answers to participation in international structures and missions. International missions or structures that are weak, poorly planned and executed, or inherently unfair jeopardize the confidence that the world places not only in multilateral cooperation but also in the United States.

*(3) Training*—The third lesson from the integration of the NVA into the *Bundeswehr* is its application to training the militaries of emerging democracies and multilateral intervention forces whose aim is to establish or maintain peace. Defense Minister Rühe correctly termed the *Bundeswehr's* "internal leadership" concept as one of Germany's best intellectual exports.[125] Along with practical retraining and employment assistance for separating personnel, internal leadership should supplement human rights training for Latin American militaries, and the militaries of eastern Europe and the former Soviet Union, so that their militaries also may become reliable partners of democracy.

This process already is well underway with respect to the Soviet forces previously stationed in the new states of Germany. With funding of $130 million (200 million DM), the German government used private companies to train returning Soviet soldiers in the market economy, economics, data processing, finance and accounting, insurance, marketing, and vocational education using computer diagnostics and graphics.[126]

Bilateral training and exchange programs are not without perils: they hold the possibility for developing competing alliances, conflicting messages, and inconsistent training. This training should be offered under a multilateral framework to avoid inconsistent or repetitive instruction and the tendency toward national rivalry that naturally is stronger where programs are based on nationality.

## IX. Conclusion

Unlike Germany, where the power of the communist party and its security police have largely been removed, the same networks retain power throughout much of the former Soviet Union and east-

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[125]Luschert Interview, *supra* note 7.

[126]*Entlassene Offiziere lernen fur einen beruflichen Alltag [Russian Officers Leaving the Forces Learn Occupational Skills]*, F.A.Z., Oct. 25, 1993, at 19.

ern Europe. It is naive to assume that the events of 1989, coupled with the fledgling reconciliation in South Africa between blacks and whites and in the Middle East between Arabs and Jews, have transformed the world into a "Garden of Eden" where the only threats are economic predators.

The right course is to identify and to keep a moral compass in this "Hot Peace"[127] by encouraging and assisting countries to follow majority representational rule with protection for minorities. The *Bundeswehr*'s experience sets an example for reconciliation and training to the military around the world.

[127] "Hot Peace" is the author's term for the current state of world security: simultaneous ethnic, religious, and politically motivated armed conflicts in numerous countries, few of which move any major power, alliance, or other multilateral organization to intervene with military force. Instead, the world observes the conflicts and encourages negotiated settlements, expressly refraining from taking sides. As the Cold War was a time of tension among major powers amid relative tranquility, so the Hot Peace appears as its mirrored reflection: a period of tranquil relations among major powers amid relatively frequent—and bloody—regional conflicts.

# THE TWELFTH ANNUAL GILBERT A. CUNEO LECTURE: THE ORIGINS AND DEVELOPMENT OF THE FEDERAL ACQUISITION STREAMLINING ACT*

THE HONORABLE JEFF BINGAMAN**

## I. Introduction

General Gray, Colonel Graves, members of the faculty, and participants in the symposium, I am honored that The Judge Advocate General's School has asked me to present the Twelfth Annual Gilbert A. Cuneo Lecture. Gilbert Cuneo not only had a distinguished career as a procurement attorney in both the public and private sectors, he also actively promoted continuing legal education in the procurement field as a means of providing for continuous improvement in the law. This lecture was endowed in his name with the goal of furthering healthy cooperation between government and the private sector in the field of federal acquisition policy.

Today, I will address the origins and development of the Federal Acquisition Streamlining Act of 1994—legislation that embodies the spirit of the Cuneo Lecture by removing many of the barriers that have inhibited government-industry cooperation on acquisition policy matters. First, I will discuss the impact of the streamlining movement on the legislative process. Second, I will describe the activities that led to the establishment of the Advisory Panel on Streamlining and Codifying the Acquisition Laws—the "Section 800" Panel. Finally, I will discuss the events that resulted in the successful enactment of the Federal Acquisition Streamlining Act.

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* This article is based on a lecture delivered by Senator Jeff Bingaman to members of the Staff and Faculty and students attending the 1995 Government Contract Law Symposium on January 9, 1995, at The Judge Advocate General's School, United States Army, located in Charlottesville, Virginia. The Cuneo Lecture is named in memory of Gilbert A. Cuneo, who was an extensive commentator and premier litigator in the field of government contract law. Mr. Cuneo graduated from Harvard Law School in 1937 and entered the United States Army in 1942. He served as a government contract law instructor on the faculty of The Judge Advocate General's School, then located at the University of Michigan Law School, from 1944 to 1946. For the next twelve years, Mr. Cuneo was an administrative law judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals. He entered the private practice of law in 1958 in Washington, D.C. During the next twenty years, Mr. Cuneo lectured and litigated extensively in all areas of government contract law, and was unanimously recognized as the dean of the government contract bar.

** United States Senate (D-N.M.).

II. The Impact of the Streamlining Movement

If you have not had the opportunity to read the first Cuneo Lecture by John E. Cavanagh—which was published in the May 1984 issue of *The Army Lawyer*[1]—I urge you to do so. Mr. Cavanagh outlined the major changes that had taken place in the procurement process during the late 1970s and early 1980s, which reflected a growing adversarial relationship between the government and its contractors. Citing a report by the Defense Science Board, Mr. Cavanagh noted that increased regulatory requirements had established deterrents that prevented smaller companies from pursuing defense business. Those firms that chose to participate in government procurements experienced increased costs as a result of these requirements.

Unlike some critics who simply denounce government regulation, Mr. Cavanagh recognized that in a democracy that depends on the willingness of taxpayers to fund government procurements, some degree of regulation and oversight will always be necessary. What he advocated was a more careful review of acquisition procedures to remove or alter the regulations that unduly promoted adversarial relationships and that inhibited a more cooperative approach. As I will discuss in my remarks, nearly a decade would pass, however, before such a review was undertaken by an advisory panel established under legislation initiated by the Senate Armed Services Committee.

At first, Mr. Cavanagh's call for greater cooperation seemed like a lost cry in the woods. Although Congress was extremely generous in funding defense programs during the 1980s, that generosity was accompanied by an unprecedented level of scrutiny. Congressional involvement in defense procurements—which is our constitutional responsibility under the Constitution[2]—extended beyond concern about specific weapons systems and into detailed concern with the acquisition process. At times, it seemed that every publicized incident of fraud, waste, or abuse—real or perceived—was accompanied by a legislative fix.

While much of the attention was warranted and overdue, the cumulative impact of these intense efforts to regulate the acquisition process often was overlooked. Over time, those of us who followed defense procurement policy in Congress—particularly on the Armed Services Committee—studied with concern the issues raised

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[1]John E. Cavanagh, *The First Gilbert A. Cuneo Lecture: The Adversarial Relationship in Government Contracting: Causes and Consequences*, ARMY LAW., May 1984, at 1.

[2]U.S. CONST. art. I, §§ 8, 9.

by Mr. Cavanagh and others about the adverse impact of overregulation on the health of the defense industrial and technology base.

## III. Legislative Development of Acquisition Streamlining Initiatives

In 1987, at the beginning of the 101st Congress, the Senate Armed Services Committee, under the leadership of Senator Sam Nunn, established a new subcommittee—the Subcommittee on Defense Industry and Technology—as the successor to the Acquisition Policy Subcommittee. The responsibilities of the new Subcommittee included oversight of the defense industrial base and the technology base, as well as defense acquisition policy. I was pleased to serve as the first chairman of the new Subcommittee. The Ranking Minority Member was Senator Phil Gramm of Texas—who you no doubt will be hearing more of in the next year!

In 1987, we conducted a comprehensive review of defense acquisition policy, during which we received testimony from leading government officials, the defense industry, academic experts, and the oversight community.[3] In our report accompanying the National Defense Authorization Act for Fiscal Years 1988 and 1989, we took note of evidence "suggesting that the procurement system is suffering from regulatory overload as a result of the number and scope of recent regulatory and legislative changes."[4] We also noted that while the individual actions "may well have been taken in a good-faith effort to address a specific acquisition policy problem, . . . in combination these actions may produce a serious adverse impact on innovation and risk taking."[5] Our report called on the Department of Defense (DOD) "to identify promptly any statutory provisions that have a negative impact on innovation."[6]

In addition to seeking DOD proposals, the Subcommittee established an Industry Advisory Group in August 1987, consisting of thirteen senior defense industry officials, led by John Rittenhouse, Senior Vice President of General Electric's RCA Aerospace and Defense Group. The Advisory Group, which was asked "to identify those aspects of the acquisition process that stifle innovation, drain good talent away from defense industries, and threaten our techno-

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[3] *See Department of Defense Authorization for Appropriations for Fiscal Years 1988 and 1989: Hearings on S. 1174 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 100th Cong., 1st Sess., pt. 7, at 3370-574 (1987).

[4] S. REP. No. 57, 100th Cong., 1st Sess. 13 (1987).

[5] *Id.* at 14.

[6] *Id.*

logical and industrial lead,"[7] produced twenty issue papers, focussing primarily on ways to streamline and simplify the acquisition process.[8] On February 5, 1988, the Subcommittee released the Advisory Committee's Report, along with illustrative legislative language, in an effort to stimulate broad discussion of these issues during the Committee's 1988 oversight hearings.[9]

Although we were hopeful that our activities would encourage the DOD to submit a comprehensive streamlining proposal, the DOD proposed changes in only five statutes as part of its 1988 legislative package.[10] In testimony before the Subcommittee, the Under Secretary of Defense for Acquisition, Robert Costello, acknowledged his frustration in attempting to develop an acquisition reform agenda, and described the DOD's legislative proposals as "pablum."[11]

In our report on the National Defense Authorization Act for Fiscal Year 1989, the Armed Services Committee identified several themes underscoring the need for acquisition streamlining:

> [T]he acquisition process is beset by cumbersome and contradictory policies that act as a disincentive to innovation and produce delay in fielding new weapons systems.
>
> [T]o achieve significant savings in defense expenditures, the DOD must focus its attention on costs, which . . . will require a rigorous review of nonvalue added regulations and acquisition practices.
>
> [G]overnment and industry must work together to foster a sense of trust and confidence in an environment that establishes clear lines of responsibility and firm procedures for accountability.
>
> [A]cquisition changes often have been justified in terms of addressing isolated elements of procurement policy without regard to the system-wide impact of such changes.
>
> [T]he acquisition system is suffering from regulatory overload as a result of the demanding task of implementing numerous legislative and internal changes in recent years. As a consequence, managers must spend excessive time

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[7] *See* S. REP. NO. 326, 100th Cong., 2d Sess. 12 (1987) [hereinafter S. REP. NO. 326].

[8] The Industry Advisory Group's Report is reprinted in *Department of Defense Authorization for Appropriations for Fiscal Year 1989: Hearings on S. 2355 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 100th Cong., 2d Sess., pt. 7, at 661-729 (1988).

[9] *See id.* at 659. The Subcommittee's hearings on the issues raised by the Industry Advisory Group are set forth in *id.* at 301-630.

[10] *See id.* at 341.

[11] *Id.*

revising and disseminating procedural changes, to the detriment of their ability to manage their programs.[12]

The Committee expressly noted its disappointment that the DOD had not responded to the Committee's repeated encouragement to submit legislation that would "reduce the complexity of the acquisition system."[13] As a result, the Committee initiated legislation, which ultimately was enacted into law, requiring the Under Secretary of Defense for Acquisition to prepare a report on the simplification and streamlining of acquisition procedures, including identification of statutory impediments to timely fielding of new systems, innovation, and cost-effectiveness.[14]

Despite this invitation to submit a comprehensive reform proposal, the DOD produced a report which the Armed Services Committee subsequently described as "insubstantial and incomplete."[15] The report recommended only twelve statutory changes, failed to set forth specific legislative proposals, and provided virtually no justification or supporting analysis for the proposed changes. The report's deficiencies meant that it could not provide an adequate basis for legislative changes, particularly in light of the skepticism about acquisition simplification that accompanied the revelations of fraud accompanying the "Ill Wind" procurement scandal.

The Committee was encouraged by the emphasis on acquisition reform promised by the Defense Management Review (DMR) initiated by Secretary of Defense Dick Cheney in 1989, but expressed concern that "the proposals therein, like those of the Packard Commission, consist primarily of broad principles which can be furthered—or frustrated—in the implementation process."[16]

Events over the next year increased the Committee's frustration over the DOD's unwillingness to take the initiative in developing a comprehensive acquisition reform package. The Ill Wind scandal had resulted in legislation that added to the complexity of the acquisition process.[17] The Senate had agreed to this legislation only after

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[12]S. REP. No. 326, *supra* note 7, at 12-13.

[13]*Id.* at 111-12.

[14]National Defense Authorization Act for Fiscal Year 1989, Pub. L. No. 100-456, § 809, 102 Stat. 1918, 2012 (1988). *See* S. REP. No. 326, *supra* note 7, at 111-12; H.R. REP. No. 989, 100th Cong., 2d Sess. 427 (1988).

[15]S. REP. No. 81, 101st Cong., 1st Sess. 183 (1989) [hereinafter S. REP. No. 81]. The Under Secretary's report is reprinted in *Department of Defense Authorization for Appropriations for Fiscal Years 1990 and 1991: Hearings on S. 1085 Before the Subcomm. on Defense Industry and Technology of the Senate Committee on Armed Services*, 101st Cong., 1st Sess., pt. 7, at 43-76 (1989) [hereinafter *Hearings on S. 1085*].

[16]S. REP. No. 81, *supra* note 15, at 183.

[17]*E.g.*, Section 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1988), *as amended* by The Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679.

seeking the views of the Administration. We were advised by the Office of Management and Budget that the final version "satisfie[d] the concerns of the Administration."[18] We were able to make a number of useful clarifications in these laws in 1989, and late in 1989 the so-called "procurement integrity" provisions were suspended for a one-year period. The suspension created an opportunity to determine whether these provisions should be reinstated, modified, or repealed. Once again, however, the DOD failed to produce any legislative proposal.[19]

The DMR led to the development in 1990 of eighteen proposed statutory changes, which were introduced as Title II of Senate Bill 2440, entitled "The Defense Management Improvement Act."[20] Although the recommendations were more ambitious than previous DOD proposals, the package suffered from the same defect as prior efforts—the complete absence of justifications and supporting analysis for the changes. On March 15, 1990, Senator Malcolm Wallop—who was then serving as the Ranking Republican on the Defense Industry and Technology Subcommittee—joined me in requesting that the DOD provide a detailed analysis of the proposed legislation. By the time we convened our hearings on April 24 of that year, the supporting information had not been provided, apparently because the DOD had been unable to clear its proposed responses through the Office of Management and Budget.[21]

The situation did not improve prior to our markup of the annual defense bill in July 1990. The DOD did not identify the specific laws that needed to be modified or repealed to streamline the acquisition process. Instead, the DOD's approach to streamlining consisted primarily of a request for broad authority to waive the acquisition laws, largely unaccompanied by supporting information justifying any specific waivers.[22] No less an advocate of streamlining than David Packard severely criticized the proposed use of waivers:

> [The proposal] does not address the real reforms which are needed to make commercial product acquisition better. Rather than advancing the important concepts of paper-

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[18] *See Hearings on S. 1085, supra* note 15, at 446. *See also Lessons Learned from Recent Procurement Fraud Investigations: Hearings Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 101st Cong., 2d Sess. 2 (1990) [hereinafter *Lessons Learned*].

[19] *See Lessons Learned, supra* note 18, at 2.

[20] *Reprinted in Department of Defense Authorization for Appropriations for Fiscal Year 1991: Hearings on S. 2884 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 101st Cong., 2d Sess., pt. 6, at 1263-1317 (1990).

[21] *See id.* at 244.

[22] *See* S. REP. NO. 707, 101st Cong., 2d Sess. 189, 193 (1990).

> work reduction, real market research, quality buying, market acceptability, or other critically needed changes to the culture of the procurement process, it seems to be directed to achieve some other policy objective.[23]

He added that "legislation should not focus on . . . arbitrarily sweeping aside all basic statutory checks and balances of the system."[24] The Public Contract Law Section of the ABA, while emphasizing the need for streamlining, stated that "simply removing existing procurement procedures will not magically solve the problem."[25]

## IV. Establishment of the Section 800 Panel

After three years of exhorting the DOD to develop a comprehensive streamlining proposal, the Armed Services Committee concluded in 1990 that it simply would not happen unless the Committee developed an alternative approach. With the support of the Ranking Republican on our Subcommittee, Senator Malcolm Wallop, I proposed legislation—which was enacted as Section 800 of the National Defense Authorization Act for Fiscal Year 1991[26]—to encourage government and private sector cooperation in the development of acquisition reform legislation.

The legislation required the DOD to establish an Advisory Panel on Streamlining and Codifying the Acquisition Laws, composed of "recognized experts in acquisition laws and procurement policies . . . [who] reflect diverse experiences in the public and private sectors."[27]

In recommending this legislation, the Armed Services Committee was mindful of the numerous studies of the acquisition system by government agencies and commissions since the end of World War II—most recently the Packard Commission and DMR.[28]

The purpose of the Section 800 Panel was not to plow the same ground; rather, the goal was to take the general principles set forth in these studies and prepare a pragmatic, workable set of recommended changes to the acquisition laws.[29]

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[23] *Id.* at 189.

