Volume 151 Winter 1996

MILITARY LAW REVIEW

ARTICLES

Department of Army Pamphlet 27-100-151

DEPT OF ARMY PAMPHLET 27-100-150 MILITARY LAW REVIEW VOLUME 151 • 1996

MILITARY LAW REVIEW

Volume 151 **Winter 1996**

CONTENTS

ARTICLES

Pamphlet No.
27-100-151

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, D.C., *Winter 1996*

MILITARY LAW REVIEW—VOLUME 151

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, United States Army, Charlottesville, Virginia, since 1958. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in the area of military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402; or call (202) 512-1800. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Editor of the *Military Law Review*.

Inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies should be addressed to the Editor of the *Military Law Review*. Judge advocates of other military services should request distribution from their publication channels.

CITATION: This issue of the *Military Law Review* may be cited as 151 MIL. L. REV. (page number) (1996). Each quarterly issue is a complete, separately numbered volume.

POSTAL INFORMATION: The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Second-class postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review,* The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781.

INDEXING:

* The primary *Military Law Review* indices are volume 81 (summer 1978) and volume 91 (winter 1981).

* Volume 81 includes all writings in volumes 1 through 80, and replaces all previous *Military Law Review* indices.

* Volume 91 includes all writings in volumes 75 through 90 (excluding volume 81), and replaces the volume indices in volumes 82 through 90.

* Volume 96 contains a cumulative index for volumes 92-96.

* Volume 101 contains a cumulative index for volumes 97-101.

* Volume 111 contains a cumulative index for volumes 102-111.

* Volume 121 contains a cumulative index for volumes 112-121.

* Volume 131 contains a cumulative index for volumes 122-131.

* Volume 141 contains a cumulative index for volumes 132-141.

* Volume 151 contains a cumulative index for volumes 142-151.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.); Index to Legal Periodicals; Monthly Catalogue of United States Government Publications; Index to United States Government Periodicals; Legal Resources Index;* three computerized data bases, the *Public Affairs Information Service, The Social Science Citation Index,* and *LEXIS;* and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche,* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review,* The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Authors also should submit a 5 1/4 inch or 3 1/2 inch computer diskette containing their articles in IBM compatible format.

Footnotes should be coded as footnotes, typed double-spaced, and numbered consecutively from the beginning to the end of a writing, not chapter by chapter. Citations should conform to *The Bluebook, A Uniform System of Citation* (16th ed. 1996), copyrighted by the *Columbia, Harvard,* and *University of Pennsylvania Law Reviews* and the *Yale Law Journal,* and to *Military Citation* (TJAGSA 6th ed. 1996) (available through the Defense Technical Information Center, ordering number AD A254610). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

EDITORIAL REVIEW: The Editorial Board of the *Military Law Review* consists of the Deputy Commandant of The Judge Advocate General's School; the Director, Developments, Doctrine, and Literature Department; and the Editor of the *Military Law Review.* Professors at the School assist the Editorial Board in the review process. The Editorial Board submits its recommendations to the Commandant, TJAGSA, who has final approval authority for writings published in the *Military Law Review.* The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.

The Editorial Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Editorial Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. No minimum or maximum length requirement exists.

When a writing is accepted for publication, the Editor of the *Military Law Review* will provide a copy of the edited manuscript to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, only galley proofs—not page proofs—are provided to authors.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings

appear. Additional copies usually are available in limited quantities. They may be requested from the Editor of the *Military Law Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Editor of the *Military Law Review*.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review*, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781.

MILITARY
LAW REVIEW

Volume 151 Winter 1996

THE NATIONAL ENVIRONMENTAL COMMITTEE: A PROPOSAL TO RELIEVE REGULATORY GRIDLOCK AT FEDERAL FACILITY SUPERFUND SITES

MAJOR STUART W. RISCH*

I. The Problem and a Solution

A. The Problem

Federal agencies[1] are engaged in a fierce battle[2] with an

* Judge Advocate General's Corps, United States Army. Currently assigned as a Litigation Attorney, General Litigation Branch, United States Army Litigation Division, Arlington, Virginia. B.A., 1984, Lafayette College, Easton, Pennsylvania; J.D., 1987, Seton Hall University School of Law, Newark, New Jersey; LL.M., 1996, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Formerly assigned as Editor, *Military Law Review*, The Judge Advocate General's School, Charlottesville, Virginia, 1993-95; Chief, Military Justice, Senior Trial Counsel, and Chief, Legal Assistance, 1st Cavalry Division, Fort Hood, Texas, 1988-93. This article is based on a thesis that the author submitted to satisfy, in part, the Master of Laws degree requirements of the 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. The author expresses his sincere appreciation to Major David N. Diner for his guidance and assistance with numerous drafts of this article.

[1] This article focuses primarily on the Department of Defense (DOD) and the Department of Energy (DOE). *See infra* note 42 (discussing the various federal agencies' environmental restoration efforts and concerns).

[2] The environmental mission ahead for the U.S. Dept. of Defense will be as tough as any military campaign in its history. The unknowns of site contamination, political fallout from base closure and sharpened budget knives and changed priorities on Capitol Hill are all combining to make the military's war on wastes a long and painful one.

Debra K. Rubin et al., *Base Cleanups Face New Era of Cuts and Commitments*, 234 ENGINEERING NEWS-REC. 36, 36 (Mar. 6, 1995) [hereinafter *New Era of Cuts*].

"The Pentagon has stated that the problem of cleaning up toxic and hazardous waste sites at military facilities is its 'largest challenge.'" *Department of Defense Envtl. Programs: Hearings Before the Readiness Subcomm., the Envtl. Restoration Panel, and the Dep't of Energy Defense Nuclear Facilities Panel of the House Comm. on Armed Services*, 102d Cong., 1st Sess. 194 (1991) [hereinafter *House Armed Services Comm. 1991 Hearings*] (testimony of Thomas E. Baca, Deputy Assistant Secretary of Defense (Env't)), *quoted in* Richard A. Wegman & Harold G. Bailey, Jr.,

unusual opponent—the hazardous wastes[3] that they have generated and improperly disposed for decades at their own facilities across the nation.[4] Since the mid-1900s, these agencies have jeopardized human health and safety and endangered the environment[5] by discarding toxic wastes and materials at thousands of federal facility sites in every state.[6] Consequently, many of these facilities[7] are "laced with almost every imaginable contaminant—toxic and hazardous wastes, fuels, solvents, and unexploded ordnance."[8]

Accordingly, these agencies have had to adopt new strategies

The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed, 21 ECOLOGY L. Q. 865, 868 (1994).

[3] *See* 42 U.S.C. § 6903(5) (defining the term "hazardous waste"); *id.* § 9601(14) (defining the term "hazardous substance"); *see also infra* notes 79, 136 (detailed definitions and discussion of the terms). I will use the terms "hazardous waste," "hazardous substance," and "toxic waste" interchangeably.

[4] *See* Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1522-23 & nn.27-31 (1994) [hereinafter *Federalism and Hazardous Waste*] ("[T]he most dangerous hazardous waste sites in the United States are those that the federal government created itself."); Kyle Bettigole, *Defending Against Defense: Civil Resistance, Necessity and the United States Military's Toxic Legacy*, 21 B.C. ENVTL. AFF. L. REV. 667, 667-68 & nn.2-6 (1994) ("the Departments of Defense (DOD) and Energy (DOE) have 'cast a chemical plague over our country,' creating a toxic legacy for the next several generations.") (citations omitted).

See also SETH SHULMAN, THE THREAT AT HOME: CONFRONTING THE TOXIC LEGACY OF THE U.S. MILITARY (1992) (describing environmental conditions within the DOD); G.D. Baasch et al., *Integrating Waste Minimization and Recycling in the Hanford Cleanup Mission*, 4 FED. FACILITIES ENVTL. J. 93, 93 (Spring 1993) (discussing the Hanford Nuclear Reservation, the worst of the DOE's 17 major nuclear weapons research and production facilities that are replete with radioactive and toxic wastes. The article refers to the Hanford site as "home to one of the largest and most complex waste cleanup projects the world has ever seen.").

[5] Bettigole, *supra* note 4, at 670 & nn.28 (citing CONGRESSIONAL BUDGET OFFICE, FEDERAL LIABILITIES UNDER HAZARDOUS WASTE LAWS, S. DOC. NO. 95, 101st Cong., 2d Sess. 13 (1990)) (indicating that "chronic illnesses such as cancer, brain damage, nerve and digestive disorders, and reproductive problems are among the many health dangers created by direct contact with hazardous substances, or indirect exposure to contaminated air or drinking water"). *See* Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 265 (1985).

[6] Bettigole, *supra* note 4, at 667 & n.4 (citing Seth Shulman, *Operation Restore Earth: The U.S. Military Gets Ready to Clean Up After the Cold War*, E. MAG., Mar.-Apr. 1993, at 37); GENERAL ACCT. OFF., PUB. NO. NSIAD-94-133, ENVIRONMENTAL CLEANUP: TOO MANY HIGH PRIORITY SITES IMPEDE DOD'S PROGRAM 4-5 (1994) (indicating that every state in the country has at least one potentially contaminated site).

[7] The term "facility" is broadly defined as "(A) any building, structure, installation, equipment, pipe, or pipeline . . . well, pit, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). "Federal facilities" are defined as "facilities which are owned or operated by a department, agency, or instrumentality of the United States." *Id.* § 9620(a)(2). These definitions include areas contiguous to federal facilities where hazardous substances may have extended beyond the boundaries of the facility. 40 C.F.R. § 260.10. The term federal facility, as used in this article, incorporates the term "federal agencies."