[24] *Id.* at 193.

[25] *Id.*

[26] Pub. L. No. 101-510, § 800 104 Stat. 1485, 1587 (1990) [hereinafter Pub. L. No. 510].

[27] *Id.* § 800(b).

[28] S. REP. No. 384, 101st Cong., 2d Sess. 194 (1990) [hereinafter S. REP. No. 384].

[29] *Id.*

The statute established an ambitious agenda, calling on the Panel to undertake the following tasks:

> First, review the acquisition laws . . . with a view towards streamlining the acquisition process.
>
> Second, recommend repeal or amendment of existing laws to the extent necessary to
>
> > eliminate . . . laws that are unnecessary for the establishment and administration of buyer and seller relationships in procurement;
> >
> > ensure the continuing financial and ethical integrity of defense procurement programs; and
> >
> > protect the best interests of the Department of Defense.[30]

We also knew that comprehensive streamlining legislation could not be enacted if we merely received a set of conclusions accompanied by platitudes. The Panel's report would have to stand up to detailed public and congressional scrutiny from a diverse set of committees and constituencies. To ensure that the report included the necessary supporting materials, we set forth a specific reporting format, requiring the Advisory Panel to list each specific acquisition law, accompanied by the following:

> (1) a legislative history that describes the purpose of the original provision and any subsequent amendments;
>
> (2) a description of the role of the law in current acquisition practices . . . ; and
>
> (3) a recommendation as to whether the law should be retained, repealed, or modified.[31]

We further directed the Panel, when considering whether a particular statute should be retained, repealed, or modified, to consider:

> (1) whether the statutory purpose remains valid in light of subsequent changes in the acquisition system;
>
> (2) if so, whether the wording of the statute should be changed to reflect subsequent developments; and
>
> (3) whether the detailed requirements should be replaced by broad statutory guidance.[32]

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[30]Pub. L. No. 510, *supra* note 26, § 800(c).

[31]S. REP. No. 384, *supra* note 28, at 194.

[32]*Id.* at 195.

Finally, we directed the Panel to prepare a detailed legislative proposal, accompanied by a sectional analysis.[33]

Congress directed that the Panel be established under the sponsorship of the Defense Management Systems College,[34] located at Fort Belvoir, Virginia, to ensure that the Panel was adequately staffed and supported by an institution knowledgeable in acquisition policy.

The legislation, enacted on November 5, 1990, established a two-year timeframe for preparation and completion of the report. To ensure that valuable time was not lost, the statute required the DOD to establish the Panel by January 15, 1991.[35] The statute called for the Panel to submit its recommendations to the Under Secretary of Defense for Acquisition not later than December 15, 1992, and for the Under Secretary to transmit the report and any accompanying comments to Congress by January 15, 1993.[36] The timing was designed to provide the Administration and the Congress with a report, at the outset of the 103d Congress, to provide a solid foundation for consideration of acquisition reform during that Congress.

Despite this strong showing of congressional support for acquisition streamlining, the Executive Branch initially appeared indifferent to the opportunity for comprehensive acquisition reform. Month after month passed without any appointments to the Panel. On a bipartisan basis I joined with Senator Dan Coats—who had become The Ranking Minority Member of our Subcommittee—in urging the Administration to promptly establish the Panel. The months continued to slip by, however, without any appointments until we raised the public visibility of the issue at the hearing on the nomination of Donald Yockey to be the Under Secretary of Defense for Acquisition.[37] Mr. Yockey acknowledged that "we have been delinquent in establishing that entity."[38] The DOD did not constitute the Panel until September 1991. Consequently, the Panel began its work nine months behind schedule.

Fortunately, the DOD appointed a distinguished thirteen-member panel, headed by Rear Admiral William L. Vincent, who was then Commandant of the Defense Systems Management College. Seven of the members were from the public sector, including Army

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[33]*Id.* at 194.

[34]Pub. L. No. 510, *supra* note 26, § 800(a).

[35]*Id.*

[36]*Id.* § 800(d).

[37]*Nominations Before the Senate Comm. on Armed Services*, 102d Cong., 1st Sess. 151 (1991).

[38]*Id.*

Deputy General Counsel Tony Gamboa, who is well-known to The Judge Advocate General's School as an expert on procurement law. In addition, six of the appointed individuals were from the private sector, including leaders of academia and the bar—such as Tom Madden, who will be speaking to you this afternoon. Bill Vincent also assembled an outstanding support staff from the Defense Systems Management College and the military departments. The Panel's efforts were aided immeasurably by the analytical work that Colleen Preston had initiated in her capacity as General Counsel of the House Armed Services Committee.

Once established, the Panel approached its task with diligence and enthusiasm. To underscore the continuing congressional interest and support for the Panel's work, the Defense Industry and Technology Subcommittee held an oversight hearing in June 1992, during which we received testimony from members of the Panel on the status of their efforts.[39]

The Panel faced an enormous challenge—to conduct an in-depth analysis of the entire body of acquisition laws and propose a new set of laws—all within a year's time. They more than met that challenge by producing an 1800-page report that reviewed more than 600 procurement laws and made specific proposals to amend or repeal nearly 300 laws.[40]

Regardless of whether one agrees with each of the Panel's recommendations, I believe there is general recognition that they fulfilled their primary role by setting forth the key issues for acquisition reform and providing a clear and comprehensive vehicle for legislative discussion and debate.

The statutory changes recommended by the Advisory Panel were detailed and complex. The underlying issues, however, involved the foundations of the acquisition process—auditing practices, oversight activities, competition in contracting, paperwork reduction, integration of the government and commercial sectors, and strengthening the technology and industrial base.

## V. Activities During the First Session of the 103d Congress

The Armed Services Committee conducted a thorough review of the Panel's recommendations with a view toward a comprehen-

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[39] *Department of Defense Authorization for Appropriations for Fiscal Year 1992 and the Future Years Defense Program: Hearings on S. 3114 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 102d Cong., 2d Sess., pt. 5, at 469-71, 519-29 (1992).

[40] DEP'T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION LAW: REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION LAWS (Jan. 1993).

sive overhaul of the acquisition laws. We began this effort during the spring of 1993 with two hearings. At the first hearing, on March 10, 1993, the Panel provided the Committee with a detailed presentation of its recommendations. At our second hearing, on June 28, 1993, we received testimony on the DOD's acquisition reform agenda from Colleen Preston, who was appointed to the new position of Deputy Under Secretary of Defense for Acquisition Reform.

In addition, in other hearings before the Armed Services Committee, Secretary Aspin,[41] then-Deputy Secretary Perry,[42] and then-Under Secretary Deutch[43] consistently emphasized the high priority that the Clinton Administration had assigned to acquisition reform. The Administration's commitment was more than rhetorical. Steven Kelman, the new Administrator of the Office of Federal Procurement Policy, and Colleen Preston both gave priority attention to the development of comments and proposals on acquisition streamlining measures.

The Administration's commitment was essential. Enactment of a comprehensive acquisition reform bill required strong leadership from the White House to unify the Executive Branch and to address the diverse concerns that would be raised both among executive agencies and in the numerous congressional committees having an interest in acquisition policy.

The Section 800 Panel's Report engendered strong bipartisan support within the Armed Services Committee. Our Committee had concluded that the post-Cold War defense build-down presented particularly difficult challenges in terms of maintaining an adequate industrial and technology base. The Committee concluded that this challenge could best be met by minimizing the nation's dependence on defense-unique industries by encouraging the development and utilization of dual-use products and processes that both the government and commercial sectors can use.

Our Committee recognized that the interest in acquisition policy in Congress extended beyond the Armed Services Committee, and that we would need to develop broad, bipartisan support before we could obtain congressional approval for comprehensive reform. We determined that we should enlist the participation of our sister committees in the acquisition arena—Governmental Affairs and Small Business—in the process. We then would develop a bill, pro-

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[41] *E.g.*, *Department of Defense Authorization for Appropriations for Fiscal Year 1994 and the Future Years Defense Program: Hearings on S. 1298 Before the Senate Comm. on Armed Services*, 103d Cong., 1st Sess., pt. 1, at 36 (1993).

[42] *E.g.*, *id.* at 782-84.

[43] *E.g.*, *id.*, pt. 5, at 68-70.

vide ample opportunity for the public to review the bill, and conduct detailed hearings prior to marking up legislation in committee.

A number of Senators participated actively in this effort, including Senators Nunn and Thurmond as Chairman and Ranking Minority Member of the Armed Services Committee, and myself and Senator Smith, as Chairman and Ranking Minority Member of the Defense Industry and Technology Subcommittee. We had the support of Chairman Glenn of the Governmental Affairs Committee, and his Ranking Republican Member Senator Roth, as well as Senator Levin of the Government Management Subcommittee and his Ranking Republican Member, Senator Cohen. From the Small Business Committee, Chairman Bumpers and the Ranking Republican Member, Senator Pressler, also participated.

These Senators established a staff working group, which undertook a detailed line-by-line review of the Section 800 Report during the spring and summer of 1993. There was even a connection with The Judge Advocate General's School. Andy Effron, who represented the Armed Services Committee on the working group along with Jon Etherton, and Greg Scott of the Legislative Counsel's office, who undertook the arduous task of drafting the bill, were both introduced to defense procurement law as members of the 80th Basic Class, and both received advanced course degrees from the School.

During the staff review, there was constant interchange between the staff and the Senators as we sought to develop a bill that could serve as a vehicle for enactment of a comprehensive reform of the acquisition laws. The result was a draft that formed the basis for Senate Bill 1587, which was introduced on October 26, 1993.

In a parallel development, the Clinton Administration was reviewing many of the same issues as part of Vice President Gore's National Performance Review—popularly known as "Reinventing Government." The Vice President's report endorsed many of the Section 800 reforms.

At a White House ceremony on October 26, 1993, the President and Vice President specifically endorsed our bill as the vehicle for their reform efforts. One of the key results of the Administration's strong commitment was an equally strong commitment by the leadership of the House Armed Services and Government Operations Committee to join in the reform effort.

By the end of the first session of the 103d Congress, we had established a solid foundation, but we still needed to complete the challenging task of persuading the Congress as a whole—through

hearings and debates—that we should enact a major acquisition reform bill.

## VI. Activities in the Second Session of the 103d Congress

At the February 2, 1994, hearing on William Perry's nomination to be Secretary of Defense, Senator Nunn announced that our Committee would begin joint hearings with the Governmental Affairs Committee, and that we anticipated action on an acquisition reform bill during the spring. There were parallel efforts in the House, which gave some cause for optimism.

The Governmental Affairs and Armed Services Committees held three joint hearings in the spring of 1994, during which we received testimony from representatives of the Administration, the oversight community, and diverse segments of the private sector, including major contractors, commercial companies, and small businesses.[44]

The Governmental Affairs and Armed Services Committees each marked up the bill on April 26, 1994. The Governmental Affairs Committee reported its bill to the Senate on May 11,[45] and the Armed Services Committee submitted its report on May 12.[46] On June 8, the Senate passed Senate Bill 1587 with relatively few amendments, and the House passed a companion bill on June 27.[47] Although the general philosophy of both bills was compatible, numerous differences arose that had to be resolved in conference. With strong bipartisan support for the basic philosophy of the bill, the differences were overcome. A conference report was filed,[48] approved by both Houses,[49] and signed into law by the President on October 13, 1994.[50]

The relatively smooth progress of the bill through committee markups, floor debates, and conference was the result of a very intense effort on the part of members and staff to address issues

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[44]*Federal Acquisition Streamlining Act of 1993: Joint Hearings on S. 1587 Before the Senate Comm. on Governmental Affairs and the Senate Comm. on Armed Services*, 103d Cong., 2d Sess. (1994).

[45]S. REP. NO. 258, 103d Cong., 2d Sess. (1994).

[46]S. REP. NO. 259, 103d Cong., 2d Sess. (1994).

[47]H.R. 2238, 103d Cong., 2d Sess. (1994). *See* H.R. REP. NO. 545, 103d Cong., 2d Sess., pts. 1, 2 (1994).

[48]H.R. REP. NO. 712, 103d Cong., 2d Sess. (1994).

[49]The Senate agreed to the conference report on August 23 and the House agreed to the conference report on September 23.

[50]The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

raised by numerous Senators and Representatives in a manner that responded positively to their concerns without undermining the essential streamlining features of the bill. Our efforts were aided immeasurably by the detailed information provided by Steve Kelman at the Office of Federal Procurement Policy and Colleen Preston at the DOD, and their staffs, often on very short notice.

## VII. Key Features of the Federal Acquisition Streamlining Act of 1994

I know that you will be discussing the details of this legislation throughout your conference, so I will simply note four key highlights of the legislation at this time.

*Streamlining*: The Act reduces paperwork burdens through revision and consolidation of over 225 provisions of law to eliminate redundancy, provide consistency, and facilitate implementation.

*Electronic Commerce Procedures*: The Act requires the federal government to transform the acquisition system from a cumbersome process driven by paperwork to a computer-based system readily accessible to government and private sector users, including small businesses.

*Simplified Acquisition Threshold*: The Act establishes a "simplified acquisition threshold" of $100,000 to streamline the process of making small purchases and to reduce the amount of staff time needed for such purchases, resulting in substantial savings for the government.

*Commercial Items*: The Act facilitates the acquisition of commercial end-items and components—including commercial products that are modified to meet government needs.

The Act authorizes an implementation period of up to one year for most provisions. This affords you—the experts in acquisition policy—with a real opportunity to shape the details of the implementing rules. The implementation period is as important—if not more so—than the legislation itself. The bill is based on the philosophy that the content of the acquisition laws should be minimized, giving the Executive Branch substantial discretion in framing implementing rules. With few exceptions, those rules can be as detailed or as complex as the Executive Branch desires. By the end of the implementing period, we could have a new set of acquisition rules that significantly streamlines the acquisition process; or, we could find ourselves with rules that simply mirror the old, highly regulated system.

The choice is now up to those of you in the Executive Branch. Congress has voted for streamlining. I urge you to take maximum advantage of this extraordinary opportunity.

## VIII. The Future

I know that many of you are interested in what the future holds. As a result of the November election, I will still have an opportunity to participate in the process, but the formal leadership will pass to the other side of the aisle. Fortunately, the issue of streamlining has enjoyed strong bipartisan support, and I am optimistic that my Republican colleagues will continue their commitment.

I see three areas of concern for the future. First, we have the unfinished agenda of the Section 800 Panel. Although we enacted most of the Panel's recommendations, a number of its recommendations on which we did not take significant action still exist. These include defense trade, procurement ethics, protest process reform, and computer acquisition policies. There were also a number of so-called socioeconomic laws which we did not include in the list of authorized waivers for commercial acquisitions and purchases below the simplified acquisition threshold.

Second, the Administration is likely to identify additional statutes that should be modified or repealed as a result of its ongoing acquisition reform and pilot program activities. In this regard, each of you has an important role to play. You are in the field and work with these statutes on a daily basis, so you are in the best position to identify and recommend statutory changes.

Finally, we will continue to face proposals to provide more rather than less regulation. The taxpayers want, and deserve, to have government funds spent wisely. While most government officials and contractors share that concern, there always will be exceptions. In some cases, additional legislation will be necessary. It is my hope, however, that the experience of the 1980s will caution us against applying a legislative or regulatory solution to every problem, and that we will limit additional requirements to those areas where a generalized problem truly exists.

## IX. Lessons for the Future

Finally, I would like to make a few observations about the lessons that we might derive from this legislative history.

First, ideas matter. Thoughtful presentations such as Mr. Cavanagh's Cuneo Lecture can have a decided impact on policymakers both in the Legislative and Executive Branches. Conferences—such as this symposium—that encourage the development and exchange of new ideas are of critical importance to the continuous improvement of the law.

Second, details matter. By the late 1980s, we had no shortage of reports—such as the Packard Commission's Report—recommending concepts such as legislative streamlining, simplified small purchases, and greater use of commercial items. What we lacked was a detailed set of legislative proposals to implement those objectives—a gap that the Section 800 Panel's Report filled.

Third, analysis matters. Although there was strong support within the Armed Services Committee for streamlining, there was a great deal of skepticism among our sister committees. We could not rely simply on generalities—such as broad references to paperwork burdens—to support changing a wide variety of specific laws. We needed a detailed analysis of the history, purposes, and problems presented by specific statutes. Again, the Section 800 Panel's Report filled that need.

Fourth, bipartisanship matters. When you undertake to change a large number of existing statutes, you are likely to face opposition from those who have supported those laws. In this circumstance, bipartisan support is crucial to overcome opposition—particularly in the Senate, where the rules provide great leverage to any determined minority. The strong bipartisan tradition of the Armed Services Committee established the foundation for success.

Finally, Administration support matters. At the outset of the process, there was a great deal of skepticism among our sister committees and in the House about the need to overhaul so many statutes. Although the Section 800 Panel's Report provided the intellectual and analytical framework for our legislation, it would have been a much more difficult process had we not had the active engagement of the Administration at the highest levels. The continuing support of President Clinton, and the active day-to-day involvement of Vice President Gore, was invaluable.

## X. Conclusion

In closing, I would like to thank you again for the honor of allowing me to deliver the Cuneo Lecture. We on the Armed Services Committee are proud of the work of The Army Judge Advocate

General's School, as well as the other elements of our higher military education system, and I wish you the best for a successful symposium. In the time that remains, I would be pleased to address questions that you might have about the process that resulted in the Federal Acquisition Streamlining Act.

# CORROBORATION RESURRECTED: THE MILITARY RESPONSE TO *IDAHO V. WRIGHT*

MAJOR TIMOTHY W. MURPHY*

## I. Introduction

The legal development of the hearsay rules is closely intertwined with the parallel development of the Sixth Amendment's Confrontation Clause. Courts and scholars consistently have noted the similarity between the respective "core values" of each: the production of reliable evidence.[1]

The United States Supreme Court has long recognized that the pursuit of justice at times requires the admission of out-of-court declarations, notwithstanding the wording of the Confrontation Clause.[2] In *California v. Green*,[3] the Court concluded that the Confrontation Clause is satisfied if a witness is produced at trial, without regard to whether that witness's out-of-court statement is admissible under the rules of evidence.[4] In situations where the witness is "unavailable," either physically or through some defect in his or her testimony, the Confrontation Clause is satisfied if the statement bears sufficient "indicia of reliability."

In *Ohio v. Roberts*,[5] the Court declared that a presumption of reliability is inferred automatically when the statement falls within a "firmly rooted exception." Otherwise, the proponent must demon-

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[1]Bourjaily v. United States, 483 U.S. 171 (1987); Haddad, *The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?* 81 J. CRIM. L. 77, 83 n.36 (1990); Schwab, Idaho v. Wright: *Is It a Step in the Wrong Direction in Determining the Reliability of Hearsay Statements for the Confrontation Clause?* 53 OHIO ST. L.J. 663, 664-65 (1992).

[2]*See, e.g.*, Ross, *Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 MIL. L. REV. 31, 35 (1987). The relevant provision of the Sixth Amendment states: In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. CONST. amend. VI.

[3]399 U.S. 149 (1970).

[4]*Id.*

[5]448 U.S. 56 (1980).

strate that the statement has "particularized guarantees of trustworthiness."[6]

In *Idaho v. Wright*,[7] the Supreme Court addressed the relationship between the Confrontation Clause and the residual hearsay exception. One particular aspect of that opinion—the prohibition against using corroborative evidence to establish a statement's trustworthiness—has been criticized as unworkable and inconsistent with the Court's prior Sixth Amendment decisions.[8]

Military courts, in particular, have aggressively sought to limit *Wright's* application and resurrect the use of corroborative evidence in assessing the admissibility of residual hearsay. Military court decisions have focused on two questions: (1) Does the *Wright* limitation apply when no confrontation issue exists?; and (2) Does *Wright* apply when the corroborative evidence is the accused's confession?

This article will discuss and assess the efforts by military courts to limit *Wright's* application in light of the legal development of the residual hearsay exceptions and the Confrontation Clause.

## II. *Idaho v. Wright* and Corroboration

In *Wright*, the defendant objected to the admission of a physician's testimony, introduced pursuant to Idaho's residual hearsay exception, in which the physician described his conversations with a three-year-old victim concerning the child's allegations of sexual abuse. The three-year-old child did not testify at trial.[9] Relying on the Confrontation Clause, the Idaho Supreme Court concluded that the trial court's admission of the testimony violated certain procedural requirements mandated by the United States Constitution.[10]

On appeal, the United States Supreme Court, in an opinion by Justice O'Connor, affirmed the decision of the Idaho Supreme Court, but rejected that court's interpretation of the Confrontation Clause. Reaffirming its rationale in *Roberts*, the Court held that the Idaho residual hearsay exception was not "firmly rooted." Accordingly, the proponent of the statement was required to demonstrate that the statement bore "particularized guarantees of trustworthiness."[11]

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[6] *Id.* at 57, 66.

[7] 497 U.S. 805 (1990).

[8] Id. at 827-35 (Kennedy, J., dissenting).

[9] Id. at 809-11.

[10] Idaho v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989).

[11] *Wright*, 497 U.S. at 813-18.

The Court concluded that these "guarantees" must be "drawn from the totality of the circumstances that surround the making of the statement." The Court specifically excluded consideration of independent evidence corroborating the statement from its definition of "circumstances" indicating trustworthiness.[12]

This view, the Court argued, was consistent with the philosophy underlying the hearsay rules. Relying on Professor Wigmore's commentaries, the Court stated that while hearsay generally is inadmissible because of its unreliability, in certain circumstances, out-of-court declarations are "free enough from inaccuracy and untrustworthiness" to be admissible. The "test" to determine the evidentiary accuracy of a particular out-of-court statement is whether the cross-examination of the declarant would have been useful in determining the statement's veracity.[13]

The Court concluded that the "trustworthiness" of the specific hearsay exceptions was derived solely from the circumstances surrounding the making of the hearsay statement, rather than corroborating evidence indicating its veracity. Therefore, the "particularized guarantees of trustworthiness" necessary for the admission of a residual hearsay statement under the Confrontation Clause should likewise be drawn only from facts and circumstances surrounding its utterance.[14]

Reviewing its previous Confrontation Clause decisions, the Court sought to distinguish favorable references to the use of corroboration as a factor in assessing "trustworthiness" contained in those cases. The Court concluded that *Dutton v. Evans*,[15] in which Justice Stewart specifically considered the collateral testimony of a witness in assessing the reliability of a hearsay statement, "more appropriately indicates that any error in admitting the statement might be harmless."[16] In response to the assertion in *Cruz v. New York*[17] that the "interlocking" nature of an accused's confession with a hearsay statement "pertains to its reliability" as a basis for determining its admission, the Court noted that *Cruz* is "silent" about whether such a hearsay statement actually would be admissible.[18] Finally, ignoring

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[12] *Id.* at 819-20.

[13] *Id.* (citing 5 J. WIGMORE, EVIDENCE, § 1420 (Chadbourn rev. ed. 1974)).

[14] *Id.* The Supreme Court specifically discussed the "excited utterance" exception (FRE 803(2)), the "dying declaration" exception (FRE 804(b)(2)), and the "medical treatment" exception (FRE 803(4)).

[15] 400 U.S. 74 (1970).

[16] *Wright*, 497 U.S. at 823.

[17] 481 U.S. 186 (1987).

[18] *Wright*, 497 U.S. at 823. In a footnote, the majority contends that the dissenters' reliance on the language in Cruz is taken out of context, because the Supreme

language contained in Justice Brennan's majority opinion in *Lee v. Illinois*[19] (admitting into evidence a codefendant's interlocking hearsay statement when it is "thoroughly substantiated by the defendant's own statement"), the Court instead concluded that *Lee* totally rejected the "interlock" theory of determining reliability.[20]

## III. Criticisms of *Idaho v. Wright*

The rationale behind *Wright's* exclusion of corroboration can be criticized in two respects. First, the *Wright* majority grafted a rejected interpretation of the residual hearsay exception onto Confrontation Clause analysis. Second, the *Wright* majority ignored the Supreme Court's movement toward a "reliability standard" in assessing the admissibility of hearsay statements under the Confrontation Clause, focusing instead on a mechanical application of a standard centered on the utility of cross-examination in examining the admissibility of a particular out-of-court statement.

During the legislative process that resulted in the codification of the *Federal Rules of Evidence*, hearsay underwent a dramatic restriction. Initially, the advisory committee established by Congress to draft the rules suggested a broad hearsay exception.[21] In later drafts, the committee transformed twenty-three proposed, nonexclusive "illustrations" into the specific codified "exceptions" now found in the rules. Not wishing to totally eliminate the judicial development of hearsay, Congress approved the residual exceptions.[22]

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Court in that case was dealing with the validity of a limiting instruction in a joint trial involving the "interlocking" confessions of codefendants. Although *Cruz* did not specifically address the issue of whether an "interlocking" confession of a coconspirator would be admissible against the other had separate trials occurred, the opinion makes a clear distinction between the "harmfullness" of such evidence in joint trials, versus the "reliability" of that evidence for Confrontation Clause purposes. *See id.* at 832 (Kennedy, J. dissenting).

[19]476 U.S. 530 (1986). In his dissent in *Wright*, Justice Kennedy highlights the majority's misinterpretation of *Lee* by noting that, notwithstanding their differing conclusions, the majority of the Supreme Court agreed that corroboration was a legitimate factor in the analysis of that case. *Wright's* misinterpretation of these precedents forms the underlying rationale for dismissing its discussion of the continued viability of the "interlock" theory. *See Wright*, 497 U.S. at 831-32; *see also id.* at n.57-61 and accompanying text.

[20] *Wright*, 497 U.S. at 824.

[21]The proposed rule stated: A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy. 46 F.R.D. 161 (1969).

[22]For excellent summaries of the legislative history of the creation of the FRE and the Residual Hearsay Exceptions, *see* Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982); Rand, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L. J. 873 (1992).

Some legal commentators, perceiving that an unrestrained development of the residual hearsay exceptions would lead to a "swallowing up" of the rule against hearsay, advocated a strict interpretation of the phrase "equivalent circumstantial guarantees of trustworthiness" found in the text of the rules. These commentators concluded that the "reliability" of the specific exceptions to hearsay was based on the facts and circumstances surrounding the making of the statement. Accordingly, "equivalency" required that the reliability of a statement offered under the residual hearsay exception be gleaned only from facts and circumstances surrounding its making. These commentators concluded that any assessment of corroborative evidence to establish the underlying truth of the statement, or the presence of the declarant at trial, was irrelevant for purposes of evaluating the statement when made, and therefore should not be a factor in determining admissibility.[23]

As *Wright's* reliance on Professor Wigmore suggests, this viewpoint defines the "reliability" of an out-of-court declaration solely by the utility of cross-examination in that particular circumstance. One would focus only on facts and circumstances surrounding the utterance of a statement, because cross-examination would occur at that time.

Notwithstanding the popularity of these limitations with legal commentators, the majority of federal courts, including the United States Court of Appeals for the Armed Forces (CAAF),[24] adopted a more flexible approach toward the residual hearsay exceptions that permitted an evaluation of corroboration in assessing a statement's "trustworthiness."[25]

Proponents of this more flexible approach argue that the trustworthiness of all out-of-court statements, even those admitted under "firmly rooted" exceptions, is weighed to some extent in the context of other evidence.[26] They also question the weight and interpretation given to the word "equivalent" by the strict constructionists, contending that the specific exceptions are more a product of historical legal development than a representation of inherently

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[23]*See, e.g.*, Sonenschein, *supra* note 22, at 876-84; Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431 (1986).

[24]Formerly the United States Court of Military Appeals (COMA). Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the COMA as the United States Court of Appeals for the Armed Forces (CAAF). *See* Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This article will refer to the court by its new name.

[25]Rand, *supra* note 22, at 897.

[26]Hudson, *Using Residual Hearsay*, ARMY LAW., Nov. 1993, at 9.

reliable evidence.[27] Factors, including corroborative evidence, which shed light on the veracity of a particular out-of-court declaration are viewed as consistent with the underlying purpose of the rules of evidence to produce trustworthy evidence.[28]

Additionally, the flexible approach is viewed as consistent with the shift in the Supreme Court's analysis of the Confrontation Clause away from a focus on the validity of various substitutes for cross-examination toward a discussion of the trustworthiness and accuracy of the criminal process.[29] Given this unity of purpose between the hearsay rules and the Confrontation Clause, and the similarity in language between the residual hearsay exception and the constitutional criteria established in the Supreme Court's decisions, some courts, including the CAAF, "constitutionalized" aspects of the residual hearsay exceptions. In particular, the criteria used to establish the "equivalent circumstantial guarantees of trustworthiness" under the residual exception was equated with the "particularized guarantees of trustworthiness" required by the Constitution.[30]

That the majority in *Wright* would look to evidentiary interpretations of the residual hearsay rule in an attempt to craft a constitutional approach to the rule is not surprising. However, the opinion's adoption of the minority approach is "puzzling." Its citation to *Huff v. White Motor Corporation*,[31] a wrongful death case, is significant because it confirmed that the Court was adopting the minority view, but ironic because the United States Court of Appeals for the Seventh Circuit had rejected *Huff* before *Wright*.[32]

As previously noted, rather than citing precedent to support its conclusion, the *Wright* majority distinguished or ignored language contained in the Court's prior Sixth Amendment cases. The opinion focused to such an extent on the utility of cross-examination that it seemed to concede that the actual truth of the out-of-court declaration was irrelevant.[33] As Justice Kennedy pointed out in his dissent, this slavish devotion to form over substance undermines the Confrontation Clause's underlying purpose of producing reliable evidence.[34]

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[27]*See, e.g.*, Rand, *supra* note 22, at 878-81; Jonakait, *supra* note 23, at 445.

[28]Schwab, *supra* note 1, at 678-80.

[29]*See id.* at 666; Haddad, *supra* note 1, at 83.

[30]United States v. Hines, 23 M.J. 125, 135 (C.M.A. 1986); *see also* Imwinkelreid, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521 (1992).

[31]609 F.2d 286 (7th Cir. 1979).

[32]Rand, *supra* note 22, at 897 n.112.

[33]Idaho v. Wright, 497 U.S. 805, 822-23 (1990).

[34]*Id.* at 829 (Kennedy, J., dissenting).

Some commentators have opined that *Wright* may be short lived.[35] Certainly, its singular focus on cross-examination already appears to be an anomaly, given the Supreme Court's subsequent reaffirmation that the underlying purpose of the Confrontation Clause is to promote the integrity of the fact-finding process.[36]

## IV. Military Limitations on the Rationale of *Idaho v. Wright*

Judge Crawford's concurring opinion in *United States v. Clark*[37] contains the first suggestion that the CAAF would consider limiting *Wright's* application. In *Clark*, the CAAF admitted into evidence, pursuant to Military Rule of Evidence (MRE) 804(b)(5), the statements made by a five-year-old sexual abuse victim to her babysitter. The victim did not testify at trial, but her unavailability was determined by the military judge to be the fault of the accused.[38] In her concurring opinion upholding the conviction, Judge Crawford stated that, in her view, the limitations on considering corroborating evidence mentioned in *Wright* did not apply in situations where the Confrontation Clause was not at issue.[39]

In *United States v. Lyons,*[40] the prosecution successfully admitted into evidence, pursuant to MRE 803(24), the videotaped interview of a seventeen-year-old deaf, mute, mentally retarded female, in which she "reenacted" certain sexual activity between herself and the accused. The military judge concluded that the videotape was "circumstantially trustworthy" and "corroborated by extrinsic circumstances." The government used the videotape to augment the witness's in-court testimony—which had been "ineffective"—showing it to the court members immediately following the prosecutor's direct examination of the witness. Afterwards, defense counsel cross-examined the witness regarding both her direct testimony and the contents of the videotape.[41]

In addressing the military judge's apparent consideration of corroborating evidence, the Army Court of Criminal Appeals (ACCA)[42] referenced *Wright's* limiting language and found that the

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[35]Hudson, *supra* note 26, at 9; Schwab, *supra* note 1, at 680.

[36]White v. Illinois, 502 U.S. 346 (1992).

[37]35 M.J. 98 (C.M.A. 1992).

[38]*Id.* at 102.

[39]*Id.* at 107 (Crawford, J. concurring).

[40]36 M.J. 183 (C.M.A. 1992).

[41]*Id.* at 184-85.

[42]Formerly the United States Army Court of Military Review (ACMR). Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the ACMR, as well as the Navy-

judge's consideration was harmless error. The ACCA also concluded that no Confrontation Clause issue existed.[43]

In four separate opinions, the CAAF affirmed the decision of the ACCA. Judge Wiss, joined by Judge Gierke, analyzed the videotape under the Confrontation Clause and concluded that sufficient "indicia of reliability" surrounded its making to permit its admission. This opinion did not discuss corroboration.[44]

Chief Judge Sullivan, Judge Cox, and Judge Crawford, in separate opinions, concluded that the Confrontation Clause was not at issue because the declarant testified at trial. In response to the argument that the witness's condition limited the effectiveness of the defense cross-examination, Judge Crawford noted that the Confrontation Clause requires only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish."[45] Judge Crawford again argued that the restrictions on assessing corroboration outlined in *Wright* did not apply to non-Confrontation Clause cases. She emphasized that analysis of the admissibility of hearsay statements under the Confrontation Clause and residual exceptions is different, notwithstanding the similarity in language.[46] Judge Cox seemed to agree with Judge Crawford's position, although he indicated that the question remained open.[47]

Taking its lead from Judge Crawford, the Navy-Marine Court of Criminal Appeals (NMCCA) further "de-coupled" the residual exception from the Confrontation Clause in *United States v. Martindale*.[48] In *Martindale*, the prosecution offered into evidence the statement of the accused's twelve-year-old son, in which the child described various allegations of sexual abuse. The witness testified at an Article 39(a) session held to determine the admissibility of the statement under the residual hearsay exceptions. At the hearing, the victim testified that while he recalled making the statement, he "either could not or would not" recall specific acts of abuse.[49]

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Marine Court of Military Review (NMCMR) and the Air Force Court of Military Review (AFCMR), as the United States Army Court of Criminal Appeals (ACCA), the United States Navy-Marine Court of Criminal Appeals (NMCCA), and the United States Air Force Court of Criminal Appeals (AFCCA), respectively. *See* Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This article will refer to these courts by their new names.