[8] Ken Miller, *Pentagon Says Environmental Mess Will Cost $25 Billion*, GANNETT NEWS SERVICE, May 13, 1993, at 1 (quoting the Deputy Under Secretary of Defense

and fundamentally change long-standing practices to promote and protect the environment.[9] They collectively have spent tens of billions of dollars to date in an attempt to clean up their environmental messes.[10] Estimates predict that the final clean-up costs could run into the *trillions*.[11] These diligent efforts have allowed the agencies to gain significant ground, yet much work remains.[12]

Federal agencies have been battling to rid their facilities of this toxic menace since the mid to late 1970s. It was only then that the dangers posed by hazardous wastes at both private and federal facilities across the nation first vaulted to the forefront of national attention.[13]

As a result of the nation's increased concern over this threat to the environment, Congress responded by enacting a wave of environmental legislation in the late 1970s[14] and early 1980s. It passed

(Environmental Security) (DUSD(ES)), Sherri Wasserman Goodman, in testimony before the House Armed Services subcommittee).

[9] *See, e.g.*, DEPARTMENT OF DEFENSE, DEFENSE ENVIRONMENTAL CLEANUP PROGRAM ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1993, at 1-4 (Mar. 31, 1994) [hereinafter DERP 1993 REPORT] (acknowledging that "new goals and strategies must be established in each of the program areas—cleanup, compliance, conservation, pollution prevention, and technology."); UNITED STATES ARMY, ENVIRONMENTAL STRATEGY INTO THE 21ST CENTURY (1992). *See also infra* notes 235-37 and accompanying text.

[10] The DOD alone has spent at least $7 billion through fiscal year (FY) 1994 on all phases of the clean-up process at almost 22,000 sites, and the DOE's spending dwarfs that of all other agencies combined. *See* DEPARTMENT OF DEFENSE, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1994, at B6-1 (Mar. 31, 1995) [hereinafter DERP 1994 REPORT]; *but see* Rubin, *supra* note 2, at 36 (indicating that a recent Congressional Budget Office (CBO) report placed the DOD's costs at almost $11 billion).

[11] *See* U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-95-1, REPORT TO THE SECRETARY OF ENERGY, DEPARTMENT OF ENERGY, NATIONAL PRIORITIES NEEDED FOR MEETING ENVIRONMENTAL AGREEMENTS 10 (1995) [hereinafter NATIONAL PRIORITIES] (indicating that the DOE alone will likely spend as much as $1 trillion to clean up over 7000 contaminated sites).

[12] "[T]he military still has far to go before it resolves the most difficult environmental problem it faces: the thousands of sites on DOD installations that are contaminated and in need of cleanup because of past disposal, spills, and leaks of hazardous materials." Martin Calhoun, *The Big Green Military Machine: Department of Defense*, BUS. & SOC'Y REV., Jan. 1995, at 21, 22.

[13] The threat posed by improperly disposed hazardous wastes was thrust into the limelight in 1980 with the discovery of the Love Canal near Niagara Falls, New York, *and similar toxic waste dumpsites nationwide posing deadly risks to area residents*. *See* SENATE COMM. ON ENVTL. & PUB. WORKS, ENVTL. EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 7, 8 (1980) [hereinafter S. REP. NO. 848]; *see also infra* notes 100-06 and accompanying text (detailed discussion of various hazardous waste sites).

[14] "Throughout the 1970s, the United States established a world-class track record for enacting innovative environmental laws." Peter B. Prestley, *The Future of Superfund*, 79 A.B.A. J. 62, 62-63 (Aug. 1993).

[15] Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended in scattered sections of 42 U.S.C. §§ 6901-6986 (1988)), amended by Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980) (current version at 42 U.S.C. §§ 6901-6992k (1988)). *See infra* Appendix B (list containing commonly used acronyms, such as "RCRA," in the environmental law arena).

the Resource Conservation and Recovery Act (RCRA)[15] in 1976 and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[16] in 1980 (commonly referred to as the "Superfund").[17] Together, the two statutes inspired great expectations, but in reality have demonstrated limited success in combatting toxic wastes.[18] The statutes' ambiguity, substantive omissions, and piecemeal application have led to claims that the Superfund is "broken," and that the pace of cleanups at toxic waste sites is too slow,[19] the costs exorbitant.[20]

---

[16] Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9657 (1988)), reauthorized and amended in part by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 26 U.S.C. and 42 U.S.C. §§ 9601-9675 (1988)). *See also* Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. Frequently, the CERCLA is referenced under the paragraph of the original legislation. Those paragraph numbers run from 100 to 175 and correspond to 42 U.S.C. §§ 9601-9675.

[17] The CERCLA initially created a $16 billion fund for use in responding to releases or threatened releases of hazardous substances at any site nationwide, hence the nickname "Superfund." *See infra* notes 131-35 and accompanying text (discussing the fund in greater detail).

[18] *See* R.S. Hanash, *Superfund Reform*, 6 FED. FACILITIES ENVTL. J. 115, 115 (Winter 1995/96) ("After 15 years, the Superfund program is often described as one that has 'cost billions, cleaned up little, and satisfied no one,' and Congress is still debating over how to fix its major deficiencies."); Babich, *supra* note 4, at 1520 ("the Superfund program for cleanup of hazardous substances is now notorious for fostering too much litigation and too little actual cleanup").

But see id. at 1521-22 (indicating a belief that "both statutes have dramatically improved environmental protection"); n.26 (citing Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733, 755-58 (1990) (the CERCLA and RCRA have been successful in increasing waste minimization and voluntary cleanup); 42 U.S.C. §§ 6973, 9606 (the statutes also allow quick responses to threats to public health)).

[19] The average amount of time from the discovery of a contaminated site through the cleanup has ranged from 12-15 years. Since the Superfund's enactment in 1980, only 346 sites have been cleaned. Gary Lee, *Superfund Law Revisions Pushed—GOP Tries to Rewrite Hazardous Waste-Site Cleanup Regulations*, WASH. POST, Oct. 15, 1995, at A18. "[I]t has become apparent that cleaning up the environment is a long-term project that some experts believe will take as long as 50 years." Prestley, *supra* note 14, at 62.

The pace of cleanups at federal facilities is not much better. The DOD reported in March, 1995, that 21,425 contaminated sites existed on 1769 installations, and that it had completed cleanups at only 810 sites. The remainder of the sites were still mired in the investigation/assessment/design phases of the clean-up process. DERP 1994 REPORT, *supra* note 10, at B6-1.

Studies indicate that the average amount of time spent studying sites, before cleanups even begin, is 14 years. CONGRESSIONAL BUDGET OFFICE, CLEANING UP DEFENSE INSTALLATIONS: ISSUES AND OPTIONS 1, 2 (1995) [hereinafter ISSUES & OPTIONS]. Such extensive periods of assessments, studies, inspections, and reports have caused the DOD's own environmental chief to admit that the clean-up process is afflicted with "paralysis by analysis." Calhoun, *supra* note 12, at 23 (quoting Deputy Under Secretary of Defense (Environmental Security) (DUSD(ES)) Sherri W. Goodman, referring to the situation in which "the bulk of the cleanup program to date has been devoted to assessing contamination rather than cleaning it up").

[20] The total estimated bill for cleaning up contaminated sites nationwide has varied from year to year. Presently, the figures are staggering. Estimates on the high end run from $420 billion to figures in the trillions. *See* Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L. REV. 2039,

Yet these criticisms have been heard time and again. Many before me have written on the ills of the Superfund program and *recommended specific revisions to the statutes.*[21] *I will not fall into* that rank of critics. Although these specific areas of reform are a vitally important part of the Superfund debate,[22] this article focuses on the administrative body that implements all of the requirements—imposed by a variety of federal, state, and local environmental laws—on federal facilities appearing on the National Priorities List (NPL).[23]

2068 (1993) (citing *U.S. Hazwaste Cleanup Costs Could Hit $420 Billion Over 20-30 Years*, HAZARDOUS WASTE BUS., July 1, 1992, at 3); Ronan, *A Clean Sweep on Cleanup*, RECORDER, Sept. 30, 1992, at 1 ($750 billion); Martin L. Calhoun, *Cleaning Up the Military's Toxic Legacy*, USA TODAY, Sept. 1995, at 60, 64 (Magazine, vol. 124, no. 2604) (indicating that "independent estimates of the price tag for cleaning up *military bases* range to $1 trillion." (emphasis added)).

The average cost of cleaning up a Superfund site has been placed between $25 and $30 million. Prestley, *supra* note 14, at 65; *Superfund: Industry Coalition Study Urges Greater Role for Cost Consideration in Remedy Selections*, 20 Env't Rep. (BNA) 856, 856 (Sept. 22, 1989) (industry coalition estimate of $25 million per site).

Critics of the Superfund program have alternatively attacked the high administrative and legal costs associated with the cleanups. *See, e.g.*, Prestley, *supra* note 14, at 65. "The substantial transaction costs that have marked the Superfund process to date also have been the target of strident criticism." *Id. See also Overhaul Is Proposed for Law Governing Cleanups of Hazardous Waste Sites*, WASH. POST, Feb. 4, 1994, at A17 (indicating that even EPA Administrator Carol Browner believes that the Superfund needs to be "fixed." She is concerned that "too much money is going to the lawyers and not enough to cleanups.").

Federal facilities will bear the lion's share of the clean-up costs at Superfund sites. Current DOD estimates place the total cost of cleanups at around $30 billion. *Hanash, supra note 18, at 115. However, the DOD Inspector General (IG) reports that* the total DOD bill will range from $100-$200 billion. Wegman & Bailey, *supra* note 2, at 877. Estimates place the DOE's final bill near the $300 billion mark. *See also infra* note 42 (discussing comparative costs for each federal agency).

[21] *See, e.g.*, Earl K. Madsen et al., *Superfund Reauthorization: An Opportunity to Rectify Major Problems*, 24 Env't Rep. (BNA) 1020 (Oct. 1, 1993) (recommending that Congress clarify numerous provisions of the CERCLA and reexamine others). The article specifically recommends that Congress define response costs; require states to establish the need for ARARs (clean-up standards); allow pre-enforcement review of EPA decisions; and encourage *de minimis* settlements. *See also* Prestley, *supra* note 14, *at 62 (identifying the need for more cost-effective ways of apportioning* clean-up responsibility, streamlining current clean-up methods to produce more timely cleanups, better priority setting, increasing the Superfund financing pool, and reassessing the Superfund's retroactive liability provisions). These two articles are representative of hundreds calling for various changes to the CERCLA.