[43] United States v. Lyons, 33 M.J. 543 (A.C.M.R. 1991).

[44] *Lyons*, 36 M.J. at 186-88.

[45] *Id.* at 188. (Crawford, J., concurring) (citing United States v. Owens, 484 U.S. 554, 559 (1988), quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)).

[46] *Id.* at 188-89.

[47] *Id.* at 188 (Cox, J., concurring).

[48] United States v. Martindale, 36 M.J. 870 (N.M.C.M.R. 1993).

[49] *Id.* at 874-75.

The military judge admitted the statement under the provisions of MRE 803(24) and MRE 804(b)(5), after concluding that the child was "unavailable" as a witness within the meaning of MRE 804(a)(2) and MRE 804(a)(3). After his ruling, the military judge offered the defense the opportunity to question the child in front of the court members to "preserve (the accused's) right to confront and cross-examine." The defense specifically declined this offer.[50]

In its opinion, the NMCCA concluded that the child was "available" within the meaning of the Confrontation Clause because the defense had been offered an opportunity to cross-examine the witness. Witness availability for purposes of MRE 804(b)(5) is distinct from availability under the Confrontation Clause. Accordingly, the "finer points" of Confrontation Clause analysis defined in *Wright* did not apply. The NMCCA then analyzed the admissibility of the child's statement using the factors outlined in *United States v. Hines*,[51] concluding that the statements bore "equivalent guarantees of trustworthiness," in part, because of its interlocking nature with the accused's confession.[52]

In *United States v. Hansen*,[53] the Air Force Court of Criminal Appeals (AFCCA) attempted to distinguish *Wright* factually. In *Hansen*, the prosecution successfully introduced the victim's statements to criminal investigators under the provisions of MRE 803(24). Although the victim testified at trial, she either recanted, or stated that she did not recall, the allegations of sexual abuse against her father contained in her statements.[54] The military judge applied the standards set forth in *Hines*—including the "interlocking nature" of the statement with the accused's confession—in his ruling.[55]

The AFCCA concluded that, because the victim testified, no Confrontation Clause issue arose. Unlike the *Lyons-Martindale* approach, however, the AFCCA accepted the proposition that *Wright* applied to the interpretation of the residual exceptions, but argued that the case was factually distinguishable.[56] Addressing the continued legitimacy of the "interlock" theory, the AFCCA criticized *Wright's* interpretation of *Lee v. Illinois*, and, without explanation, suggested that the use of the "interlock" analysis involving a hearsay statement and an accused's admission is distinguishable

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[50] *Id.*

[51] 23 M.J. 125, 135 (C.M.A. 1986).

[52] *Martindale*, 36 M.J. at 875-81.

[53] 36 M.J. 599 (A.F.C.M.R. 1992).

[54] *Id.* at 604.

[55] *Id.* at 606.

[56] *Id.* at 606-07.

from an "interlock" analysis involving a hearsay statement and that of a coconspirator.[57]

One could argue that because the facts in *Wright* did not include an "interlocking statement," its interpretation of its precedents on that issue are simply dicta. As has been noted, *Hansen* is correct in its assertion that *Wright* misconstrued its precedents dealing with the "interlock" theory.[58] The Supreme Court's discussion of the "interlock" approach in *Lee* concluded that a coconspirators' statement to police authorities, even if incriminating, may be motivated by self-interest and a desire to shift fault to another, and therefore is inherently suspicious.[59] The Supreme Court never indicated in *Lee*, nor even in *Wright*, that corroborative evidence is unreliable per se. The underlying concern with the reliability of the corroborative evidence is lacking when it comes from an accused's confession.[60]

Whatever the logic and merits of the *Hansen* approach, it is difficult to reconcile it with *Wright's* sweeping language condemning corroboration in any form. The legal viability of the *Hansen* analysis was short lived,[61] given the CAAF's decision in *United States v. McGrath*.[62] In *McGrath*, the CAAF held that when the Confrontation Clause is not at issue, corroborative evidence may be used to assess the "equivalent circumstantial guarantees of trustworthiness required by the residual exceptions."

*McGrath* involved an accused who confessed to a series of sexual offenses with his fourteen-year-old natural daughter. At a pretrial Article 39(a) hearing, the defense moved to suppress the confession, contending that it lacked sufficient corroboration for admission. In response, the government called the victim as a witness. The victim refused to answer questions, and stated that she was present at trial only because she had been forced to comply with a subpoena issued by a German court. In response to a series of questions posed to her by both the prosecutor and the military judge, the victim stated that her motivation for refusing to answer questions was based on her belief that she could prevent her father's imprisonment. Prior to trial, the victim had detailed her father's abuse to Air Force investigators in two written, sworn statements.

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[57] *Id.* at 607 n.6.

[58] *See supra* notes 13-18 and accompanying text.

[59] Lee v. Illinois, 476 U.S. 530, 544-45 (1986).

[60] SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 622 (2d ed. 1986).

[61] United States v. Grant, 38 M.J. 684, 693 (A.F.C.M.R. 1993). In *Grant*, the author of *Hansen* declined to rely on it as precedent or address the issue of whether *Wright* applies to non-Confrontation cases.

[62] 39 M.J. 158 (C.M.A. 1994).

At trial, she affirmed that she had not lied when giving those statements.[63]

At the end of the victim's testimony, the military judge offered the defense an opportunity to cross-examine the victim, which the defense declined. The military judge then admitted, over defense objection, the two written statements under the provisions of MRE 804(b)(5), taking into account the accused's corroborating confession in assessing the statements' admissibility.[64]

In an opinion by Judge Cox, joined by Judges Crawford and Gierke, the CAAF noted that the underlying purpose of the Confrontation Clause is to literally provide an accused with physical confrontation, thereby "securing for the (defendant) the opportunity to cross-examine." Once this "benchmark" standard has been satisfied, the constitutional requirement is complete, without regard to a detailed analysis of the cross-examination's practical effectiveness.[65]

Turning to the admissibility of the two statements, the CAAF adopted the approach first suggested by Judge Crawford in *Lyons*, and held that *Wright's* limitations did not apply because the defense had an opportunity to cross-examine the declarant at trial. The CAAF concluded that the limitations were inapplicable to "pure rule-of-evidence" questions, which are designed to foster admission of reliable evidence. Additionally, the CAAF specifically noted that the evidentiary analysis of hearsay provided by Professor Wigmore, on which *Wright's* analysis is grounded, itself presupposed that the opportunity for cross-examination at trial would not occur. Accordingly, that analysis, although evidentiary based, was not an impediment, in cases like *McGrath*, to interpreting the residual hearsay rule so as to permit the consideration of corroborating evidence.[66]

In his dissent, Chief Judge Sullivan suggested that the victim's refusal to meaningfully answer the questions of the prosecutor and military judge thwarted any opportunity for cross-examination under the Sixth Amendment. In regard to *Wright's* applicability to the residual hearsay rules, the Chief Judge seemed to indicate that *Wright* "constitutionalized" the residual hearsay exceptions, making *Wright's* approach applicable even in those situations in which the Sixth Amendment is not at issue.[67] In a separate dissenting opin-

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[63] *Id.* at 159-61.

[64] *Id.*

[65] *Id.* at 162-63.

[66] *Id.* at 164-67.

[67] *Id.* at 169-72 (Sullivan, C.J., dissenting).

ion, Judge Wiss reiterated the pre-*Wright* minority interpretation focusing on the language of the residual exceptions.[68]

## V. Conclusion

If *Wright's* purpose in elevating the minority interpretation of the residual exceptions to Confrontation analysis was to effectuate a consistent approach to the two concepts, it has failed miserably. The distinction enunciated in the *McGrath* approach is grounded in the Supreme Court's consistent refusal to "constitutionalize" the rules of evidence, and, more importantly, the recognition that a witness's testimony at trial satisfies the Confrontation Clause. *Wright* reaffirmed these principles.[69]

As prosecutors increasingly call witnesses to the stand to meet confrontation requirements, it is likely that increased litigation regarding the "probative worth" of that confrontation will occur. One commentator has noted that the Supreme Court has been reluctant to delve into this kind of analysis because it dictates "case-by-case" review.[70] If this reluctance continues, *Wright's* practical effect on the consideration of extrinsic evidence likely will be increasingly limited to those few cases in which a declarant refuses to testify, cannot testify because of legal privilege, or is incompetent.

Critics of the *McGrath* approach view the disparate treatment of residual hearsay as improper and undesirable. Their arguments are basically a reiteration of the minority approach adopted by *Wright*, grounded in a utilitarian view of the admission of hearsay.[71] Nevertheless, the Supreme Court consistently has refused to equate the rules of evidence and the principles of the Confrontation Clause. In addition, most of these criticisms question the Court's analysis in *California v. Green*, a case that the Supreme Court's subsequent decisions, including *Wright*, have consistently upheld.[72] As the NMCCA noted in *Martindale*, the facts and legal analysis of *Wright* clearly make it a Confrontation Clause case, not an evidentiary interpretation case.[73] This reality contradicts Chief Judge Sullivan's con-

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[68]*Id.* (Wiss, J., dissenting).

[69]Idaho v. Wright, 497 U.S. 805, 814 (1990).

[70]Haddad, *supra* note 1, at 89-90. By analyzing the futility of defense cross-examination in *McGrath*, Chief Judge Sullivan's dissent seems to advocate just such a "case-by-case" approach. *See id.* at 89 n.62.

[71]*See supra* note 23 and accompanying text.

[72]Sonenschein, *supra* note 22, at 878-79.

[73]United States v. Martindale, 36 M.J. 870, 877 (N.M.C.M.R. 1993). In United States v. Martindale, 40 M.J. 348 (C.M.A. 1994), the CAAF affirmed the NMCCA by relying on *McGrath*.

tention that *Wright* "constitutionalized" the residual hearsay rules. There is nothing unprincipled or illogical about contending that *Wright* is inapplicable to non-Confrontation cases.

A second criticism focuses on the value of a hearsay statement if a declarant testifies. In his dissent in *West Virginia v. Edward, Charles L., Sr.*,[74] Justice Miller of the West Virginia Supreme Court argued that there is never an occasion when the residual exceptions should be used when a witness is available, because the hearsay statement would not meet the "most probative" requirement of West Virginia Rule of Evidence 803(24).[75] This argument fails to consider the practical realities of litigation. As the Supreme Court has perceptively recognized, in certain circumstances, an out-of-court statement may be more "reliable" than the testimony of a witness under oath.[76] Certainly, as a practical matter, the fact-finding process was advanced in *Lyons* by the admission of the videotape, notwithstanding the victim's live testimony.

The *McGrath* approach allows for the continued development of hearsay through the residual exceptions based on a "reliability" standard. By limiting the Wigmore evidentiary commentary to only those cases in which a declarant is not available for cross-examination, the CAAF has overcome the narrow, utilitarian approach advocated in *Wright* without compromising *Wright's* interpretation of the Confrontation Clause. The approach's greatest value is likely to be at a more practical level, where it gives litigators a continued opportunity to use corroborative evidence, especially in the form of "interlocking" statements, to gain the admissibility of reliable hearsay declarations. Finally, the analysis provides the United States Supreme Court an opportunity to revisit the corroboration issue and, at least to some extent, correct the errors made in *Wright* without overruling it outright.

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[74]183 W.Va. 641, 398 S.E.2d 123 (1990).

[75]The language of West Virginia Rules of Evidence 803(24) and 804(b)(5) is identical to the language in the rules' counterparts in the *Federal Rules of Evidence* and the Military Rules of Evidence. *See id.* at 669 (Miller, J., dissenting); *see also* Jonakait, *supra* note 23, at 458.

[76]United States v. Inadi, 475 U.S. 387 (1986).

# *BOOK REVIEWS*

# THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY*

REVIEWED BY MAJOR MARITZA S. RYAN**

A recent article in the "CyberSurfing" section of *The Washington Post* reported the appearance of an electronic message board entitled "Lawyer Jokes" on *America Online*.[1] A sampling from the information superhighway:

> A young lawyer found himself confronting St. Peter at the Pearly Gates. "How could you do this to me?", he shouted. "I'm only thirty-five!" St. Pete replied, "Sorry—we were looking at your billable hours and figured you had to be at least ninety!"
>
> Question: What's the difference between a vulture and a lawyer?
> Answer: Removable wingtips.
>
> Question: Why are lawyers buried twelve feet down?
> Answer: Because deep down they may be very good people.

One may be surprised to find—interspersed among the cruelly self-inflicted jokes posted by computer-literate attorneys—a good measure of introspection and, indeed, true sadness about the sullied reputation of the legal profession today. In his latest book, famed Washington lawyer Sol M. Linowitz takes on the truth behind the jests, trying to grasp exactly what ails the profession, how it got this way, and what can be done about it. In the end, his prescription is: "Counsellor, heal thyself!" By definition, traitors are those who have turned on their own, and the perpetrators of the "betrayal" in the book's title are none other than the members of the profession themselves. For all the public scorn, ridicule, and even contempt heaped on the legal profession by laymen, Mr. Linowitz's greatest indictment is of those lawyers who fail the public trust by greedily transforming his beloved "profession" into a profit-oriented "busi-

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*SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (Scribner's 1994); 273 pages (hardcover).

**Judge Advocate General's Corps, United States Army. Currently assigned as a Student, 43d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Formerly assigned as an Instructor, Department of Law, United States Military Academy, West Point, New York.

[1]Howard Kurtz, *Lawyers Subject to Writs of Wit*, WASH. POST, Sept. 1, 1994, at D-7.

ness." Although military lawyers may seem immune to many of the ills of civilian practice about which the author writes, our perceived value as judge advocates—the ability to both offer independent counsel and effectively advocate credible points of view—nevertheless is affected by a greater legal environment that, like it or not, reflects on our own professional standing. This alone makes the book a valuable investment of time and thought for judge advocates.

Mr. Linowitz possesses a diverse and impressive resume, having graduated from Cornell Law School in 1938 and practiced both in private firms as well as in the United States government. The sheer length of his practice—over fifty years—gives him a unique vantage point from which to observe the development—or in some ways, the decline—of the practice of law. His book is replete with the names of great legal minds, successful entrepreneurs, and government leaders with whom he has worked throughout his long career. He read for Elihu Root, helped founder Joseph C. Wilson begin the Xerox Corporation, and served as a peace negotiator and international emissary under President Carter. Although he admits that the "good old days" had their negative aspects (for example, the overt bigotry that kept him and other Jewish law school graduates out of the major law firms despite top academic credentials), Mr. Linowitz frequently waxes nostalgic as he recalls his early days of practice, often painting them in hazy, sepia tones. Despite this tendency, it would be a mistake to dismiss his comments as the sad longings of an old-timer for days gone by. Instead, his perspectives carry special relevance, coming as they do from a lawyer who observed first-hand the births of corporate law "mega-firms," pervasive government regulation and bureaucracy, and the marketing of legal specialties.

Mr. Linowitz first tackles the issue of "Lawyering in the 20th Century" by examining today's problems from a historical context. In Mr. Linowitz's recollection, the society in which he began his practice held lawyers in high regard and rewarded them accordingly, not just financially, but in social standing within their communities. Today, the public's attitude toward lawyers seems one of heightened cynicism and distrust, as reflected in a number of public opinion polls rating lawyers just below used car salesmen in integrity (no offense intended to used car salesmen!). A recent poll conducted by the *American Bar Association Journal* showed that, after all the news coverage of the O.J. Simpson case, twenty-five percent of survey participants had even "less respect for lawyers in general."[2] Of course, the reverse is that, as Mr. Linowitz notes, lawyers today constitute "an unhappy profession." Of all the occupations surveyed by Johns Hopkins researchers in 1991, lawyers were the most

[2]Don J. DeBenedictis, *The National Verdict*, *A.B.A. J.*, Oct. 1994, at 53.