[22] Part VI contains a discussion of specific reforms within the context of my proposal.

[23] The NPL is a national roster of the most heavily contaminated sites that pose the greatest risk to human health and the environment. The list is located at 40 C.F.R. § 300.425(c)(1). The Environmental Protection Agency (EPA) ranks sites on the list by the degree of hazard posed. The agency uses the Hazard Ranking System (HRS) to identify those sites that must be listed—that is, those sites that score 28.50 or higher. *See* 40 C.F.R. pt. 300. app. A. The EPA published the first list in 1981, and it contained 115 entries. *Who's Who on the List*, 7 E.P.A. J. Nov.-Dec. 1981, at 16-17. *See* 47 Fed. Reg. 58,476, 58,479 (1982). Congress requires the EPA to update the list annually. 42 U.S.C. § 9605(a)(8)(B). This ensures that the most heavily contaminated sites requiring top priority appear on the list.

Presently, the possibility exists that both the RCRA and the CERCLA will govern hazardous waste cleanups[24] at federal facility NPL sites. Congress enacted the RCRA to regulate the future generation, treatment, and disposal of hazardous wastes.[25] It created the CERCLA to confront those wastes disposed of prior to the RCRA's enactment.[26] Typically, the Environmental Protection Agency (EPA) enforces the CERCLA, but delegates authority to enforce the RCRA to the states. However, when both statutes simultaneously apply to a federal facility cleanup—the "RCRA/CERCLA interface"—the statutory overlap creates a regulatory overlap.[27] Disputes erupt between the states, federal facilities, and the EPA over control of the cleanup. A duplication of effort occurs because federal facilities must evaluate sites under both statutes. Conflicts arise over the appropriate clean-up standards and remedy.[28] In short, "regulatory gridlock" develops.[29]

This gridlock arises out of the two statutes' failure to address important issues. Who controls the cleanup? Who sets the clean-up

---

[24] *See* Melinda R. Kassen, *The Inadequacies of Congressional Attempts to Legislate Federal Facility Compliance with Environmental Requirements*, 54 MD. L. REV. 1475, 1475 n.4 (1994). Ms. Kassen indicates that "[g]iven the magnitude and complexity of the contamination at these [federal] facilities, a complete 'clean up' at these sites is not possible. However, because the use of this phrase has become endemic in this field, it appears throughout the article." I adopt her line of thinking on this particular issue.

See also Bill Turque & John McCormick, *The Military's Toxic Legacy*, NEWSWEEK, Aug. 6, 1990, at 20, 24 (stating that "[t]he tug of war between environmental concerns may grow more tense, partly because the term cleanup is a misnomer. While the worst sites might eventually be suitable for limited surface users, they will never be completely safe. Even the military's success stories can leave frightening legacies.").

[25] *See infra* notes 76-99 and accompanying text (discussing the RCRA).

[26] *See infra* notes 121-79 and accompanying text (discussing the CERCLA). Congress envisioned that the two statutes would comprehensively govern hazardous wastes. Hilary Noskin et al., *When Does RCRA Apply to a CERCLA Site?*, 3 FED. FACILITIES ENVTL. J. 173, 173 (Summer 1992).

[27] Federal facilities must often "comply at the same time with two different statutes that employ distinct regulatory mechanisms, goals, and approaches." Wegman & Bailey, *supra* note 2, at 900-01 (citations omitted). *See also* Richard G. Stoll, *RCRA Versus CERCLA: Choice and Overlap*, 778 A.L.I.-A.B.A. 141, 152 (1992).

[28] Ultimately, federal facility cleanups experience a concomitant increase in cost, delays, and frustration. *See supra* notes 19-20.

[29] *See infra* notes 304-429 and accompanying text (analyzing the RCRA/CERCLA interface and related issues). This gridlock grinds the pace of cleanups to a "screeching halt." Two excellent examples are found in the cleanups at the Army's Twin Cities Army Ammunition Plan (TCAAP) in Minnesota, and the Army's Rocky Mountain Arsenal in Colorado. The TCAAP has been involved in the clean-up process (assessment through actual cleanup) since 1981, and the anticipated date of completion is not until the year 2050. The process has been underway at the Rocky Mountain Arsenal for decades, and there is reason to believe that it will never be completed. Wegman & Bailey, *supra* note 2, at 875-76; *see also House Armed Services Comm. 1991 Hearings*, *supra* note 2, at 287-88 (providing examples where the overlap caused significant delays in the clean-up process).

standards? Who selects the clean-up remedy? Who pays the staggering clean-up costs? The stakes for federal facilities, and our country, are enormous.

I have identified four potential solutions to relieve the gridlock:

(1) Grant complete control of the clean-up process at federal facility NPL sites to the states;[30]

(2) Grant complete control of the clean-up process at these sites to the EPA;[31]

(3) Maintain the status quo, mandating the use of tri-party interagency agreements to resolve conflicts between the regulatory authorities;[32] or

(4) Create a national administrative committee, granting it *complete* authority over all federal facility NPL sites.

An analysis of these potential solutions reveals that the first three do not present a workable approach to resolving the problems created by the interface of the two statutes. The fourth alternative, however, provides a unique opportunity to remove the regulatory gridlock and to address additional problems that currently plague the clean-up process at federal facilities.

B. The Proposed Solution

Accordingly, I recommend the creation of a National Environmental Committee (NEC),[33] to function in a manner similar to the Federal Reserve Board.[34] This committee would assume

---

[30] *See infra* notes 434-49 and accompanying text (analyzing state control).

[31] *See infra* notes 450-63 and accompanying text (analyzing EPA control).

[32] *See infra* notes 464-77 and accompanying text (analyzing the status quo).

[33] *See infra* Appendix A (proposed legislation establishing the NEC); notes 478-81 and accompanying text. The idea for a small, centralized administrative group as a solution, albeit to the related problem of risk regulation, did not originate with me. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE—TOWARD EFFECTIVE RISK REGULATION (1993). Justice Breyer proposes the creation of a new administrative entity to develop a "coherent risk regulating system . . . for use in several different risk-related programs." *Id.* at 59-60. Justice Breyer clearly articulates his recommendation as follows:

> [M]y proposal is for a specific kind of group: mission-oriented, seeking to bring a degree of uniformity and rationality to decision making in highly technical areas, with broad authority, somewhat independent, and with significant prestige. Such a group would make general and government-wide the rationalizing efforts in which EPA is currently engaged.

Id. at 61. I have borrowed Justice Breyer's concept of a relatively small, administrative entity that is insulated, prestigious, and powerful. However, I apply it only to federal facility NPL cleanups. The unique and positive attributes of such a group will provide immediate benefits to the overall clean-up process at these sites.

[34] *See infra* notes 482-92 and accompanying text (providing a detailed discussion of the creation of this committee, comparing and contrasting it with the Federal Reserve Board).

responsibility for, and authority over, all federal facility NPL sites.[35] The NEC will consist of twelve members selected by the President and confirmed by the Senate, who will serve fourteen-year terms. Insulated, powerful, and prestigious, this committee will possess the characteristics necessary to achieve the difficult task of remediating federal facility Superfund sites.

Moreover, it will not suffer from the bias or economic and political pressures that hinder state and EPA efforts to direct these cleanups. More importantly, the NEC avoids the regulatory gridlock created by the interface of the two major environmental statutes by placing control with only one entity.

The committee's inherent qualities will allow it to effect numerous changes in the current system for cleaning up these wastes. The NEC will prioritize federal facility sites on a national level, ensuring that the most heavily contaminated sites receive the limited funds available for cleanups.[36] It will create national clean-up standards to replace the current site-specific method, creating a more efficient, uniform process for determining such standards.[37] Finally, it will incorporate presumptive remedies, future land use, risk-assessment, and cost-benefit considerations into the remedy selection process, thereby accelerating the clean-up process and decreasing its overall cost.[38] Accordingly, these changes will allow the NEC to accomplish the ultimate goal of the clean-up process—the timely and cost-effective clean up of federal facility Superfund sites.

C. Scope

How did we get to the present juncture, and where do we go

---

[35] Why just federal facility NPL sites? First and foremost, although the number of federal facility NPL sites represents only about 10% of the total number of NPL sites, the cost of remediating this 10% is significantly greater than the cost of remediating the remaining sites. This is primarily attributable to the type and amount of contamination at these sites. One commentator accurately noted that "the small numbers of federal facilities clearly skew their true pollution significance." Stan Millan, *Federal Facilities and Environmental Compliance: Toward A Solution*, 36 LOY. L. REV. 319, 321 (1991). *See* Kassen, *supra* note 24, at 1475 & n.5 (relating that the estimated cost of cleaning up 24,000 federal facility NPL and non-NPL sites is $400 billion, while the cost of cleaning up all 1000 private NPL facilities is only $44 million). Additionally, I limited the NEC's application because the RCRA/CERCLA interface results in federal-state authority disputes only at federal facilities.

[36] *See, e.g.*, Wegman & Bailey, *supra* note 2, at 869 ("If the share of the DOD budget devoted to cleanup is decreased—or even if it is held to present levels—it will be essential to spend prudently whatever clean-up funds are made available, and to utilize cost-efficient approaches to the maximum extent possible."); *see also infra* notes 505-10 and accompanying text (detailed discussion of prioritizing on a national level).

[37] *See infra* notes 511-19 and accompanying text (detailed discussion of national clean-up standards).

[38] *See infra* notes 520-39 and accompanying text (detailed discussion of remedy selection).

from here? Part II of this article details the evolution of federal environmental law—emphasizing those statutes governing hazardous waste—from its earliest beginnings.[39] It chronicles the enactment of major environmental legislation within the last quarter century, to include the National Environmental Policy Act (NEPA) of 1969,[40] the RCRA, and the CERCLA. It ends with the Superfund Amendments and Reauthorization Act (SARA) of 1986,[41] which subjected federal facilities to the provisions of the CERCLA and finally brought them under statutory and regulatory control.

Part III discusses the formation and growth of the Department of Defense's environmental restoration programs.[42] Thus, parts II and III will familiarize readers with the various issues and concerns surrounding hazardous waste cleanups, especially at federal facilities, and the statutes enacted to address these concerns. This familiarization is fundamental to an understanding of the problem and my recommended solution.