"depressed."[3] A recent article in *Working Woman* magazine reported that, in 1967, ninety-four percent of women lawyers would have chosen law as a career if they had it to do over again. Among the lawyers surveyed in 1993, the number expressing satisfaction with their careers had fallen to only fifty-four percent.[4]

What is the cause of all this unhappiness and frustration? Why has the legal profession dropped so precipitously in both public esteem as well as self-esteem? This book has one answer: money, or, more accurately, the unprincipled pursuit of it. Interestingly, Mr. Linowitz traces the beginnings of what he considers an untoward concern with profit to the increased federal regulation brought on by the New Deal. Businesses, particularly the multistate corporations then just beginning to organize, grew to depend on the technical knowledge of lawyer/specialists just to comply with the intricate government regulations concerning antitrust, price fixing, and the like. Perhaps more importantly, erring corporations faced criminal as well as civil sanctions in prosecutions mounted by an opponent with almost unlimited litigation resources—the United States government. Thus, according to Linowitz, began the spread of the "scorched earth" style of litigation from the criminal to the corporate practice of law.

Next came the rise of the in-house counsel and the concurrent demise in the independence of these lawyers. Other attorneys also came to abandon their own professional autonomy in favor of the approach that "the 'client' is always right." Somewhere along the line, Elihu Root's sage advice that, although a course of action was legal, it should not be taken because it was "a rotten thing to do," fell into disuse. Megafirms needing huge profits to support themselves soon turned to the "marketing" of legal services to as many customers who could afford them, rather than choosing clients on the merits of their cases. As for new associates, Linowitz writes that the big firms "lure" them in, but "don't tell them that they're going to be giving up a decent way of life." "They are so busy racking up the [billable] hours, it becomes an obsession, not a life." The almighty bottom line, not the provision of good legal counsel, is the force driving legal practice today. Meanwhile, those attorneys in private practice easily earn many times more than the judges before whom they argue; private firm buildings and facilities outshine the run-down public courtrooms; and government prosecutors are underpaid and impossibly overloaded with cases. Finally, those "customers" unable to afford the fees are shut out of the legal system altogether.

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[3]Andrew Herrmann, *Depressing News for Lawyers*, CHICAGO SUN-TIMES, Sept. 13, 1991.

[4]WALL STREET J., Mar. 27, 1993, at B-12.

Lest his book paint too pessimistic a picture of the current state of the profession in this country, Mr. Linowitz offers a number of solutions. He devotes a chapter each to what the law schools, bar associations, judges, lawyers, and society can do to place the profession back on its pedestal. Among Mr. Linowitz's suggestions: law schools should seek broad liberal arts backgrounds in prospective candidates, devote considerably more time to teaching ethics, and fund more legal clinics so that future lawyers can learn how to serve real, live clients.

Bar associations should establish specialized ethics codes tailored to specialized areas of law, be more determined in policing themselves, and require pro bono services of all their members.

Judges should take more active roles in their courtrooms, insisting on civility and professionalism and not hesitating to sanction unethical or over-aggressive practitioners of "war by other means."

Lawyers should consider newer, more realistic (not to mention, humane) billing practices in lieu of the billable hours method, seek arbitration or conciliation where practicable, and simply learn to "just say no" to overly demanding clients as well as overly demanding schedules.

Last, but not least, society must come to realize the centrality of law to the American experience, and why our legal system, flawed though it may be, remains the envy of the world. A look at the shocking lawlessness now rampant in the former Soviet Union, Rwanda, and Somalia bears this out. Education in legal history and philosophy should start early and continue regularly throughout the elementary and high school years. A better-educated citizenry, argues Mr. Linowitz, might be more likely to spend more on a court system badly in need of renovation, maintenance, and expansion (the current budget takes up only .6% of all government expenditures in the United States).

Critics' opinions have ranged from those who found *The Betrayed Profession* to be "valuable and complex,"[5] to others who found it "too bland, too sentimental, and too simplistic to make much of a difference."[6] Yet all have agreed that the subject is one long overdue for examination. As Mr. Linowitz himself admitted, "I certainly don't claim to have all the answers, but I do believe I am raising a number of the right questions." To the extent that this book has reignited a vigorous debate as to the future direction of law as a profession, Sol M. Linowitz has already performed a great public service. And that, as they say, is no joking matter . . . .

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[5]Jonathan Groner, *Law in the Dock*, a review of *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, WASH. POST, Aug. 21, 1994, at X-4.

[6]Jonathan Kirsch, *Love the Practice, Pillory the Contemporary Practitioner*, a review of *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, L.A. TIMES, July 20, 1994, at E-4.

# TENNOZAN THE BATTLE OF OKINAWA AND THE ATOMIC BOMB*

REVIEWED BY CAPTAIN SHANNON A. SHY**

*The Okinawan campaign and Japanese defensive effort were many times larger and more deadly [than Iwo Jima]. In fact, what took place on and around the island in the spring of 1945 was the greatest land, sea and air battle of all time. The Japanese called it a Tennozan, a decisive struggle on which, for a time, they staked everything.*

Tens of thousands of American forces, mostly Marines, currently live and train on the small Japanese island of Okinawa. Undoubtedly all of these forces know that the United States fought the Japanese on Okinawa during World War II. However, having lived and trained there myself, I believe that many, if not most of these forces, are unaware of the bravery, the savagery, and the great human tragedy that occurred on Okinawan soil in 1945. Additionally, these forces most likely are unaware of the battle's significance in the decision to use the atomic bomb.

Best-selling author George Feifer would find the American forces' lack of knowledge about what occurred on Okinawa puzzling, yet historically reflective of American society. In *Tennozan*, Feifer fills the information void concerning this ferocious battle and its consequences. *Tennozan* is descriptive, compelling, and intense. The book offers much more than a historical perspective. Feifer gives the reader an intimate view of war through the eyes of some of those who experienced it, including Marines, Japanese soldiers, and Okinawans.

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*GEORGE FEIFER, TENNOZAN: THE BATTLE OF OKINAWA AND THE ATOMIC BOMB (New York: Ticknor & Fields, 1992); 615 pages, including bibliography and index (paperback). All quotations in this review are taken from *Tennozan*.

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Although *Tennozan* is largely a tribute to many of our Okinawan veterans, Feifer's purpose is not to glorify war. Instead, *Tennozan* is best described as a condemnation of war and its inherent horrors. While the book describes incredible bravery, it also is filled with ugliness, human atrocities, and myriad examples of men and women either surviving or dying in unthinkable conditions.

Feifer's purpose is simple—to educate readers, particularly those who have never seen combat (to include Feifer), about three separate, but related, topics. A closer look at Feifer's reasons for selecting these three topics will help readers understand *Tennozan's* substantive content and the reason why Feifer chose such a personalized delivery of his message.

Feifer originally "conceived [*Tennozan*] as an account of the fighting man's ordeal that never won rightful gratitude in America." Feifer questions "why so little is remembered—more precisely was never appreciated, even at the time—about the three months of mammoth *American* sacrifice." Feifer observes that "[m]ore than twice the number of Americans were killed and wounded on Okinawa than on Guadalcanal and Iwo Jima combined."

However, Feifer eventually broadened *Tennozan's* scope, stating that "nonmilitary issues that emerged during the course of my research pushed me toward a larger story." Believing that "American casualties were a small part of the overall loss," Feifer's second topic in *Tennozan* is the "Japanese story," which he describes as "essentially untold in America" and "more gruesome."

Feifer's statement concerning American casualties as they relate to "the overall loss," may offend some readers. However, Feifer neither deemphasizes American losses nor sympathizes with Japan's cause during World War II. He undoubtedly finds the feats of the Americans extraordinary and the loss of American lives tragic. Moreover, he is highly critical of Japanese leadership during that era. Nevertheless, Feifer is correct in his decision to tell the Japanese story. Its inclusion is critical for a complete appreciation of the battle and its consequences.

Although the Japanese story also concerns suffering on the part of the Japanese military, Feifer's primary focus is the civilian tragedy on Okinawa. He states that the "Okinawan devastation—cultural, material, and spiritual, as well as corporal—remains unknown to most Americans." The following passage best frames his concerns and purpose.

> I will not apologize for repeating in later chapters that more innocent civilians died on Okinawa, and in greater agony, than in Hiroshima and Nagasaki and that the cul-

> tural damage was incalculably greater than that of the two atomic bombs. Okinawans are hardly the first people to endure a martyrdom of geography, but few have endured more with less recognition.

Feifer's third topic in *Tennozan* concerns facts underlying the decision to use the atomic bomb. He notes that the Battle of Okinawa was the "first operation on Japanese soil," and "the last battle before the start of the atomic age." He never specifically states why he chose to include a factual analysis of the broader issue concerning use of the bomb. I inferred two possible reasons.

First, Feifer's discussion points out the logical correlation between America's lessons learned from the battle on Okinawa and the decision to use the bomb. Secondly, Feifer questions, somewhat emotionally, the disparity between the public's outrage, or "deep revulsion," over the use of the bombs and the generally "unrecognized" massive destruction of Okinawa's people and culture. Feifer simply wants to put the decision in its proper perspective. He summarizes his purpose well in the following two statements:

> Without the essential facts, it is impossible to understand the decision, made some six weeks after the campaign ended, to use the atomic bomb.
>
> . . . .
>
> Although no precise assessment of the rights and wrongs of that decision is likely to be made, it is one that should be debated with evidence as well as emotion.

Supported by an extensive bibliography and scores of interviews with the "battle's participants and victims," *Tennozan* satisfies Feifer's central purpose and his goals under each of the three topics. His personalized approach to the battle, intricate detail, easy-to-follow organization, and substantive content all contribute to *Tennozan's* success.

Unlike most other books concerning military battles, *Tennozan* does not account for or trace every unit which fought on Okinawa. Instead, Feifer concentrates on one American unit and primarily one Japanese unit. Marines will be particularly interested in *Tennozan*, because Feifer follows the Sixth Marine Division, which he relates "took the most casualties while capturing some 75 percent of Okinawa's territory, including many of the best defensive fortifications." Marines also will find Feifer's discussions concerning the mentality of the Marines, and the interservice rivalry between the Marines and the Army, interesting and, at times, enjoyable.

Feifer's success in making the story realistic, personal, and

intense comes not from covering units, but from concentrating on select Marines, Japanese soldiers, and civilians. By providing detailed background information, Feifer completely familiarizes the reader with certain individuals—such as Marine Private First Class Dick Whitaker, Japanese Army Captain Tadashi Kojo, and Okinawan Normal School student-turned soldier, Masahide Ota.[1]

Using this approach, Feifer develops the personalities and the emotions of the combatants and victims. Additionally, Feifer adds to the realism by telling the story, in part, by using quotes obtained from his interviews. Combining this emotional familiarity and realism with Feifer's remarkable ability to describe a scene in graphic detail, readers get a clear picture of what the combatants and the victims endured.

The organization of the substantive material supports Feifer's personalized approach and makes the book easy to follow. *Tennozan* is organized into four "books" arranged chronologically. Each book is subdivided into chapters. At the beginning of each chapter (and in other places), Feifer inserts quotations from historians, authors, and veterans of the battle. These quotations add another personal touch and help focus the reader's attention.

Book I, with the possible exception of its first chapter, sets the stage for the battle. Among other things, Feifer introduces some of the battle's participants and provides an excellent discussion about Okinawa in 1944 and Japan's year-long defensive buildup there.

Feifer's choice for the first chapter is artful. It concerns the Japanese premier battleship *Yamato*, which the Americans sank while it was sailing towards Okinawa, unprotected, after the battle on Okinawa already had begun. Although chronologically out of sequence, *Yamato's* suicide mission at the hands of Japanese leadership foreshadows a similar destiny for the Japanese infantry on Okinawa.

Books II and III describe the battle in gory detail. They discuss the Sixth Marine Division's agonizing and often fatal struggle to take Sugar Loaf Hill, the continual kamikaze bombardment of the United States Navy's fleet, the mentality of the Japanese soldier that it is better to die than to surrender, cave-sweeps, and the murder and maltreatment of civilians. These are but a few reasons why this book is captivating and enjoyable as well as educational.

Two chapters in Book III deserve additional comment. Although Feifer mentions the battle's impact on Okinawa's civilian

[1]Masahide Ota was elected Governor of the Okinawa Prefecture in 1990. Ota also wrote a book entitled, *Battle of Okinawa: The Typhoon of Steel and Bombs*. Feifer cites this book in his bibliography.

population and culture throughout the book, readers need search no further than the chapter entitled, "Civilian Suffering," to appreciate the horror that engulfed the lives of Okinawans. Here, Feifer achieves his goal of educating readers—especially Americans—about Okinawa's civilian tragedy.

The chapter entitled, "American Atrocities," presents some disturbing allegations. Feifer relays stories about Americans committing war crimes, including the murders of prisoners of war and civilians. Although he treats most of the accounts appropriately and, for the most part, is merely repeating the assessments of his interviewees, I question Feifer's apparent attempt to rationalize certain alleged acts.

For example, in response to an allegation concerning the American murder of sixty civilian men, Feifer hypothesizes that "maybe those Americans were on the verge of battle fatigue. Maybe they were consumed with revenge." Clearly, Feifer considers these acts "atrocities." I am not suggesting that he is justifying the acts. However, the alleged acts were clearly criminal and a general statement of condemnation in his personal assessment of the alleged act would have been more appropriate.

Book IV discusses the final days of the battle, the civilian toll, the United States occupation of Okinawa, and the atomic bomb. The stories about the cave-sweeps and the Japanese soldiers—including Kojo—who evaded capture until well after the end of the battle are fascinating.

Feifer achieves his third goal in the chapter concerning use of the atomic bomb. As it was not his purpose, Feifer never offers an opinion as to whether the United States should have used the bomb (however, a fair reading suggests he supports the decision to use the bomb). Instead, he provides facts and queries so readers may draw their own conclusions. His analysis, which in part relies on facts gained from the Okinawa experience and the "victory or death" attitude of Japan's men, women, and children, is engaging and leads to a persuasive argument in support of the bomb. I recommend a review of this chapter to anyone who wishes to argue the morality of dropping the bomb.

Overall, Feifer balances his approach to the three topics appropriately. The majority of the book is dedicated to the preparations for, and conduct of, the battle. However, the impact on civilians and the information on which Feifer relies to support his atomic bomb analysis are themes that run constant throughout the book.

*Tennozan* contains sufficient supplementary materials, including several photographs and explanatory footnotes within the text.

The footnotes add significantly to the reader's understanding, particularly in those areas where a historical perspective is necessary. Unfortunately, the book contains no tactical maps and only one general map depicting significant points on a portion of the island. Although Feifer did not intend *Tennozan* to be a lesson or survey in military tactics, the absence of tactical maps proves somewhat frustrating.

Servicemembers of all grades, and civilians with any interest in warfare, should find *Tennozan* engrossing. Moreover, officers and staff noncommissioned officers should find *Tennozan* particularly useful. First, *Tennozan* provides an instructive contrast between good and bad military leadership in training and in combat. Second, the book provides an excellent account of how soldiers act and react in combat. Third, the chapters concerning the handling of civilians and enemy prisoners of war contain myriad problems that our Marines, soldiers, sailors, and airmen may face one day. These real-life situations provide the basis for invaluable training scenarios and teaching points for dealing with such problems. Additionally, the chapter entitled, "American Atrocities," provides an invaluable teaching point—that is, we can never forget the law of war, regardless of stress, fatigue, anger, or fear.

Finally, 1995 marks the fiftieth anniversary of the Battle of Okinawa. *Tennozan* is an excellent source of information on the subject. Out of respect for our veterans of this great battle and our Okinawan hosts, and for the educational development of our forces, anyone stationed or expecting to be stationed in Okinawa should read this book.

# ON THE EDGE: THE CLINTON PRESIDENCY*

REVIEWED BY CAPTAIN FRANCIS A. DELZOMPO**

To best-selling author Elizabeth Drew, President Bill Clinton is a complex and oftentimes perplexing man. His strengths—intelligence, ambition, and drive—are notable. So, too, are his flaws. Questions regarding his "character," his actions while Governor of Arkansas, and his associates' actions hounded him during the first eighteen months of his tenure as Commander-in-Chief. Throughout those months, the President's strengths and weaknesses battled to define the Clinton Presidency. The picture that emerged, correctly or incorrectly, was one of a President lacking both a philosophical and an ideological core, but who was nonetheless committed to furthering his legislative agenda for America. For those in the White House, the ride was turbulent, repeatedly placing Bill Clinton's Presidency "on the edge."

This is both the title and thesis of Drew's latest book, *On the Edge*. Drew catalogues the turbulence, documents the achievements, and attempts to explain the roller-coaster ride that characterized the first eighteen months of the Clinton Presidency. Drew portrays President Clinton as a risk taker, a man who lives somewhat dangerously both in his personal life and in his professional dealings. Time after time during the first eighteen months of his Presidency, it appeared that Bill Clinton was in jeopardy and that his "effectiveness and authority could come to an end."[1] As a result, and because Clinton lacked both a personal and an ideological following among the American electorate, he and his aides attempted to define success by the Administration's legislative achievements. However, these attempts carried risks. When the Congress passed his initiatives, critics could argue that this was merely a Democratic Congress cooperating with a Democratic President. Yet where Clinton failed to deliver on promised legislation—such as his economic stimulus package or his wife's health care reform bill—he looked impotent to the American people. His Presidency wavered during these periods.

Drew's stated purpose in writing *On the Edge* is to help readers

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*ELIZABETH DREW, ON THE EDGE: THE CLINTON PRESIDENCY (Simon & Schuster 1994).

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[1] DREW, *supra* note *, at i (Introduction).

understand Bill Clinton and his Presidency. She does so by drawing a picture of a man torn between conflicting passions, an ever-shifting political ideology, and an intense, almost all-consuming desire to be liked. But Drew has done more. While any writer can report a result, it is the gifted journalist who can get behind the veil and describe the process that leads to the result. This is where Drew makes her contribution. She begins with the inauguration in January, 1993, describing the activities of the Clinton transition team in Little Rock, Arkansas, and Washington D.C. She concludes with a description of Congress's narrow passage of a crime bill in August, 1994. In between, Drew tracks the Clinton rollercoaster through eighteen months of peaks and valleys. She reports significant events, through the eyes of those creating, or responding to, those events, and she adds to that reporting a refreshing, critical analysis.

Drew presents an uncomplicated, easy-to-read narrative. She avoids jargon, actively tells her story, and provides a picture that—although sometimes disturbing—never fails to hold the reader's interest. *On the Edge* contains twenty-nine chapters, each concerned with one major subject or event, and Drew organizes the material chronologically within each chapter. Although the subjects and time frames of each chapter often overlap, this organization best serves the author's purpose.

Comparisons to Bob Woodward's best-seller, *The Agenda*,[2] although inevitable, do a disservice to *On the Edge*. Both books explore the Clinton White House through the eyes and ears of those closest to the President;[3] and both books flow from the pens of respected and much-honored writers. However, in *The Agenda*, Woodward confines the subject matter to Clinton's *economic* policies during the Administration's first year in office. Drew's aim is not nearly so narrow. From the earliest days of the Administration, Drew interviewed the highest officials in the White House and the cabinet, and on Capitol Hill, endeavoring to document, report, and analyze *all* the significant aspects of the Clinton Presidency.

For example, Woodward dismisses as a "side issue"[4] the furor Clinton caused when he attempted unilaterally to lift the ban on

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[2] BOB WOODWARD, THE AGENDA: INSIDE THE CLINTON WHITE HOUSE (Simon & Schuster 1994).

[3] Drew based her book "on regular interviews with every high official in the Clinton White House on the broad range of issues, foreign and domestic, that the President confronted—or was confronted with." Further, her interviewing "involved frequent sessions with Cabinet officers involved in these issues, and others in the various agencies, as well as Members of Congress and Capitol Hill staff members . . . ." DREW, *supra* note * (Author's note). Woodward used the same sources and interviewing techniques. WOODWARD, *supra* note 2, at i (Introduction).

[4] WOODWARD, *supra* note 2, at 171.

homosexuals serving in the armed forces. Drew explores and analyzes the issue in depth. Woodward barely mentions the failed nomination of Zoe Baird for Attorney General and omits altogether the failed nomination of Lani Guinier for Assistant Attorney General for Civil Rights. Drew not only discusses how these episodes occurred, but critically analyzes the President's missteps in each case. These are but two examples of how *On the Edge* surpasses *The Agenda*.

The most telling distinction between the two books, however, is the bias, or lack of bias, in each. Where Drew objectively, albeit critically, describes President Clinton's performance in office, Woodward repeatedly inserts a distinctly pro-Clinton partisan edge. Although each author avers to have been fair and unbiased, *On the Edge* outshines *The Agenda* in this regard.

For example, a key part of Clinton's proposed 1994 economic plan included a short-term stimulus package of $16 billion, reportedly needed to "jump start" the economy out of recession. (Many critics considered the package nothing more than a payoff to certain big-city mayors who had supported the President during the election, which Woodward never mentions). After the House of Representatives approved the package, certain Democratic Senators began a filibuster in opposition to the "pork" it contained. When those Senators eventually abated, Woodward tells us that the Republicans took up the filibuster "with relish."[5] As the filibuster continued during April, 1993, Woodward describes the process as "almost a national embarrassment."[6] Woodward never states *why* he considers a legitimate part of the political process a national embarrassment. Eventually, on April 21, 1993, President Clinton publicly admitted defeat, and the bill died. Throughout his discussion of this episode, Woodward uncritically accepts the contention that the economy was in recession and needed to be jump started with more deficit spending, although economic indicators actually showed that the recession had bottomed out months earlier. This uncritical acceptance is both baffling and an indication of Woodward's particular bias.

Drew also discusses the stimulus package. Unlike Woodward, she recognizes the symbolic significance of this piece of legislation and avoids any impulse to inject her own partisanship. Drew tells us that "the stimulus program offered Republicans their first shot at Clinton's economic program and their first chance to embarrass the new President."[7] She states this not to chide Republicans, but to

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[5] *Id.* at 159.

[6] *Id.* at 170.

[7] DREW, *supra* note *, at 116.

educate readers on the realities of Washington politics. Because Clinton failed to consult with Senate Republicans before proposing the bill, those same Republicans felt no allegiance to the bill or the President. Drew also tells us that "Clinton and his staff mishandled the stimulus bill at virtually every step."[8] Again, Drew's reporting and analysis, although critical, stops short of abandoning objectivity. This is characteristic of *On the Edge*.

*On the Edge* contains one subtle theme of particular interest to military leaders. The theme concerns one of Clinton's many transformations in office—his growth from a President concerned only with domestic policy to a President engaged and often engrossed in foreign policy. During the 1992 presidential campaign, candidate Clinton promised to "focus like a laser" on the economy. In the early months of his Presidency, as a result of necessity and of choice, he attempted to do just that. Later, world events threatened to overtake Clinton and his Administration. As summer turned to fall in 1993, continuing civil strife in Bosnia, the killing of American soldiers in Somalia, and pressure to act in Haiti combined to thrust this domestic policy President into the global arena.

Drew is unapologetic in her analysis of how Clinton and his foreign policy team both handled and mishandled each of these situations. More than anything else, the response to each—sometimes resulting in the loss of life—revealed a vacuum of experience in the Administration and in Clinton himself. Perhaps this explains former President Carter's recent emergence as a *de facto* arbiter of United States foreign policy. To the military leader, the missteps that Drew describes, combined with the apparent (if not actual) reliance on a former President to shape foreign policy, are causes for concern.

So, too, as Drew describes it, is the President's troubled relationship with the military. Drew is candid in reporting the President's efforts as a young man to avoid military service, his attempt to force homosexuals on the military, and the unpopularity of his first Secretary of Defense, Les Aspin. Drew discusses these matters frankly and reveals the concern that they caused in the White House.

In sum, *On the Edge* is a well-crafted, critical history of the first eighteen months of the Clinton Administration, in which Drew paints a sometimes unflattering and frequently unsettling picture of President Clinton and his Administration. She does so, however, with the intent to educate, not to embarrass, to inform, not to chasten. In this, she has succeeded.

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[8] *Id.* at 114.

# OPERATION CROSSROADS THE ATOMIC TESTS AT BIKINI ATOLL*

REVIEWED BY MAJOR TIMOTHY J. SAVIANO**

Jonathan Weisgall has presented a superbly written account of the two atomic tests conducted by the United States in 1946 at Bikini Atoll in the Marshall Islands—code named "Operation Crossroads." Relying on documents that were recently uncovered and declassified, Weisgall offers the first true historical assessment of the Bikini tests. His assessment is not based on misleading government information to support a political or military agenda during the early atomic age, but instead on fact.

Weisgall does not just describe the tests in isolation. He takes readers back in time to the end of World War II, after the atomic bomb was dropped on both Hiroshima and Nagasaki. He sensitizes you to the heated political and scientific debates concerning atomic weapons and the necessity of further tests. Weisgall also discusses the impact of the atomic tests on United States-Soviet Union relations and the ongoing disarmament talks.

In effect, Weisgall sets the stage of the social and political climate in America during the early atomic age. With this backdrop, Weisgall, in a story-like fashion, presents an interesting and readable historical account of Operation Crossroads. In so doing, Weisgall discusses the fate of the 167 Bikini islanders displaced by the United States government so that it could conduct the atomic tests at the Atoll.

As an attorney, Weisgall has represented these islanders since 1975. He has litigated three lawsuits against the United States on their behalf. The book is a culmination of his two-decade-long investigation of Operation Crossroads on behalf of his clients.[1]

Despite Weisgall's representation of the islanders, he does not use this book as a vehicle to take "cheap shots" at the United States.

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* JONATHAN M. WEISGALL, OPERATION CROSSROADS—THE ATOMIC TESTS AT BIKINI ATOLL (Naval Institute Press, Annapolis, Maryland, 1994); 415 pages (hardcover).

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[1] Weisgall has written several articles concerning the fate of the Bikini islanders as a result of atomic testing in the Marshall Islands. He also was the executive producer of a documentary film about Operation Crossroads entitled *Radio Bikini*, which was nominated for an Academy Award for best documentary in 1988.

Rather, he is more concerned with providing an accurate and extremely well-documented account of the events that transpired at Bikini Atoll. Nevertheless, as the true facts unfold, the record becomes unmistakably clear. The United States, in conducting the second atomic test at Bikini, created the world's first nuclear disaster with little regard for the dire consequences of atomic fallout.

*Operation Crossroads* can be broken down into two main parts. The first and most important part is the description of the atomic tests and their destructive impact on the Navy's target fleet and the islands. Throughout this part, Weisgall documents the interservice rivalry between the Navy and the Army concerning these tests. (The tests were designed to measure the effectiveness of atomic bombs on naval ships.). The rivalry played a pivotal role in the conduct of the tests and indeed, as Weisgall explains, the Navy's existence hung in the balance.

The second part of *Operation Crossroads* concerns the tragic displacement of the Bikini islanders and their fate as a result of atomic tests on their homeland. Both parts are interwoven throughout the book in a chronological manner as the events unfold in real time. In so doing, Weisgall is able to present a clear and understandable account of Operation Crossroads.

The first test, code named Able, took place on July 1, 1946. The Army Air Force[2] dropped the atomic bomb from a B-29 Superfortress at an altitude of 30,000 feet. The bomb was detonated 518 feet above the Bikini lagoon's surface, which contained the Navy's target fleet of ninety-five ships. The explosion was enormous and created the now familiar mushroom cloud, which climbed to 20,000 feet. The bomb released explosive energy equivalent to 23,000 tons of TNT. As a result of the Able bomb, five target ships sank.

The second test, code named Baker, took place on July 25, 1946, about three weeks after the Able test. The bomb was suspended at a depth of 90 feet below the Bikini lagoon surface. Once detonated, the explosion created an enormous dome of water that rose nearly a mile into the sky. The explosion also created an underwater shock wave and gigantic water waves that caused severe damage to many target ships and the islands. Nine target ships sank and dozens were critically damaged.[3]

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[2]It was not until 1947 that the Air Force became a separate branch of the military. In 1946, at the time of Operation Crossroads, the "Air Force" was a branch of the Army called the Army Air Force.

[3]Weisgall includes several pictures taken at Bikini Atoll. These pictures include the preparation stage, the actual explosions, the damage to target ships, and the military crews attempting to decontaminate the ships.

Weisgall's description of the explosions, their impact on the target vessels and the islands, the enormous preparation by the Navy and the Army for the operation, and the key personnel involved is remarkable. He presents such a detailed and comprehensive account of Operation Crossroads that you feel as if Weisgall was actually at Bikini Atoll in 1946 recording the events as they occurred.

One of the revelations uncovered by Weisgall, and emphasized throughout the book, concerns the enormous amount of radiation released by the Baker test. The outright destruction of the nine ships by the Baker bomb was relatively minor when compared to the effects of radioactivity. A radioactive spray covered the entire target fleet as the dome of water settled down into the lagoon. Weisgall points out that leading scientists had predicted that most of the radioactivity from an underwater explosion would fall back into the lagoon instead of dissipating into the atmosphere. Concerned about environmental hazards, the scientific community urged that the Baker test be cancelled or at least postponed.

Despite these warnings, the Baker test went ahead as scheduled. As predicted, all target ships, as well as the Bikini lagoon, were heavily contaminated by radioactive materials. To make matters worse, the Navy had not planned any decontamination measures. Consequently, the Navy resorted to several methods to attempt to decontaminate the ships. Many of these methods—such as washing down and scrubbing the ships—exposed thousands of military personnel to prolonged, unsafe levels of radiation. These "decontamination" methods, however, had negligible effects on the radiation levels on the ships. Weisgall notes that the science of ship decontamination was born at Bikini Atoll in 1946.

Unlike the testing of other atomic bombs which were shrouded in wartime secrecy, the two tests at Bikini Atoll were staged as grand public relations events. More than 175 reporters from around the world were present to cover the tests. Moreover, over 42,000 military and scientific personnel participated in Operation Crossroads. It was the biggest news story of 1946.

However, the military downplayed the amount of radioactivity from the Baker test. The story for the reporters and the public was the description of the explosion and the number of sunken ships. As Weisgall points out, however, the real story concerned the radiation levels. Because of the enormous amount of radiation released, Weisgall calls the Baker test the world's first nuclear disaster.

The true impact of the Baker test—the deadly lingering radioactivity—remained classified for many years. This was mostly attributable to interservice rivalry between the Navy and the Army. As Weisgall illustrates, with the advent of the atomic bomb, the public,

as well as several key congressmen, believed that the Navy was now obsolete because ships were vulnerable to atomic attack. Moreover, the perception was that the Army Air Force was essential to national defense due to its capability of dropping the atomic bomb.

As a result, the Navy fought hard to show that naval vessels were still needed for national defense. The Navy was concerned that if it did not take some action it would lose necessary congressional appropriations to sustain a postwar Navy of any appreciable size. Thus, it was the Navy that originally proposed Operation Crossroads—intent on demonstrating that its ships could withstand an atomic attack "better than the public imagines it will." Because of the public view, the Navy reasoned that anything less than the complete destruction of the target fleet would be considered a victory.

On the other hand, the Army Air Force's goal at Bikini was to sink as many ships as possible. The interservice rivalry essentially boiled down to a battle over congressional appropriations. Unfortunately for the Army Air Force, and despite its protests, the Navy was put in charge of Operation Crossroads. As Weisgall illustrates, the Navy was able to control the testing, the configuration of the target fleet, and most importantly, the assessment and reporting of the damage to the target fleet. Thus, the Navy ensured that the true extent of the damage, especially as it pertained to radiation, was not made public.

The story of Operation Crossroads cannot be told without discussing the fate of the Bikini people. To stage the testing of atomic bombs at Bikini, the United States had to uproot 167 islanders from their homeland. In return, they were promised that the United States would care for them during the testing and then return them to Bikini Atoll. Unfortunately, as Weisgall notes, the islanders became "nuclear nomads," as the United States moved them several times.

Although the Bikinians were fishermen, they were eventually resettled on Kili, a small island that had neither a lagoon nor sheltered fishing ground. In 1952, conditions became so bad on Kili that the United States had to airdrop emergency rations on to the island. Because of the radiation levels at Bikini, the islanders were not allowed to return home until 1969. On their return, they were shocked to see how much the Atoll had been destroyed or damaged by the bombs.[4]

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[4] Weisgall also discusses additional atomic tests conducted by the United States at Bikini Atoll. For example, in 1954, the United States detonated a hydrogen bomb at Bikini Atoll. This was the largest nuclear bomb ever exploded. It left a crater one-and-one-half miles wide and 480-feet deep in the lagoon and vaporized three tiny islands in the Atoll. It is no wonder why the Bikinians were shocked when they returned to their homeland.

About 139 islanders lived on Bikini Atoll from 1969 until 1978, when medical tests revealed that they had ingested harmful doses of radioactivity. Again, the Bikinians were moved to Kili. As a result of the lawsuits brought against the United States, the Bikinians obtained a fifteen-year, $75 million settlement for the taking and use of Bikini and a $110 million trust fund for the radiological cleanup and resettlement of Bikini.

Overall, *Operation Crossroads* is an excellent book. With respect to the fate of the Bikini islanders, however, I found the book to be somewhat lacking in information. This is not to say that Weisgall did not cover the subject—he has sufficiently described the overall treatment that the islanders received from the United States government. Nevertheless, given Weisgall's relationship to the islanders, and the detail in which he described the atomic testing at Bikini, I expected a more detailed account of the fate of the islanders.

I am reminded, however, that the purpose of this book was to bring to the public's attention a true historical account of the two atomic tests at Bikini Atoll. To this end, Weisgall overwhelmingly succeeded. I could only hope that Weisgall will author another book, in the same painstaking detail as *Operation Crossroads*, that will describe the life of the Bikinians as a result of atomic testing at Bikini. Such a book would be enlightening, insightful, and enjoyable to read—as readers will find with *Operation Crossroads*.