Part IV examines the RCRA/CERCLA interface and the regulatory gridlock that it creates.[43] Part V analyzes potential solutions to the overlapping regulatory authorities aimed at removing the grid-

---

[39] *See infra* notes 46-226 and accompanying text.

[40] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370a (1988 & Supp. III 1991). *See infra* notes 65-72 and accompanying text.

[41] Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.). *See infra* notes 180-226 and accompanying text. The SARA actually amended the CERCLA.

[42] *See infra* notes 227-303 and accompanying text. I examine the DOD because it is representative of the major problems and programs present at federal facilities. Nevertheless, my recommendations apply to all federal facilities, not just the DOD's. I provide facts and figures on other federal facilities where appropriate.

Note, however, that "[t]he vast majority of federal facilities that have released contamination into the environment are defense facilities, owned and operated by the Department of Defense (DOD) or by the Department of Energy (DOE), the agency responsible for manufacturing and maintaining nuclear weapons." Kassen, *supra* note 24, at 1475 & n.3 (citing to a conversation with Mr. Thomas P. Grumbly, Assistant Secretary for Environmental Management, DOE, in which he related that Alice Rivlin, Director of the Office of Management and Budget (OMB), had "suggested naming a draft report on environmental restoration at federal facilities, 'The Elephant, the Rabbit, and the Mice,' as a way of describing the relative sizes of the tasks at DOE, DOD, and all other federal agencies").

The Department of the Interior (DOI) has the most contaminated sites, followed by the DOD, DOE, the Department of Agriculture (USDA) and the National Aeronautics and Space Administration (NASA). However, due to the nature of the contamination at DOE sites (radioactive wastes), the estimated cost to clean DOE's sites dwarfs that of the remaining federal facilities combined. *See also infra* Appendix D (providing figures from a recent report on cleanups at federal facilities prepared by the Federal Facilities Policy Group); DEPARTMENT OF ENERGY, DOE/EM-0232, ESTIMATING THE COLD WAR MORTGAGE: THE 1995 BASELINE ENVIRONMENTAL MANAGEMENT REPORT (1995).

[43] *See infra* notes 304-429 and accompanying text. Part IV details how these federal statutes overlap, creating federal-state authority disputes at federal facility NPL sites. It also describes the effect that the disputes have on the pace and cost of the clean-up process at these sites.

lock.[44] Part VI recommends creating the NEC and discusses the advantages of forming such a committee. I also address potential objections to the committee, ultimately concluding that it represents the best solution to the gridlock currently impeding federal facility clean-up efforts.[45]

In sum, to achieve the successful cleanup of federal facility Superfund sites, Congress must take control of the clean-up process away from the states and the EPA. It must then vest it in a national committee that possesses the ability to manage the process to a successful conclusion.

II. America and Hazardous Waste

> *Recent decades have borne witness to the dubious merit of American hazardous waste disposal practices. The enormous technological advances credited to those years are no longer viewed as entirely benign. Americans are now aware of the high cost of industrial progress—the increased menace of hazardous contamination.*[46]

A. The Early Years

1. The Industry "Boom"—The era of rapid industrialization[47] in America from the mid-1800s through the 1980s, coupled with the chemical industry expansion following the World Wars,[48] resulted in

---

[44] *See infra* notes 430-81 and accompanying text.

[45] *See infra* notes 482-546 and accompanying text.

[46] Sean Sweeney, *Owner Beware: Lender Liability and CERCLA*, 79 A.B.A. J. 68, 68 (Feb. 1993).

[47] This period, commonly referred to as the "industrial revolution," was a shift in the United States from the "traditional agricultural-based economy" to an economy "based on the mechanized production of manufactured goods in large-scale enterprises." MICROSOFT ENCARTA '95 INTERACTIVE MULTIMEDIA ENCYCLOPEDIA (1995) [hereinafter ENCARTA] (search of History library under "Industrial Revolution"). Such a period generally is characterized by the development of new methods of production, achieved by the "systematic application of scientific and practical knowledge to the manufacturing process." *Id.* It also involves urbanization—or the migration of the population from rural to urban locations. *Id.* Industrialization usually results in an increase in the national income per capita and changes in how this income is distributed, as well as in social classes and in working and living conditions. *Id.* Quite obviously, it also can have a tremendous impact on the environment as a result of the increase in the production of manufactured goods and the concomitant increase in the wastes generated by this production.

[48] *See* Richard J. Hunter & Daniel Naujokas, *Liability of Corporate Officers and Directors in the Environmental Context Under the "Authority to Control" Doctrine*, 28 MID-ATLANTIC J. BUS. 147 (JUNE 1992) (no. 2) (the authors were students at Seton Hall University Stillman School of Business).

the production of massive amounts of hazardous wastes.[49] These wastes included every imaginable toxic substance—"flammables, explosives, nuclear and petroleum fuel by-products, germ-laden refuse from hospitals and laboratories, toxic metals such as mercury or lead, and dozens of synthetic chemical compounds including DDT, PCBs and dioxins."[50] American industry disposed of these wastes through a variety of methods. Toxic wastes placed in fifty-five gallon metal barrels were buried at any number of "fly by night" waste disposal facilities. Worse yet, free-flowing liquids were poured into open landfills and "oozy lagoons."[51] The state of hazardous waste disposal during this era was, by modern standards, appalling.[52]

The military was no less responsible than the private sector for the escalation in the amount of hazardous wastes or for the manner in which they were discarded.[53] Beginning after World War I (WWI)—in an attempt to develop chemical weapons to counter those Germany possessed and used during the war[54]—the military began

---

[49] *See* J. GORDON ARBUCKLE, ENVIRONMENTAL LAW HANDBOOK 60 (12th ed. 1993) (indicating that post-war America produced massive quantities of hazardous wastes). Estimates in the early 1980s indicated that the chemical industry generates approximately 70% of this waste. Sharon L. McCarthy, *CERCLA Cleanup Costs Under Comprehensive General Liability Insurance Policies: Property Damage or Economic Damage?*, 56 FORDHAM L. REV. 1169, 1169-70 (1988) (citing M. KRATZMAN, CHEMICAL CATASTROPHES: REGULATING ENVIRONMENTAL RISK THROUGH POLLUTION LIABILITY INSURANCE 14 (1985)).

[50] Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1462 (1986) [hereinafter *Developments*]. The note indicates that "[t]he volume of hazardous wastes has increased dramatically in the last decade [1970-1981]." From 1970, when "industry produced only about 9 million metric tons," the volume surged to an astonishing 43 million metric tons in 1981. *Id.* at 1462 & n.2 (citing COUNCIL ON ENVIRONMENTAL QUALITY, THIRTEENTH ANNUAL REPORT (1982), *reprinted in* F. GRAD, ENVIRONMENTAL LAW § 4.04, at 640 (3d ed. 1985); EPA, OFFICE OF SOLID WASTE MANAGEMENT PROGRAMS, REPORT TO CONGRESS: DISPOSAL OF HAZARDOUS WASTES 4 (1974), *reprinted in* 2 THE POLLUTION CRISIS 321, 326 (E. Rabin & M. Schwartz eds. 1976)).

[51] *Developments*, *supra* note 50, at 1462; McCarthy, *supra* note 49, at 1170 n.3 (citing Finegan, *Double Billing*, Inc., Mar. 1988, at 50). Apparently, some in the chemical industry honestly believed that placing wastes in metal barrels or drums and covering them in clay would contain the wastes and prevent them from leaking.

Unfortunately, just the opposite occurred. These containers and various other burial methods proved ineffective in restraining the wastes, which ultimately leaked into the surrounding ground and were dispersed into the air, water, and soil.

[52] *See Developments*, *supra* note 50, at 1469 ("the postwar explosion of American industry brought increased use of the environment as a dumping ground for industrial by-products").

[53] *See* Kassen, *supra* note 24, at 1435 (citing Comment, Bettigole, *supra* note 4, at 667) (stating that "[t]he federal government is the nation's largest polluter," and attributing the majority of contamination released from federal facilities to Department of Defense (DOD) and Department of Energy (DOE) facilities).

[54] Although chemical agents have existed in some manner for centuries, their most widespread use occurred during WWI. Lieutenant Colonel Warren G. Foote, *The Chemical Demilitarization Program—Will it Destroy the Nation's Stockpile of Chemical Weapons by December 31, 2004?* 146 MIL. L. REV. 1, 4 (1994) (citing Combat

generating increasingly greater amounts of hazardous wastes as a result of both its chemical and nonchemical weapons production.[55]

This tremendous industrial growth, coupled with a growth in population and urbanization in the United States, led to serious degradation of the environment.[56] In the early 1960s, the public began to notice the effects on the country's natural resources. Rachel Carson's 1962 epic *Silent Spring*[57] served as the catalyst for the environmental movement. Carson raised the nation's environmental consciousness by "describing the systematic destruction of rivers, streams, lakes and drinking water in the United States" from the use and abuse of pesticides and other manmade chemicals.[58]

Studies Instit., United States Army Command and General Staff College, Charles Heller, *Chemical Warfare in World War I: The American Experience, 1917-1918*, 10 LEAVENWORTH PAPERS, Sept. 1984, at 8-10). Earlier attempts to prohibit the use of chemical agents—that is, the Hague Declaration in 1899 and the Treaty of Versailles in 1919, both of which prohibited the use of asphyxiating or poisonous gases—proved largely unsuccessful, as WWI demonstrated. The United States suffered 224,089 casualties as a result of Germany's use of poison gas in France in WWI, and Russia experienced nearly 475,000 nonfatal casualties and 56,000 deaths at the hands of Germany's chemical weapons. *Id.* at nn.16-17 (citing EDWARD SPIERS, CHEMICAL WARFARE 31-32 (1986)).

As a result, other countries—primarily the United States—recognized the need to develop their own chemical weapons as a deterrent to the first use by Germany and any other nations possessing such capability. Accordingly, the race to develop chemical agents and sophisticated delivery systems for these agents had begun.

[55] "Decades of improper and unsafe handling, storage, and disposal of hazardous materials while building and maintaining the world's most powerful fighting force have severely polluted America's air, water, and soil." Calhoun, *supra* note 20, at 60. As further evidence of his point, Calhoun cites to a base commander in Virginia who responded to criticism concerning toxic chemical contamination emanating from his installation by saying, "We're in the business of protecting the nation, not the environment." *Id.* Yet Calhoun also stresses that "the military has been taking great pains to project a new image and a changed attitude when it comes to environmental matters." *Id.*; *see also infra* notes 235-37 and accompanying text (a more detailed discussion of the military's efforts at increased awareness of environmental issues and protection).

[56] Scott C. Whitney, *Superfund Reform: Clarification of Cleanup Standards to Rationalize the Remedy Selection Process*, 20 COLUM. J. ENVTL. L. 183 (1995) (indicating that industrialization "damaged the environment by polluting the air, the surface water in lakes, rivers, and adjacent oceans, and the water in sub-surface aquifers . . . . [and] created a vast inventory of hazardous and solid waste sites throughout the nation"). *See* A. REITZE, ENVIRONMENTAL LAW 23 (2d ed. 1972); *see also infra* note 65 (discussing the effects of population and conservation on the environment).

[57] RACHEL CARSON, SILENT SPRING (1962). Carson, an American marine biologist, was employed from 1936 through 1952 as an aquatic biologist for the United States Bureau of Fisheries and its successor, the United States Fish and Wildlife Service (FWS). Known for her scientific accuracy, Carson "questioned the use of chemical pesticides and was responsible for arousing worldwide concern for the preservation of the environment" in *Silent Spring*. ENCARTA, *supra* note 47 (search of Life Science library, within the subcategory People in Life Science, under "Rachel Louise Carson").

[58] James J. King, *Assessing the Mess*, BEST'S REVIEW—PROP. & CASUALTY INS. EDITION, June 1989, at 68 (vol. 90, no. 2). Carson's writing galvanized public opinion in the early days of the environmental movement. Another commentator noted that

The federal courts also contributed to this environmental awakening. In 1965, the United States Court of Appeals for the Second Circuit (Second Circuit) handed down its decision in *Scenic Hudson Preservation Conference v. Federal Power Commission (Scenic Hudson)*.[59] *Scenic Hudson* concerned the preservation of Storm King Mountain on the Hudson River, and was the case that many believe established the framework for environmental law for the ensuing years.[60] Thus, out of a growing concern over the destruction of limited natural resources as the direct result of pollution, the environmental movement was born.

2. Environmental Legislation of the 1960s—Congress responded to this movement by enacting a steady stream of environmental legislation during the 1960s to protect the nation's air and water, and regulate the disposal of solid wastes.[61] However, Congress failed to

---

> [p]rior to NEPA's enactment, modern environmental law and policy began in the early and mid-1960s with a few causes celebre centering around the preservation of a resource.
>
> To Rachel Carson, the resource was birds whose spring would be silent if the Department of Transportation ranged unchecked.

David Sive, *U.K. and U.S.: Each Contribute to Environmental Ethic*, OIL DAILY, May 18, 1990, at 4. The Conservation Foundation also played a major role in the development of modern environmental law, focusing on "building ecological principles into development activities." Russell E. Train, *The Council on Environmental Quality*, E.P.A. J. Jan.-Feb. 1990, at 18 (Train was the first Chairman of the Council on Environmental Quality (CEQ), a former administrator of the EPA, and the Chairman of the Board of the World Wildlife Fund and The Conservation Foundation).

[59] 354 F.2d 608 (2d Cir. 1965). The decision "established that courts could require federal agencies to pay heed to environmental concerns. Judicial review of agency action became an important new battleground for environmental groups." Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1159 (1995).

[60] Sive & Riesel, *A Grass-Roots Fire Spread Through the Law*, NAT'L L. J., Nov. 29, 1993, at S24 (15th Anniversary Edition, 1978-1993, Environmental Law Section) ("Initially, courts tended to follow the teaching of *Scenic Hudson*, rigorously requiring agencies to develop procedures for the meaningful examination of environmental issues."); *see also* Sive, *supra* note 58, at 5 (indicating that the concept of reasonable "alternatives to the proposed action" that would lessen the environmental impact arose out of *Scenic Hudson*). Congress subsequently incorporated this concept into requirements set out in the National Environmental Policy Act of 1969 (NEPA).

[61] Congress initially addressed the deteriorating quality of the air in 1955, with the Clean Air Act of 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7642q (1988 & Supp. III 1991)). It subsequently amended this statute in 1963, 1965, 1966, and 1967. *See* Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963); the National Emissions Standards Act of 1965, Pub. L. No. 89-272, 79 Stat. 992 (1965); the Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (1966); and the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

Congress likewise first addressed the deteriorating quality of the water in the 1950s, with the Federal Water Pollution Control Act of 1952, 66 Stat. 755 (1952). It subsequently amended this statute in 1960, 1961, 1965, and 1966. *See* Federal Water Pollution Act Amendments of 1960, Pub. L. No. 86-624, 74 Stat. 411 (1960); Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (1961); Federal Water Pollution Control Act Amendments of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); Federal Water Pollution Control Act Amendments of 1966, Pub.

confront the dangers posed by the steadily increasing amounts of hazardous wastes. Instead, the statutes regulating solid waste disposal addressed only refuse dumping and recycling concerns.[62] This was due, in part, to the nation's failure to recognize most of the hazardous substances present at waste disposal sites.[63] Methods did not exist at the time to detect the chemicals seeping into and contaminating groundwater supplies. Moreover, the effects of many of these chemicals were cumulative and, as such, were not identifiable for long periods of time.

Even though Congress reacted to the public's concern by enacting considerable legislation during the 1960s to lessen the effects of pollution on the nation's air, water, and land, America was left with a "ticking time bomb"[64]—in the form of hazardous waste disposal sites—with no environmental regulations with which to combat the danger.

B. The National Environmental Policy Act of 1969

1. The NEPA, EPA, and CEQ—The federal government lacked a true environmental policy until New Year's Day 1970 when President Richard M. Nixon signed into law the National Environmental Policy Act (NEPA) of 1969.[65] Nixon signed the measure into law in the wake of an oil spill from a Union Oil Company ship in the Pacific Ocean off the coast of Santa Barbara.[66] Legal

L. No. 89-753, 80 Stat. 1246 (1966).

Congress also passed legislation in 1965 designed to regulate the disposal of solid wastes. *See* Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965) (codified as amended at 42 U.S.C. §§ 6901-6987 (1982)). *See also Developments*, *supra* note 50, at 1469, nn.17 & 18 and accompanying text (for additional discussion of these statutes).

[62] *Developments*, *supra* note 50, at 1462 & n.18.

[63] Maryann Bird, *Issue and Debate Battle of Toxic Dumps: Who Pays For Cleanup?*, N.Y. TIMES, July 11, 1980, at B4.

[64] *See* Robert C. Eckhardt, *The Unfinished Business of Hazardous Waste Control*, *33* BAYLOR L. REV. 253, 254 (1981) ("like a ticking time bomb, enormous quantities of hazardous wastes threatened explosion, injurious human contact, and contamination of groundwater").

[65] 42 U.S.C. §§ 4321-4370a (published as Appendix C in DEPARTMENT OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) [hereinafter AR 200-2]); see Roger D. Staton, *EPA's Final Rule on Lender Liability: Lenders Beware*, 49 BUS. LAW. 163 (Nov. 1993). *But see* Arnold W. Reitze, Jr., *Environmental Policy—It Is Time for a New Beginning*, 14 COLUM. J. ENVTL. L. 111, 119-20 (1989) (stating that "[t]here was (and still is) no overall environmental program or goal . . . . The environmental field lacks any overall plan or direction."). Reitze contends that the nation's regulations to clean up the environment ignore the "twin problems" of population and consumption. He argues that the United States instead should adopt a comprehensive environmental policy that integrates the effects of population, material conservation, and energy policies on environmental law, takes a "long-range view of environmental priorities," and considers costs and benefits. *Id.* at 120-21.

[66] *See An Agency Seeking its Own Level*, L.A. TIMES, Jan. 24, 1990, at B6 [hereinafter *Seeking its Own Level*].

commentators generally consider the NEPA to be the "father of the environmental movement."[67] Congress and the President recognized the need for stronger environmental legislation and a "new, specialized federal agency with authority to administer and enforce the federal legislation that had been, and was in the process of being, enacted to protect the environment."[68] Congressional intent with the NEPA was to "declare a national policy" encouraging protection of the environment.[69] However, the NEPA also established the CEQ,[70]

[67] *See* King, *supra* note 58, at 68 (stating that "the environmental movement was born with the passing of NEPA," and "the U.S. Congress has passed an additional 30 pieces of legislation that regulate how we live and work in our environment. The majority of these were passed into law within the last 20 years as a result of the National Environmental Policy Act of 1969."); Train, *supra* note 58, at 18 (stating that "the environmental movement came of age in the 1970s"); Hila J. Alderman, *The Ghost of Progress Past: A Comparison of Approaches to Hazardous Waste Liability in the European Community and the United States*, 16 HOUS. J. INT'L L. 311, 311 (1993) (stating, "[t]he 1970s marked the breakwater decade for the environmental movement in the United States. During those ten years, Americans led the way in environmental legislation in fields such as clean air, clean water, waste regulation, and safe drinking water." (citations omitted)); Philip T. Cummings, *Completing the Circle*, ENVTL. F. Nov.-Dec. 1990, at 11 (discussing the developments in the environmental law arena during the decade of the 1970s). The year 1970 also saw the first Earth Day celebrated on April 22. *Seeking its Own Level*, *supra* note 66, at B6.

[68] Whitney, *supra* note 56, at 183.

[69] 42 U.S.C. § 4321. Congress defined the NEPA's purpose as follows:

> to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality.

Id. Congress further indicated that the Act would

> use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id. § 4332(a).