# ABOVE AND BELOW THE MILITARY HORIZON: A REVIEW OF JOHN KEEGAN'S *A HISTORY OF WARFARE**

REVIEWED BY MAJOR JEFFREY G. MEEKS**

In modern Rwanda, western observers still recoil at the vision of a thin line of Tutsi tribesmen, armed only with traditional weapons of wood and stone, standing in defense of their lives. Behind them is a Christian church, filled with women, children, and older men. They pray to a heedless god for deliverance from the wrath of their Hutu neighbors—people that they and their families have lived with for hundreds of years. The thin line stands briefly until overwhelmed by machete-wielding Hutus bent on revenge. The surviving men flee, leaving the church unprotected. In a fit of killing that our modern world is now calling "genocide," the Hutus descend on the church. They massacre the defenseless inhabitants in an orgy of bloodletting, shocking in both its ferocity and its scale, a scene that is repeated again and again across this ravished country.

In response, the Rwandan Patriotic Front (RPF), a Tutsi-dominated liberation movement headed by a brilliant military strategist, launches a classic "maneuver warfare" operation. They rout the military formations of the Hutu government and drive them from the battlefield. Finally, appalled by the destruction, the United Nations (UN) intervenes with 5500 soldiers, authorizing them to use all means necessary to preserve safe havens and protect relief convoys until a semblance of order is restored.

In this real-world scenario, the thesis of John Keegan's book, *A History of Warfare*, as well as its limitations, is played out in excruciating detail. In his opening line, Keegan attacks the "Clauswitzian" view of warfare by boldly declaring that, contrary to western military dogma, "war is not the continuation of policy by other means." His thesis, startling in its clarity, is that war—both the way a society views war as well as the way it wages it—is the product and shaper of culture, not an extension of politics. By turning the focus of his book to the cultural development of warfare from

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* JOHN KEEGAN, A HISTORY OF WARFARE (New York: Alfred A. Knopf, Inc. 1993).

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prehistory to present, Keegan exposes the dangerous and destructive assumptions that underlie the western approach to war, especially in an era where the doctrine of "mutually assured destruction" must coexist with "nuanced" operations other than war.

John Keegan brings to this argument a prodigious intellect and a commanding knowledge and understanding of the material that he uses to support his argument. As the former senior lecturer in military history at the Royal Military Academy in Sandhurst, England, the current defense editor for the *Daily Telegraph*, and the author of nine books on military history—including the acclaimed *The Face of Battle*—he is a master of the nuances of military history. His writing also reflects a passionate commitment to the ideal that the day of Clauswitzian "true war"—where all assets of a state are engaged in an effort to defeat the enemy—has reached the end of its usefulness when faced with thermonuclear devastation. This passion becomes the lens that focuses the reader on the myriad aspects of military history leading to Keegan's conclusions.

Keegan traces the history of warfare through chapters broken down by the method of warfare used by the people described: Stone, Flesh, Iron, and Fire. These substantive divisions are interspaced with interludes that focus on the universal concerns of the warrior—such as terrain, logistics, fortification, and armies. The underlying thread that binds each of these sections is the emphasis on the culture that wages war—both in how warfare developed from the culture that produced it, and in turn how warfare shaped and dominated these cultures, leading both to their rise and decline.

One of the useful tools that Keegan employs to develop his argument is the concept that societies exist either above or below the "military horizon." This concept, first enunciated by the anthropologist Harry Turney-High in 1949, is that all cultures, from the primitive to the most advanced, are steeped in a tradition of warfare defined and limited by the weapons and tactics that the culture is capable of bringing to the field. In a primitive society dominated by weapons of stone and wood and the limits of human strength, warfare performs a ritualistic purpose, designed to balance the needs of the culture waging war with the mystical cosmos that the war is waged in. A society that is locked below this "military horizon" of primitive warfare is unable to form armies, put officers in command of them, or maintain them in the field. Their warmaking is characterized by tentativeness in encounters with the enemy, ritualized combat (where the honor of the individual is paramount and casualties are low), and acts of unsustained combat—such as "raiding" (brief encounters to either kill individuals or steal property) and "routing" (massed surprise attacks where the warriors are driven

off and the less fortunate are slaughtered). The massacre of Tutsi in Rwanda is a reflection of the primitive "routing" warfare described by Keegan, only magnified on a national scale by the aid of modern communications.

Keegan marks the emergence of societies above the military horizon by tracing the ability of these societies to raise an army, find officers to lead and discipline that army, and keep that army in the field over time. Key to the creation of these military formations is the invention of lethal weapon systems—such as the composite bow and the bronze sword; effective methods of delivering the system—such as the chariot, the horse, and the massed formations of the phalanx; and the formation of a society with a centralized government and the ability to raise the revenue, manpower, and collective will to put armies into the field. Indeed, Keegan's premise is that only through a society's ability to move above the military horizon can it form the internal stability and prosperity that exists today as the hallmarks of modern civilization.

In the seeds of a society's ability to make war lies its own destruction. This truism is borne out in one of the most persuasive portions of the book, dealing with the rise and fall of the "horse people" of the eastern steppes—such as the Huns and the Mongols. Keegan demonstrates that their prowess at warfare grew out of their near mystical union with their horses, coupled with their prowess with the composite bow. These attributes, enhanced by the their ability to maneuver around their land-locked foes, to mass at the desired time and place and then disperse just as quickly, were products of the nomadic steppe lifestyle, where men constantly moved with their herds, driving herds of unwilling animals before them. Keegan shows that their tactics employed the basic techniques of animal husbandry—the ability to move a recalcitrant herd in the desired direction by striking constantly at its flanks, the heedless capacity to slaughter without constraint or conscience, and the facility to operate regardless of weather. These tactics made the horse people nearly unbeatable on the field of battle. Yet their roots of nomadism also led to their military downfall—the loose structure of their society was unable to settle down and rule the conquered peoples, and the cultures they conquered eventually assimilated even the most successful of these groups.

Keegan's most gripping analysis, however, comes when he addresses the results of 4000 years above the military horizon in western civilization, expressed in the "gunpowder" revolution. He clearly documents the nature of this warfare, which is steeped in the Clauswitzian tradition of face-to-face confrontation of disciplined regiments in the pitched and decisive battle, all weapon systems

deployed to their maximum deadliness to defeat and demoralize the enemy. Paramount in this philosophy is the belief that the entire state must be mobilized in the war effort to defeat the enemy, firm in the belief that, as the Romans put it, "it is sweet and becoming to die for ones country."

This warrior tradition found unparalleled success on the colonial field of battle, where that western dogma that equates war with a continuation of politics dominated less powerful cultures. When this tradition came face to face with itself on the battlefields of the World Wars, millions died on battlefields characterized with their bloodiness and ferocity. Through the Cold War, this policy continued, embodied in the concept of "mutually assured destruction." Here, Keegan exposes the danger of the western adherence to belief in "true war," which Clauswitz defines as the "act of violence pushed to the utmost bounds." The utmost bounds become difficult to contemplate when enemies stand poised with weapons of destruction capable of ending all life on the earth.

Keegan's argument works in a bipolar world where two superpowers face off with the capability to destroy each other. However, the Cold War is over. Instead, we now live in a world where the threat of general war has receded and regional conflicts—from the primitive genocide in Rwanda to the opportunistic maneuvering of Sadaam Hussein—dominate the strategic thoughts of the leaders of western democracy. It is at this level that Keegan's argument weakens.

Keegan, in his acknowledgements, cites Iraq's military defeat and continued existence as an example of the failure of Clauswitzian warfare when pitted against Islamic culture and Hussein's ability to claim spiritual victory in the face of military defeat. Here, Keegan errs. Far from being an exercise in Clauswitzian combat, the war with Iraq was an expression of the American culture where "true war" is tempered by the constraints of law (as imposed by the international community) and international politics of the conflict. The constraints of coalition warfare caused both the means and missions of the conflict to be dictated by cultural boundaries. Although the military reduction of the Iraqi "center of gravity" followed the Clauswitzian maxims of waging war, combat stopped at the line set by the limited objectives of the coalition, even though the ultimate defeat of Iraq had not occurred. In this sense, the first major combat of the post-Cold War culture of western democracies has rejected "true war," with dubious results.

The reader's problems magnify when confronted with a situation such as Rwanda. Keegan has shown us the dangers of our mili-

tary culture; he fails to present us with a blueprint to follow into peacekeeping and peacemaking. In Rwanda, neighbors operating below the military horizon massacre each other with stones, clubs, and machetes. Only the intervention of General Kigame's RPF, configured in a true "above the horizon" military force, was able to suppress the massacre. This led the UN to fear victor's retribution. The UN response was to insert a "Clauswitzian" military force to stabilize the situation, then impose restrictive rules of engagement that make "true war" impossible. Time will reveal the results.

Keegan addresses that, in the new world order that the demise of Clauswitz creates,

> the world community needs, more than it has ever done, skilful and disciplined warriors who are ready to put themselves at the service of its authority. Such warriors must properly be seen as the protectors of civilization, not its enemies. The style in which they fight for civilization—against ethnic bigots, regional warlords, ideological intransigents, common pillagers and organized international criminals—cannot derive from the model of western warmaking alone.

Unfortunately, Keegan does not present an effective model to replace the one he condemns. His failure lies in the grim fact that no effective model exists. The ritual and ceremonial aspects of primitive warfare that defuse man's violent instincts without bloodshed, have efficacy only when a common culture is shared—something that the diverse international world makes impossible. The successful armies of the past have been bent on either conquest or preservation of conquest—not peace keeping or peace making. In short, no model exists.

As history, *A History of Warfare* instructs admirably in the strengths and weaknesses of the model of warfare that our western society has inherited and developed. We must heed Keegan's warnings on the danger of viewing war as a continuation of politics. The failure of this, and any history, is that in the absence of a historical model that reveals what should be done, we are left only with a map of the pitfalls, and no instructions concerning either course or destination. We, the warriors of the present, must work this out for ourselves.

# MOSBY'S RANGERS*

REVIEWED BY CAPTAIN ROBERT B. WATSON**

*Mosby's Rangers*, by Jeffry D. Wert, is a scholarly and well-researched examination of the phenomenon which became known as "Mosby's Confederacy" during the Civil War. Mr. Wert has produced a comprehensive study of the 43d Battalion of the Virginia Cavalry, a unit that daringly blazed its way to become arguably the most famous partisan guerilla unit in American history, rivaled only by that of William Quantrell, and indisputably the most eminent of any such unit in the eastern theater of operations during the Civil War.

Unlike most previous books about Colonel John S. Mosby, the unit's famous commander, this book evaluates the 43d Battalion as a whole. While undeniably paying homage to Colonel Mosby, Wert's book invests as much study to the other and most regular members of the unit, recognizing that, while it unmistakably bore the lasting imprint of its illustrious founder, the unit was, in the final analysis, an amalgam of the personalities that comprised its most regular and reliable members.

Mr. Wert's volume also distinguishes itself from its predecessors in this area by analyzing the geopolitical composition and experiences of those noncombatant inhabitants of the area in which Colonel Mosby conducted most of his military operations. Delving into an aspect often treated only superficially by authors primarily interested in defining the personality of the Colonel, Wert clearly recognizes that "Mosby's Confederacy" was composed not only of the commander or even his soldiers, but was populated by citizens without whom a guerilla campaign could not possibly succeed, particularly when conducted in a civil conflict.

This book contains several major themes relevant to the military reader. The primary focus is on leadership skills and abilities. It also contains a great deal of material about obtaining the maximum use of personnel by placing them in those roles most suitable to their personalities (both commanders and troops), and on the military's

*JEFFRY D. WERT, MOSBY'S RANGERS (Simon & Schuster 1990); 295 pages, Appendix, Notes, and Bibliography; $11.00 (softcover).

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relationship with noncombatants in occupied areas, especially in areas of civil conflict and guerilla operations.

While this book attempts to explain Colonel Mosby's success in terms of both his entire battalion and the civilian populace among which he campaigned, Mr. Wert's first chapter contains the obligatory background sketch of the leading character in the drama, Colonel Mosby. However, instead of the usual excruciatingly detailed account of the leading character's background so often encountered in works of this type, the author refreshingly sums up the normal personal data—such as date of birth and marriage—in a few sentences. He elaborates only on incidents that tend to portray those traits that would later manifest themselves in the daring and courage that would make Mosby a renowned guerilla leader.

Interestingly, the picture that emerges of Mosby's early military service is that of a soldier who, while willing to subject himself to danger, is not actually reconciled to service in the military. The noteworthy aspect of his early service is his dislike for military discipline and regulation, which in most soldiers would be regarded as an unsuitability for military service. However, equally important to an understanding of the man's future service is his predilection for prowling the forward picket positions and outposts, reflecting both a desire for action and an attempt to escape the confines and boredom of military life in the rear echelon. Wert's analysis implies that these very qualities—primarily a restlessness for action and impatience with strictures of drill, which are incompatible with what orthodox military thinking would equate with those traits desirable in a "good soldier"—actually made Mosby the outstanding fighter and leader that he eventually became.

Wert portrays Mosby as an aloof, somewhat colorless personality. Lacking the regality of Lee or the pageantry of Stuart or Custer, Mosby's personality resembles that of the stalwart yet dour Jackson. While not as spectacularly successful as Jackson, Mosby displays the same initiative, courage, and dedication that inspires devotion in his troops despite an unapproachable demeanor.

Yet personal admiration was not the only binding force that held this command together. In addition to the esprit and camaraderie engendered by the general success of the unit's missions, the very nature of the unit's campaigns attracted a personality type often peculiarly associated with American soldiers. Military service during the Civil War often entailed long periods of camp life, which gave rise not only to intolerable boredom and drill but also to serious sickness and disease. In contrast to regular military service, duty with the guerrillas generally meant fighting during missions of relatively short durations, followed by a return to near-civilian status

between operations. While the leadership planned missions, the troops returned to local farms or country homes, usually quartered with the farm families. Thus, guerilla membership provided the opportunity to fulfill one's fighting duty to the state, while avoiding the interim discipline and drudgery of camp life, an option ideally suited to the typically independent American youth.

The men who served in the battalion were for the most part responsible individuals, not particularly given to the looting and pillage commonly experienced in these commands. Most of the battalion's operations occurred in northern Virginia, however, and soldiers arguably are less likely to commit these depredations on their home ground. Mosby considered sutler wares and supplies that fell into the hands of the command during operations as the property of the men, a fact which probably contributed to the morale of men who were chronically ill-fed and ill-clothed. Nevertheless, except when Mosby was absent from the command recuperating from wounds, it appears that operations were conducted against purely military targets whenever feasible targets could be located.

The soldiers came from varied backgrounds, including local volunteers, long-time personal friends of Mosby, regular soldiers on assignment from the Confederate Army, and deserters from the northern and, apparently, southern armies. Aside from his personal drive and leadership, Mosby's most important command decisions lay in the area of selecting officers to subordinate positions. Putting ability above personal friendships, he appointed subordinate leaders who largely reflected his aggressive and daring tactical style, and who could be relied on to exercise independent judgment and initiative. The feats of arms performed by these men and by those under their leadership bear testimony to the quality of the courage, skill, and dedication of both leaders and troops.

The author also examines in depth the civilian population in the area which became known as "Mosby's Confederacy." Experience has shown that it is extremely difficult, if not impossible, for a guerilla force to maintain protracted effectiveness without the sympathy and support of at least a substantial portion of the populace in its area of operations. Mosby's unit was no exception to this rule.

Apparently, the local populace was quite supportive of his Confederacy. Many had relatives under his command or provided food and shelter for his troops. Most were impressed, especially in the early stages of the campaign, with his successes against the northern forces. For his part, Mosby undoubtedly realized that the Confederacy for which he fought was composed of real human beings, rather than mere geographical boundaries. He did not hesitate, however, to

impose on the local residents the hardships which he knew would inevitably follow in the wake of guerilla operations.

Of particular interest in this respect is Mosby's response to a situation that arose early in his career, illuminating a noteworthy aspect of his personality as well as his relationship with the local citizenry. Soon after his initial successes in early 1863, the Union commander of the region threatened to burn the village of Middleburg, located in the vicinity of Mosby's activities. Presented with a petition by the town's leading citizens asking him to refrain from further actions in that area, Mosby replied that the enemy's threats would not deter him from attacking the Union forces. Although engaged in fighting a war on behalf of his home state, and woefully undermanned for any attempt to prevent the Union commander from carrying out his threat, Mosby's dedication to fighting the enemy clearly dictated his course of action with respect to the petition of the townsmen. While he apparently scaled back the level of his operations in the days following the request, his answer made it clear that he would not be coerced to refrain from what he believed to be acceptable and effective means of fighting the enemy despite the repercussions on the local populace.

Eventually, due to the frequency and intensity of northern patrols of the countryside, popular support for Mosby and his command began to waver. The author quotes an interesting diary entry by the father of one of Mosby's soldiers, reflecting on the dismal future if Union forces continued to scour the farms for Mosby. His forebodings were realized shortly thereafter when his son was mortally wounded; thereafter, his disapproval of Mosby's campaign became explicit in the journal entries.