Distilled to its simplest form, the NEPA requires federal agencies to consider alternative courses of action to avoid, or at least reduce, any negative impact or effect on the environment before taking any major federal action. The federal agency must *consider* such impact or effect and factor it into the decision-making process. Strycker's Bay Neighborhood Council v. Karlan, 444 U.S. 223 (1980); Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989); *see also* Charles H. Eccleston, *NEPA: Determining When an Analysis Contains Sufficient Detail To Provide Adequate Coverage for a Proposed Action*, 6 FED. FACILITIES ENVTL. J. 37-38 (Summer 1995) (detailed discussion of the NEPA); Train, *supra* note 58, at 18 (stating that the NEPA "required bureaucrats to look at alternatives to proposed actions—including the alternative of doing nothing—if a planned course of action would damage the environment"). "The project when finished may be a complete blunder; NEPA requires that it be a knowledgeable blunder." Matsumoto v. Brinegar, 568 F.2d 1289, 1290 (9th Cir. 1978). The Act accomplishes this by requiring federal agencies to complete an environmental impact statement (EIS) every time they begin "major federal actions" significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

[70] 42 U.S.C. § 4342. Congress's intent was that the CEQ "provide a consistent and expert source of review of national policies, environmental problems and trends, both

a staff office located in the Executive Office of the President, as well as the EPA.[71] Both the CEQ and the EPA were to be environmental "watchdogs."[72]

---

long-term and short-term." 115 CONG. REC. 26,572 (1969) (statement of Rep. Dingell). Dingell (D-MI), the chief proponent of the CEQ in the House, indicated that the CEQ was to effect "a systems approach to the problems of living in harmony with the environment in this world." Carl Bausch, *The Impending Demise of the Council on Environmental Quality: Is it Really Necessary Anyway?* 4 FED. FACILITIES ENVTL. J. 3, 5 (Spring 1993) (citing *Hearings on H.R. 6750 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 1st Sess. 137 (1969)). Bausch, a former assistant general counsel in the CEQ, provides an excellent description of the roles and duties of the Council. Note, however, that he argues that the subsequent reorganization of the executive branch in 1970—to include the creation of a Domestic Council within the Executive Office of the President to advise the President on domestic issues (including the environment)—created ambiguity as to the CEQ's precise role. *Id.* at 4.

Nevertheless, the CEQ has functioned effectively for 23 years, and President Clinton's attempts to abolish the CEQ as part of his plan to "reinvent government" in 1993 met with strong opposition. *See* Steve LaRue, *UCSD Professor Says Clinton Should Keep Environmental Panel*, SAN DIEGO UNION-TRIB., Feb. 10, 1993, at A6; Alex Beam, *Easy Come, Easy (Re)Go*, BOSTON GLOBE, Oct. 25, 1993, at 17 (discussing President Clinton's plan to reinvent government, and noting that it was known as "rego" in insider lingo).

The president's plan was to replace the CEQ with the Office of Environmental Policy (OEP)—ostensibly to create a "smaller office" closer to the President so that environmental issues "could have more of a priority"—but the 103d Congress opposed the plan. *CEQ Seeks to Coordinate Efforts in Reforming Laws, McGinty Says*, Nat'l Envtl. Daily (BNA), Mar. 3, 1995, at 1. Instead, the White House agreed to merge the OEP into the CEQ as of January, 1995.

[71] The EPA was actually created by presidential order. *See* Reorganization Plan No. 3 of 1970, 18 C.F.R. § 380 (1993), *reprinted in* 42 U.S.C. § 4321 (1988), *reprinted in* 5 U.S.C. app. at 1343 (1988), *and in* 84 Stat. 6322 (1970). The reorganization plan assigned the EPA the "responsibility for efficiently developing knowledge about, and effectively ensuring the protection, development, and enhancement of, the total environment." Bausch, *supra* note 70, at 4.

Moreover, the reorganization of the executive branch "centralized EPA authority over various environmental regulatory programs that had been previously scattered throughout diverse agencies of the federal government." Whitney, *supra* note 56, at 183-84. The EPA assumed the duties and responsibilities of the Federal Water Pollution Control Agency (FWPCA), the National Air Pollution Control Administration (NAPCA), and some of the responsibilities of the former Department of Health, Education, and Welfare (HEW) (now the Department of Health and Human Services), Food and Drug Administration, and Departments of Interior and Agriculture. Thus, the EPA was entrusted with regulation of the air, water, solid waste and resource recovery, and pesticides. Finally, the EPA was tasked with administering the Safe Drinking Water Act of 1974 and the Toxic Substances Control Act of 1976. *Id.* at 184 (Whitney provides an excellent discussion of the origin of the EPA and its functions).

[72] Robert Cahn, *Keeping US Agencies Focused on Environment*, CHRISTIAN SCI. MONITOR, Apr. 1, 1993, at 19 ("the landmark law that established CEQ—the National Environmental Policy Act of 1969 (NEPA)—charged CEQ with the responsibility of overseeing the vital environmental impact statement process, which has made some progress in establishing a conservation ethic among government agencies.") (Cahn, the author of this article, served from 1970-72 as one of the original members of the CEQ).

See also Millan, *supra* note 35, at 340 (referring to the EPA as "the nation's environmental watchdog").

2. Environmental Legislation of the 1970s—An explosion of environmental legislation followed Congress's enactment of the NEPA.[73] These laws "inserted the federal government into nearly every ecological niche: clean air, clean water, occupational safety, pesticides, endangered species, drinking water, toxics, and newly generated waste,"[74] to name only a few. Tragically, none of these new statutes addressed the numerous hazardous waste disposal sites still festering across the country, posing the greatest immediate risk to hundreds of thousands of Americans. As of 1976, the nation had yet to realize the full extent of the hazardous waste disposal problem.

C. The Resource Conservation and Recovery Act of 1976

What Congress did realize—albeit not until the mid-1970s—was that the nation had allowed industry to dispose of its wastes for

[73] *See* Sive, *supra* note 58, at 4 (calling it a "great tide of legislation beginning with the Clean Air Act in 1970"); *Reitze, supra* note 65, at 111-12 nn.1 & 3 (stating that Nixon's signing of the NEPA ushered in the "decade of the environment"). Reitze identifies the major environmental statutes and amendments to major environmental statutes that occurred during this period:

> a. Clean Air Act, Pub. L. No. 84-159, 69 Stat. 322 (1955); Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (1966); Clean Air Act Amendments of 1970, Pub. L. No. 89-604, 84 Stat. 1976 (1970); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified at 42 U.S.C. §§ 7401-7642 (1982)).
>
> b. Federal Water Pollution Control Act, 66 Stat. 755 (1952); Federal Water Pollution Act [sic] Amendments of 1972, Pub. L. No. 87-88, 75 Stat. 204 (1961); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); as last amended by Pub. L. No. 100-4, 101 Stat. 60 (1987) (codified at 33 U.S.C.A. §§ 1251-1387 (West 1986 & 1987 Supp.)).
>
> c. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976); as last amended by Pub. L. No. 99-519, 100 Stat. 2989 (1986) (codified at 15 U.S.C. §§ 2601-2629 (1982 & Supp. IV 1986)).
>
> d. Federal Insecticide, Fungicide and Rodenticide Act, c. 125 §§ 2-13, 61 Stat. 163 (1947); Pub. L. No. 92-516, 86 Stat. 975 (1972) as last amended by Pub. L. No. 98-620, 98 Stat. 3357 (1984) (codified at 7 U.S.C. §§ 36-136y (1982 & Supp. IV 1986)).
>
> e. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976), as last amended by Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 901-6991i (1982 & Supp. IV 1986)).
>
> f. Marine Protection, Research and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (1972); as last amended by Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 33 U.S.C. §§ 401-1445 (1982 & Supp. IV 1986)).
>
> g. Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974); as last amended by the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-399, 100 Stat. 642 (1986) (codified at 42 U.S.C. §§ 300f-300j-11 (1982 & Supp. IV 1986)).

Id. Some commentators believe that the passage of such major legislation was foreseeable once Congress and the EPA realized the overwhelming task that lay ahead. Staton, *supra* note 65, at 163.

[74] Major Stephen Russell Henley, Superfund Reauthorization 1994: DOD's Opportunity to Clean Up Its Hazardous Waste Act 5 (1994) (unpublished LL.M. thesis, The Judge Advocate General's School, United States Army, Charlottesville, Virginia) (citations omitted).

decades without any regulatory control.[75] In 1976, Congress attempted to prospectively regulate the disposal, inter alia, of hazardous wastes in the Resource Conservation and Recovery Act of 1976.[76]

1. The RCRA Defined—The RCRA actually was an amendment to the Solid Waste Disposal Act of 1965.[77] Congress designed the RCRA to control solid[78] and hazardous[79] wastes from their generation through their disposal—what is commonly referred to as "cradle to grave" regulation.[80] The act regulates all wastes that are not cov-

---

[75] Eckhardt, *supra* note 64, at 255. This 1981 article was authored by Robert C. Eckhardt, a former member of the United States House of Representatives (D-Tx.), and Chairman of the House Oversight and Investigations Subcommittee of the Interstate and Foreign Commerce Committee. His subcommittee heard testimony concerning the hazardous waste disposal problem in 1979-80 during the 96th Congress and conducted its own survey, in addition to reports conducted by and for the EPA, to determine the extent of the problem. The subcommittee's survey discovered that "1,100 disposal sites, holding about 100 million tons of chemical wastes, had been used by the Nation's 53 largest chemical companies, since 1950 without any regulatory control." *Id.* (citing 126 CONG. REC. S14,903 (daily ed. Dec. 24, 1980) (statement of Sen. Jennings)).

[76] 42 U.S.C. §§ 6901-6992k.

[77] *See supra* note 61 (discussing the Solid Waste Disposal Act of 1965); *see also* Elizabeth F. Mason, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead*, 19 B.C. ENVTL. AFF. L. REV. 73, 78 n.2 (1991). Mason indicates that "[t]he 1976 Act was a complete revision of the Solid Waste Disposal Act of 1975 . . . . Congress amended the 1976 Act by enacting first the Solid Waste Disposal Amendments of 1980 . . . and then the Hazardous and Solid Waste Amendments of 1984." *Id.* (statute citations omitted).