Mr. Wert's treatment of the various elements that comprised "Mosby's Confederacy" is outstanding. Due to the episodic nature of guerilla operations—form up, strike, and disband until next call-up—the narrative is composed primarily of vignettes about missions that the author organizes into related phases during the life of the unit. Interspersed with these campaign accounts are descriptions of intervening events that affected the local populace as well as individual members of the unit. Mr. Wert effectively relates the impact of other major wartime battles and events on Mosby's operations and the war in general without getting bogged down in the details of those events, thereby detracting from the story of Mosby's unit. This approach assumes that the reader has some grasp of Civil War history and, more specifically, Confederate States Army history. However, if the reader is more interested in Mosby's campaigns and less concerned with studying his command's interaction with the Confeder-

ate Army, extensive prior knowledge about the Civil War is unnecessary to read, enjoy, and learn from *Mosby's Rangers*.

Mr. Wert, the author of a previous work on the 1864 Shenandoah Campaign, has sifted through voluminous published and unpublished sources in researching this book. He also has included an interesting selection of pictures, primarily of the individuals who figured prominently in the existence of the battalion, and a map of Mosby's primary area of operations, a must to understand the intricacies of the cavalry campaigns described in the narrative. Brokering his information to the reader in a clear yet descriptive writing style, Mr. Wert has provided a useful and enjoyable book for the recreational reader with a casual interest in Civil War history, as well as the dedicated scholar pursuing a specific interest in Mosby, his unit, or the area in which he campaigned.

# A FROLIC OF HIS OWN*

REVIEWED BY MAJOR DAVID B. HOWLETT**

This remarkable winner of the 1994 National Book Award for fiction combines two subjects that fascinate Army lawyers: the American legal system and the Civil War. The book is hermetic, humorous, and thoroughly enjoyable.

William Gaddis creates a family that enmeshes itself in a tangle of lawsuits. Most of the action takes place in the home of middle-aged Oscar Crease. Oscar has written an unpublished play about his grandfather's experiences in the Civil War at Ball's Bluff and Antietam and is suing a movie company over its alleged use of the material for a film called, "The Blood in the Red White and Blue." Oscar is laid up in his house because of a car accident, over which he also is looking for someone to sue.

Comforting Oscar are his step-sister, Christina, and his friend, Lily. Lily is involved in a farcical will contest and, because of defective breast implants, considers suing not the manufacturer but the boyfriend who urged her to seek augmentation. Because Christina's hard-working husband Harry works for the law firm that represents the film company Oscar is suing, Harry recommends another firm to represent Oscar.

Meanwhile, Oscar's nonagenarian father is a federal trial judge hearing a series of cases involving an abstract sculpture on public property in which a pet dog becomes entrapped. The suits pit the sculptor, the municipality, the pet owner, and other parties against each other and cause numerous headaches for the judge.

Rather than using a standard narrative, Gaddis presents dialogue and documents from the various lawsuits to tell the story. Included are legal opinions written in a very realistic style, complete with citations to old New York Court of Appeals cases. The book also contains excerpts from the Civil War play, pages from deposition transcripts, and jury instructions.

Harry, a struggling young lawyer in the tradition of Louis Auchincloss novels, has his hands full representing the Episcopal Church in a trademark infringement suit against a soft drink manu-

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* WILLIAM GADDIS, A FROLIC OF HIS OWN (Poseidon Press, 1994); 585 pages.

** Judge Advocate General's Corps, United States Army. Currently an LL.M. Candidate, George Washington University, Washington, D.C.

facturer (on the grounds that Pepsi Cola is an anagram of Episcopal). Gaddis includes numerous other legal actions in the novel as well, all of which are deliberately ridiculous. At one point, Oscar insists that his complaint include a count of defaming his dead grandfather, even though his lawyer tells him this cannot be done: "I want this in the complaint . . . because it will let them know immediately that they're not just dealing with some, some nuisance."

The criminal actions in the book receive equal treatment, as is evident from this abstract from a news account of arrests at the sculpture site:

> Among the dozen arrests that evening, that of Billy Pinks, thirty-two, an unemployed auto body worker charged with assault was later reduced to statutory rape on his plea that the "provocative message on her T-shirt got his juices going" and the admission by the twelve-year-old victim that she had deceitfully led him to believe she was fourteen.

This novel is nothing like the legal novels of John Grisham or Scott Turow; in *A Frolic of His Own*, there is little real action and nothing is resolved. Gaddis is very successful in recreating the slow pace of pleadings and discovery, which in many practitioners' experience is much closer to the real practice of law than fast-paced adventures.

Gaddis is the author of three other books in the past forty years: *The Recognitions* (1955), *J.R.* (1975), and *Carpenter's Gothic* (1985). With each book, Gaddis's reputation has grown both as a skilled writer and a thorough researcher of his topics. Although he has won the National Book Award once before, commercial success and fame have thus far eluded Mr. Gaddis, who will turn 72 this year.

A *Frolic of His Own* exemplifies one reason for Gaddis's lack of fame and fortune—it is difficult to read. Gaddis so faithfully reproduces the legal world that it is difficult to imagine nonlawyers enjoying the book or even getting through it. Although Mr. Gaddis is not an attorney, he obtained a copy of *American Jurisprudence* to help him research the legal framework of the novel. His depiction of various causes of action and the legal process is quite accurate, although one can tell that his copy of "Am Jur" must have been several years old.

For those who take up the challenge, *A Frolic of His Own* is quite rewarding. In addition to prompting reflection on the legal profession, it prompts laughter on almost every page. Although lengthy, it is easy to read a few pages at a time because there is no real plot to keep up with other than the slow progress of the various

legal actions. The reader is constantly reminded of their status by conversations, news accounts, and excerpts from court documents.

*A Frolic of His Own* is not the family tragedy as depicted in Dickens's *Bleak House*. Despite the quagmire of litigation the characters impose on themselves, they end up more or less where they started and do not learn any lessons. The question then becomes, "What lesson will the reader take away?" If this book were only a lengthy diatribe about the need for tort reform, it would not be worth reading. Instead, Gaddis presents questions about the role of law in American society and leaves his readers to draw their own conclusions. *A Frolic of His Own* is challenging and fun; I strongly recommend it.

# LEADERSHIP SECRETS OF ATTILA THE HUN*

REVIEWED BY MAJOR JEFFREY W. WATSON**

In trial preparation, lawyers often begin with the closing statement, developing the "bottom line." From this summation, a lawyer develops the case that will lead the jury inexorably to the final point at which they understand the theory of the case.

In *Leadership Secrets of Attila the Hun*, Dr. Wess Roberts concludes his leadership primer with several "pearls of wisdom" that he labels "Attilaisms." These sage leadership suggestions are informative in their simplicity, encapsulating Dr. Roberts's ideas on effective leadership. This summary covers the spectrum of leadership responsibilities well—it could stand alone as a pocket guide to successful leadership.

Just as a trial lawyer proceeds from the closing statement to package a case for the jury, so too has Dr. Roberts in developing his leadership primer from the "Attilaisms." In essence, knowing where one wants to end assists in determining where to begin and what course to follow. Although "Attila the Hun is a dubious character upon whom to base a metaphor on leadership," Dr. Roberts explains in the preface why he chose Attila as the thematic character for his leadership primer. He chose Attila because other leadership writings are "sometimes a painstaking challenge [from which] to extract . . . leadership principles." Dr. Roberts used Attila's efforts to forge barbaric hordes into a nation of Huns as the foundation for his principles of leadership.

Dr. Roberts develops his theme well in the preface. This leadership theme, as seen through the eyes of Attila, remains constant throughout the book. The book is divided into chapters that highlight different leadership principles. Each chapter begins with a vignette ostensibly based on the life of Attila. From this sketch, Dr. Roberts "teaches," through Attila, the principle for that chapter. Aphorisms follow the vignettes and are admittedly Dr. Roberts's cre-

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*WESS ROBERTS, PH.D., LEADERSHIP SECRETS OF ATTILA THE HUN (Warner Books 1985, 1987); $8.35 (softcover).

**Judge Advocate General's Department, United States Air Force. Currently assigned as a Student, 43d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

ation. The value to the reader is in the manner in which way Dr. Roberts has logically tied these truths to the vignette.

The book is splendid in its simple presentation of Attila's life; however, it does have its drawbacks. The author disclaims a factual basis for his vignettes because of little written history on the Hun leader. This is understandable considering that Attila lived over 1500 years ago. For this, the author recognizes that he developed an eclectic version of the real Attila. Additionally, the history presented in the introduction is too abbreviated to fully enjoy.

Furthermore, Dr. Roberts's use of sociopolitical terms—such as "nation" and "national goals"—is distracting. The Huns are more appropriately characterized as a collection of tribes with racial or ethnic similarities. They were unquestionably nomadic. They have been described as having wandered from China to Western Europe, devouring everything in their paths much like the sand creeps forward moved by the wind.[1] It strains the imagination, in light of this description, to view them as a nation.

Because few books on the life of Attila exist, to suggest that Dr. Roberts has inaccurately recited what is known about the King of Huns is unfair. Rather, Dr. Roberts points out in his disclaimer that Attila's life has been interpreted differently by many individuals. This obviously includes the version presented by Wess Roberts.

In reading the introduction, I was left with unanswered questions about Attila's life. In describing the Battle of Chalons, Dr. Roberts makes reference to the only recorded defeat of Attila. However, for readers unfamiliar with this battle, Dr. Roberts's recitation is inadequate. Marcel Brion's book, *Attila The Scourge of God*, points out that among other reasons, Attila was defeated because cavalry tactics were ineffective against a regimented army of foot soldiers.[2] Considering that the purpose of Dr. Roberts's book is to teach leadership principles, is this criticism fair? Because the book's introduction was specifically intended to inform the management tyro about an ancient leader, the answer has to be in the affirmative. Attila was defeated at Chalons, France, in a critical battle. Readers should not wonder why Dr. Roberts used Attila as a positive leadership example after suffering defeat.

Dr. Roberts failed to cite sources for his historical presentation on Attila, diminishing the credibility of his introduction. For example, Dr. Roberts has Attila ascending to the throne as the result of a flaming sword that leapt into Attila's outstretched hand. According

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[1] MARCEL BRION, ATTILA THE SCOURGE OF GOD 4-10 (1929).

[2] *Id.* at 194-95.

to Marcel Brion, a shepherd discovered the sword and brought it to Attila, who recognized it as the Sacred Sword.[3] This plausible explanation assured Attila greatness, as the Huns were strong believers in omens.[4]

These criticisms notwithstanding, the book successfully conveys the author's intended message. Dr. Roberts begins his leadership tutorial with a chapter entitled, "Leadership Qualities." It begins with Attila's life in the Roman Court of Honorius, focusing on the future leader's Asiatic virtue of patience, stoicism, and certitude. From this rendering, Dr. Roberts teaches leadership qualities through Attila. He discusses many qualities, some of which are loyalty, courage, desire, decisiveness, and competitiveness.[5] For example, concerning competitiveness, Attila explains that an essential quality of leadership is to have an intrinsic desire to win. Attila notes, however, winning all of the time is not important, instead "it is necessary to win the important contests." Unfortunately, when positing this important quality of leadership, the author fails to mention the loss at Chalons.

Each successive chapter builds off of the previous chapter. The second chapter is entitled, "The Lust for Leadership: 'You've Got to Want to Be in Charge'." Dr. Roberts describes the successful leader as one who has "an intrinsic desire to achieve substantial personal recognition and [is] willing to earn it in all fairness." He also incorporates some time honored maxims—such as, "remember that sweat rules over inspiration."

National leaders, who doubtlessly see value in the book, have given Dr. Roberts's work ringing endorsements. For example, H. Ross Perot was one of the first to read the book. His endorsement led to his rift with General Motors (GM) Chairman, Roger Smith, when Perot attempted to distribute copies of the book at a dinner for managers of GM's new Saturn division. According to Dr. Roberts, the recitation of this event by author Albert Lee launched *Attila* into the limelight. Victor Kiam, Joe Theismann, and Dr. Denis Waitley are among several national personalities whose endorsements are listed on the inside cover of the book. All commend Dr. Roberts's style in teaching the basic tenets of leadership.

However, not all who read this book enjoy its message. Herbert

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[3] *Id.* at 66.

[4] *Id.* at 242.

[5] The qualities that he teaches are: Loyalty, Courage, Desire, Emotional Stamina, Physical Stamina, Empathy, Decisiveness, Anticipation, Timing, Competitiveness, Self-Confidence, Accountability, Responsibility, Credibility, Tenacity, Dependability, and Stewardship.

Mitgang reviewed the book for *The New York Times* in April, 1989.[6] His review is more acerbic because of Dr. Roberts's use of Attila to present leadership principles. Mr. Mitgang suggests that the Attila-isms are presented with the "cadence of Charlie Chan speaking to his No. 1 son."[7] This comment obviously is directed at Dr. Roberts's writing style rather than the substantive leadership style the book teaches. Cindy Skrzycki of *The Washington Post* also reviewed the book. Less caustic than Herbert Mitgang, Ms. Skrzycki compared *Attila* to another leadership book, *Leadership is an Art*, by Max DePree.[8] She describes *Attila* as a "take charge, be aggressive, ferret out your enemies" type book.[9] By comparison, Ms. Skrzycki suggests that "[i]f the curious appeal of *Attila* lies in its simplistic pronouncements and outrageous presentation, quite the opposite is true of *Leadership Is an Art*."[10] Max DePree's book seems to appeal to Ms. Skrzycki as a "kinder, gentler" type book.[11] Finally, Kevin Maney of *USA TODAY* presents a less critical review of Dr. Roberts's book.[12] His review delves deeper into the problems that Dr. Roberts encountered in getting his book published.[13] On a positive note, Mr. Maney says that "the buzz among publishers is that Attila could be the most popular management book since One-Minute Manager."[14]

Mr. Maney's review is also interesting for its biographical sketch of Dr. Wess Roberts.[15] Dr. Roberts earned a doctorate in psychology from Utah State University in 1973. He joined the Army National Guard and worked with leadership schools where he kept a "lot of notes about leadership."[16] He built a file on leadership principles until 1983 when he began work on *Attila*, which was rejected sixteen times before it was finally published.[17] Dr. Roberts is a personnel executive with Fireman's Fund Insurance Company,[18] where he

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[6]Herbert Mitgang, *Books of the Times, Leadership as Seen by a Scourge and a Philosopher*, N.Y. TIMES, Apr. 1, 1989, *available in* LEXIS, Nexis Library, UPI File.

[7]*Id.*

[8]Cindy Skrzycki, *The Workplace; Facing Mirror-Image Management Styles*, WASH. POST, Sept. 10, 1989, *available in* LEXIS, Nexis Library, UPI File.

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]Kevin Maney, *Attila Storms Best-Sellers List*, USA TODAY, Apr. 20, 1989, *available in* LEXIS, Nexis Library, UPI File.

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]*Id.*

doubtlessly has been able to craft the book from his own experiences in management.

From the varied comments by reviewers, it is obvious some do not like his use of Attila as the central character for teaching leadership. These comments aside, a number of influential and successful business leaders subscribe to Dr. Roberts's leadership principles. Perhaps this favorable reception is due to the many truths found in the book. For example, Attila gives counsel to "[r]eward Huns of character and integrity—for they are rare." Those in the military, as well as any other similar corporate structure, can identify with Attila's counsel on promotion.

> Any promotion will require an adjustment on your part as well as on the part of those who remember you in your former role. Have patience with yourself and others.

Attila lost a critical battle at Chalons to Aetius, a Roman warrior. Attila learned that the stone axes of the Huns were no match for the swords, bronze helmets, and body armor of the Romans. This disaster left between 162,000 and 300,000 Huns dead on the Catalaunian Plains near Chalons. From this loss, Attila teaches in Chapter 15 some of his "lessons learned." He counsels that

> [w]e must never fail to analyze the past. No bleached bone of a battle-lost Hun must go unnoticed as we prepare for the future by laying aside the ill-conceived and undisciplined strategies of our past.

Finally, we end where we began: Attilaisms. These stand-alone "pearls" are an excellent summary of Dr. Roberts's leadership beliefs. They are the capstone of an entertaining and educational leadership primer. Just as the book is subdivided into chapters, Wess Roberts has subdivided the Attilaisms into major subject areas. For example, Attila provides thoughts on advice and counsel, courage, delegation, and goals among other topics. Again, Dr. Roberts has integrated real-life experience into these areas, adding value to them. On delegation, Attila counsels, "A wise chieftain always gives tough assignments to Huns who can rise to the occasion." There are also practical lessons to be learned from these truths. Concerning goals, Attila counsels, "Superficial goals lead to superficial results." Another of similar practicality: "A Hun without purpose will never know when he has achieved it."

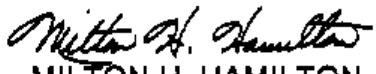
*Leadership Secrets of Attila the Hun* is worth reading. Dr. Roberts has learned from experience what he believes are the finer points of leadership, and has packaged them in the broader context of each chapter. Finally, he integrates these points into his

chronological presentation of the life of Attila. This book is must reading for entry level managers. I also recommend it to professionals who, through career progression, have become personnel managers. The value of this book as an aid to self-teaching leadership skills can perhaps be best summarized by Attila himself: "Teachable skills are for developing Huns. Learnable skills are reserved for chieftains."

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
*General, United States Army*
*Chief of Staff*

Official:



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