[78] Solid wastes are defined as liquid, semi-liquid, or containerized gaseous materials that have been discarded, served their intended purpose, or are a manufacturing by-product. Solid wastes do not include domestic sewage and discharges from National Pollution Discharge Elimination System (NPDES) point sources. 40 C.F.R. § 261.2.

[79] Hazardous wastes are solid wastes that are defined at 40 C.F.R. § 261. Hazardous wastes, for the purposes of RCRA, were to be defined by the EPA. 42 U.S.C. § 6921. Generally, hazardous wastes are solid wastes that are (1) listed; (2) ignitable, corrosive, reactive, or that have the toxicity characteristics defined in RCRA subpart C (40 C.F.R. § 261.20-261.24); (3) a mixture of a solid waste and a hazardous waste listed in RCRA subpart D (40 C.F.R. § 261). "Listed" refers to three lists developed and maintained by the EPA. The first contains hazardous wastes from nonspecific sources (40 C.F.R. § 261.31), the second contains hazardous wastes from specific sources (40 C.F.R. § 261.32), and the third contains commercial chemical products—to include those chemicals that are acutely hazardous when discarded (40 C.F.R. § 261.33(e)) and those that are toxic when discarded (40 C.F.R. § 261.33(f)). Interview with Major David N. Diner, Professor, Environmental Law, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, in Charlottesville, Virginia (Feb. 10, 1996) [hereinafter Diner Interview] (providing a detailed definition of the term "hazardous waste").

[80] Congress's intent was to provide "nationwide protection against the dangers of improper hazardous waste disposal." H.R. REP. NO. 1491, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249 [hereinafter H.R. REP. NO. 1491]. *See* Bruce R. Bryan, *The Battle Between Mens Rea and the Public Welfare: United States v. Laughlin Finds a Middle Ground*, 6 FORDHAM ENVTL. L.J. 157, 174-75 & n.103 (Spring 1995) (citing Ann K. Pollack, Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 709 n.24 (1983) ("suggesting that 'commentators have deemed RCRA system a 'cradle-to-grave' statutory scheme because subtitle C of the Act traces hazardous waste from generator, to transporter, to disposal facility.'")).

ered under another statute.[81]

Pursuant to the RCRA, any facilities[82] that treat, store, or dispose (TSDFs)[83] of hazardous wastes[84] must obtain permits to do so.[85] Similarly, generators[86] of such wastes must register with the EPA and obtain EPA identification numbers *prior* to treating, storing, or disposing of hazardous wastes.[87] They must comply with all other RCRA requirements concerning storage[88] of, and record-keeping on,[89] these wastes. They also must comply with Department of

---

[81] The RCRA is broken down into nine subchapters, or subtitles, each dealing with a different program or aspect of the overall federal policy covering solid and hazardous wastes. *See infra* Appendix C (listing the nine subtitles of the RCRA).

[82] The term facility generally is defined as "all contiguous land and structures, other improvements, and appurtenances on the land used for treating, storing, or disposing of hazardous waste." 40 C.F.R. § 260.10.

[83] The terms "treatment," "storage," and "disposal" are defined at 40 C.F.R. § 260.10.

[84] *See supra* note 79 (detailed definition of the term "hazardous wastes").

[85] 42 U.S.C. § 6925. The RCRA permit process is described in detail at 40 C.F.R. Part 270. Operators of TSDFs are responsible for obtaining a RCRA permit. For Army installations employing in excess of 250 people, this translates into the Army installation commander—colonel or higher—signing as the facility owner. The EPA or authorized states may issue these permits to TSDFs.

For a state to become authorized to issue permits, its hazardous waste program must be as stringent as (or more), and consistent with, the federal program (as well as other authorized state programs). It must also ensure enforcement of compliance with the RCRA's subtitle C (the hazardous waste subtitle). The EPA delegates its authority to qualifying states to administer portions of the hazardous waste program. The agency, however, retains parallel authority (and ultimate responsibility) to enforce the RCRA's provisions even when it delegates authority to a state. *States usually can exercise a greater range of authorities and enforcement tools at federal facilities than can the EPA.* 40 C.F.R. pt. 272; Diner Interview, *supra* note 79 (discussing the RCRA permitting process). *See infra* notes 344-56 and accompanying text (detailed discussion of states' RCRA authority at federal facility Superfund sites).

[86] The term "generator" is defined at 40 C.F.R. § 260.10.

[87] *Id.* § 262.12(a).

[88] 42 U.S.C. § 6924. If the EPA determines that a facility qualifies as a Conditionally Exempt Small Quantity Generator (CESQG)—that is, those facilities that generate 100 kilograms or less of hazardous waste, or 1 kilogram or less of acutely hazardous waste, per calendar month—few requirements other than registering with the EPA apply. Diner Interview, *supra* note 79.

The RCRA considers facilities that generate 100 kilograms or more but less than 1000 kilograms per calendar month to be Small Quantity Generators (SQGs). Those facilities that generate more than 1000 kilograms of hazardous waste, or more than one kilogram of acutely hazardous waste, are considered regular generators. The EPA considers most military installations to be regular generators. *Id.*

Facilities may maintain Satellite Accumulation Points (SAPs) or Accumulation Points (APs) without a permit. The EPA allows no more than 55 gallons of hazardous waste or one quart of acutely hazardous waste at a SAP. Facilities may store hazardous wastes at an AP for up to 90 days, but must comply with strict EPA regulations governing APs. *Id.*

[89] 40 C.F.R. § 262; 42 U.S.C. § 6922(a)(1)&(5). The RCRA requires generators to maintain detailed records that identify the type and amount of any hazardous waste generated. The generator must prepare manifests, which trace the movement and ultimate disposal location of the waste. Such a mechanism ensures that the hazardous waste reaches its ultimate destination—an EPA approved (permitted) TSDF that will safely dispose of the waste. Generators should retain these manifests indefinitely.

Transportation (DOT) requirements for packaging and labeling of the wastes for transport,[90] and notify subsequent transporters, storers, and disposers of the hazardous nature of the wastes.[91] Transporters[92] of these wastes must register with the EPA and follow all RCRA and DOT requirements as well.[93] Finally, operators[94] of TSDFs must obtain EPA identification numbers and RCRA permits, and comply with all other applicable RCRA requirements.[95]

Thus, the RCRA's scope includes everything from identifying hazardous wastes, to tracking their movement through the use of a manifest system, to enforcing standards for owners and operators of TSDFs and transporters of the wastes. Congress designed this legislation with the ultimate goal of ensuring the safe handling of wastes throughout their lifecycle. To provide an incentive to comply with what it felt were pivotal regulations, Congress inserted language in the RCRA authorizing the imposition of civil and criminal penalties for the failure to comply with the RCRA's provisions.[96]

Unfortunately, the RCRA is only prospective in its application.[97] Numerous courts and commentators have argued that the act failed to provide the "authority, funding, or personnel" necessary to deal with the glut of hazardous waste disposal sites nationwide.[98] As

---

[90] 49 C.F.R. pts. 172, 173, 178, 179; 42 U.S.C. § 6922(2)- (3).

[91] 42 U.S.C. § 6922(4).

[92] The term "transporter" is defined at 40 C.F.R. § 260.10.

[93] 40 C.F.R pt. 263; 42 U.S.C. §§ 6923 (a)(2), 6923(a)(I).

[94] The term "operator" is defined at 40 C.F.R. § 260.10.

[95] Congress tasked the EPA with regulating all TSDFs from the initial design period through the postclosure period. The RCRA also requires additional protective measures: security systems and warning signs to prevent unauthorized entry (40 C.F.R. §§ 264.15, 265.15); inspection plans (40 C.F.R. §§ 264.15, 265.15); personnel training on RCRA requirements (40 C.F.R. §§ 264.16, 265.16); safety equipment in case of a spill, fire, or explosion (40 C.F.R. §§ 264.30-49, 265.30-49); operating records describing, among other things, the type, quantity and location of each hazardous waste within the facility (40 C.F.R. §§ 264.73, 265.73); reports to the EPA (40 C.F.R. §§ 264.75-77, 265.75-77); and detailed closure and postclosure plans (40 C.F.R. §§ 264.110-20, 265.110-20).

[96] 42 U.S.C. § 6928. *See* H.R. REP. No. 1491, *supra* note 80, at 30 (stating that "[m]any times civil penalties are more appropriate and more effective than criminal. However, many times when there is a willful violation of a statute which seriously harms human health, criminal penalties may be appropriate.").

[97] The "RCRA is forward looking legislation, designed to control hazardous waste generation. Because the RCRA focuses on controlling the present and future production of hazardous waste, the RCRA could not deal with Love Canal or any of the thousands of other toxic waste dump sites created in this country prior to 1976." James Edward Enoch, Jr., *Environmental Liability for Lenders After* United States v. Fleet Factors, Corp.: *Deep Pockets or Deep Problems?*, 48 WASH. & LEE L. REV. 659, 659-60 & n.8 (citations omitted) (citing Grunbaum, *Judicial Enforcement of Hazardous Waste Liability Law, in* DIMENSIONS OF HAZARDOUS WASTE POLITICS AND POLICY 163, 164 (1988) (noting that the RCRA is effective in upgrading some waste sites, but does not provide a solution to the problem of cleaning up dormant waste sites)).

[98] Mason, *supra* note 77, at 78 n.33 (citing United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 836 n.10, 838-39 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. A & F Materials Co., 578 F. Supp. 1249, 1252 (S.D. Ill. 1984)).

such, the RCRA failed to properly address the hazardous wastes that had been disposed of improperly prior to its enactment.[99]

2. Toxic "Nightmares"—In the late 1970s, the reality of the enormous problem surrounding hazardous wastes disposed of prior to the RCRA's enactment began to receive national attention. Regulators discovered horrifying conditions at numerous disposal sites coast to coast. From Niagara Falls, New York,[100] to Elizabeth,

---

[99] *See* Major William D. Turkula, *Determining Cleanup Standards for Hazardous Waste Sites*, 135 MIL. L. REV. 167, 170 (1992) (indicating that "[m]aking sure we do not create future environmental messes by our means of waste disposal, however, does not deal with the vexing problem of cleaning up the already contaminated sites all over the country.").

[100] Known as the infamous "Love Canal," this hazardous waste site was so replete with toxic chemicals that it became the *"nom de guerre* or rallying cry to clean up the environment." *Id.* at 167. The site exploded into the national limelight with the discovery in 1978 that the town of Niagara Falls had built a residential neighborhood and elementary school directly on top of an abandoned chemical dumping site. Records showed that approximately 80,000 tons—or 352 million pounds—of hazardous waste had been dumped at the site, to include dioxin, "one of the most deadly substances known to man." Alderman, *supra* note 67, at 31.

The Love Canal, a 16-acre landfill site, actually was an unfinished hydroelectric channel originally constructed by William T. Love in the early 1900s. From the 1930s forward, the channel, or canal, had been used as a dumping grounds. From 1947 through 1952, the Hooker Chemical and Plastics Corporation had dumped and buried wastes, to include dioxin and various pesticides, at the site. Hooker covered the buried wastes with various soils including clay, which was considered an acceptable disposal method at the time.

Subsequently, the company transferred the site to the city of Niagara Falls for $1. The city covered over the dump and constructed houses and a school on top of this morass of deadly chemicals. In 1976, heavy rains forced the chemicals to surface and seep into the water supply, posing serious risks to all of the residents. Reports surfaced that children and animals were burned while playing close to their homes, and that "[r]ocks striking the sidewalk sent off colored sparks." Dower, *Hazardous Wastes, in* POLICIES FOR ENVIRONMENTAL PROTECTION 151, 168 (R. Portney ed. 1990). Basements filled with "chemical soup" during heavy rains. *See* Robert D. McFadden, *Love Canal: A Look Back*, N.Y. Times, Oct. 30, 1984, at B6; ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 288 (1992); H.R. REP. No. 1016, 96th Cong., 2d Sess. 18 (1980), *reprinted* in 1980 U.S.C.C.A.N. 6119, 6120 [hereinafter H.R. REP. No. 1016]; MICHAEL ALLABY, DICTIONARY OF THE ENVIRONMENT 239 (1989); Donald G. McNeil, Jr., *Information Bank Abstracts*, N.Y. TIMES, Aug. 2, 1978, at 1.

Subsequent investigation showed that the soil samples from the site contained "evidence of contamination from 82 waste materials, of which 11 are known carcinogens." *Id.* Studies showed that there was an increase in the reporting of miscarriages, birth defects, and deaths due to various forms of cancer among residents of the site. *Id.*; Alderman, *supra* note 67, at 313 n.5 (citing Rachel Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 396 n.13 (1991)). Hundreds of residents had to evacuate and relocate when their homes were destroyed, and President Carter ultimately declared the site "to be the first man-made national disaster area." Rachel Giesbar, *Foolish Consistency? Compliance with the National Contingency Plan Under CERCLA* § 107, 70 TEX. L. REV. 1297, 1297 (1992). The cost of restoration efforts began to run into the millions. Residents filed numerous lawsuits requesting approximately $16 billion in damages, which finally settled for almost $20 million. McFadden, *supra*, at 1.

New Jersey,[101] to Shepardsville, Kentucky,[102] ominous reports of extremely dangerous conditions surfaced, causing widespread concern and fear.[103] The shocking revelations concerning the "Love Canal" in Niagara Falls "created a strong public reaction to the specter of abandoned hazardous-waste dumps that exposed the public to the threat of latent disease."[104] Names like Love Canal, Times Beach, and the Valley of the Drums became "synonymous with," and representative of, "corporate America."[105] The nation became fixated

---

[101] This Chemical Control hazardous waste site apparently contained about 40,000 drums "of highly toxic, explosive and flammable materials" [picric acid] "within a few feet of the Company's waste incinerator, within a few feet of a local road and a railroad right of way and within one quarter mile of huge liquefied natural gas and propane storage tanks." H.R. REP. NO. 1016, *supra* note 100, at 18-19.

[102] Known as the "Valley of the Drums," this Kentucky waste site contained approximately 17,000 rotting metal drums filled with toxic waste, many of which had burst, spilling their contents into the surrounding lands. The waste ultimately seeped into land water near Louisville, Kentucky, and streams that eventually fed into the Ohio River. *See* Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach,* 42 CASE W. RES. L. REV. 65, 69 n.8 (1992) (citing H.R. REP. NO. 1016, *supra* note 100, at pt. 1, at 18, *reprinted in* 2 SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) 118 (Comm. Print 1983)); Bird, *supra* note 63, at B4.

[103] Additional reports of horrendous conditions at other sites surfaced as well. In Hopewell, Virginia, just south of the capital city of Richmond, regulators disclosed that in 1977 Allied Chemical Company had illegally dumped thousands of pounds of kepone—an insect *poison*—into the James River. Allied was indicted for its actions by a federal grand jury, and subsequently paid $5 million in fines. The state was forced to place a five-year ban on fishing in certain places on the river. *See* Healy, *supra* note 102, at 65, 69 n.9 (1992) (citing Douglas B. Feaver, *Hopewell Fined for Pollution, Says It Couldn't Be Helped,* WASH. POST, Dec. 16, 1981, at A29; Sandra Sugawara, *Virginia's James River Still Is Choked with Pesticide,* L.A. TIMES, Oct. 25, 1985, at 4.).

Moreover, the House Report accompanying the CERCLA provided this ominous account of the scene at Hooker Chemical and Plastic Corporation's waste disposal site in Montague, Michigan: "barrels of waste were often dumped off of the backs of trucks and hacked open by men armed with axes . . . .". H.R. REP. NO. 1016, *supra* note 100, at 18-19.

At Times Beach, Missouri, the EPA discovered dioxin contamination, which had seriously affected the residents' health. The EPA ultimately purchased the site and evacuated its 2000 inhabitants. *See* KRATZMAN, *supra* note 49, at 14; *see also* United States v. Northeastern Pharmaceutical and Chem. Co., Inc. (NEPACCO), 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in relevant part,* 810 F.2d 726, (8th Cir. 1986), *cert. denied,* 484 U.S. 848 (1987). The facts of the case indicate the following: NEPACCO operated a chemical manufacturing plant in Missouri. This plant for years had placed its hazardous waste in 55 gallon drums and buried them on a farm in Verona, Missouri. The drums eventually leaked, contaminating the surrounding soil. The EPA cleaned up the contaminated soil, however, NEPACCO hired an outside contractor to dispose of the remaining waste. This contractor disposed of the waste by, among other things, "spraying them as a dust suppressant on the grounds of a stable . . and on the roads in Times Beach, Missouri." *Id.*

[104] Sive & Reisel, *supra* note 60, at S25.

[105] HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., REPORT ON HAZARDOUS WASTE DISPOSAL 31 (Comm. Print 1979) (testimony before the subcommittee by James

on the dangers posed by hazardous wastes and, to a certain extent, still is.[106]

It was in the wake of these high-profile environmental disasters and amid a tremendous public outcry for remedies that Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980.[107] Congress enacted this legislation to confront the problem surrounding hazardous wastes previously generated and stored or disposed. In retrospect, it is troubling that even though the environmental movement initially took shape in the early 1960s, it was not until late 1978 that these deadly disposal sites became the "target of environmental legislation."[108]

D. The Comprehensive Environmental Response, Compensation and Liability Act of 1980

1. Not Just the Love Canal—Although the initial discovery of the Love Canal and other contaminated disposal sites thrust the issue to the "forefront of media and public attention,"[109] subsequent investigations, surveys, and studies conducted by the EPA and various other agencies revealed that these few sites were only the "tip of the iceberg."[110] The EPA examined "pits, ponds and lagoons used to treat, store and dispose of liquid wastes."[111] This study identified

> 11,000 industrial sites with 25,000 such surface impoundments. . . . and that virtually no monitoring of groundwater was being conducted and that 30% of the impoundments, or 2,455 of the 8,221 sites assessed, are unlined,

---

Moorman, Assistant United States Attorney in charge of Land and Natural Resources). Moorman stated that

> [i]n the public's mind, places such as the Chemical Control site in Elizabeth, New Jersey, Love Canal in Niagara Falls, New York, the so-called Valley of the Drums in Shepardsville, Kentucky, and the Stringfellow Acid Pits in California had become synonymous with—and the symbols of—corporate America's reckless disregard of public health.

Id.

106 *See* McFadden, *supra* note 100, at B6 (Love Canal and similar toxic waste disasters "stirred one of the most emotional debates on health and environmental issues that the nation has ever witnessed.").

107 42 U.S.C. §§ 9601-9675. Erika Clarke Birg, *Redefining "Owner or Operator" Under CERCLA to Preserve Traditional Notions of Corporate Law*, 43 EMORY L.J. 772, 774 (Spring 1994) (citing Sweeney, *supra* note 46, at 70).

108 Staton, *supra* note 65, at 165.

109 Giesbar, *supra* note 100, at 1297.

110 The discovery of the Love Canal prompted the EPA to conduct these investigations, studies, and surveys. James R. Deason, *Clear as Mud: The Function of the National Contingency Plan Consistency Requirement in a CERCLA Private Cost-Recovery Action*, 28 GA. L. REV. 555, 556 n.1. (1994).

111 S. REP. NO. 848, *supra* note 13, at 3, 5.

> overlie usable groundwater aquifers and have intervening soils which would freely allow liquid wastes to escape into groundwater.[112]

The EPA determined that between 32,000 and 50,000 hazardous waste disposal sites existed in the United States and that many of these posed a serious health risk to the public.[113] For the first time, the EPA and Congress became painfully aware of the magnitude of the problem confronting the United States.

These studies, combined with pressure from an outraged public, spurred Congress to action.[114] Congress initially recognized, however, that existing regulations were "ill-equipped to address the problem."[115] The RCRA had tied the EPA's hands by limiting its power to

---

[112] *Id.*

[113] H.R. REP. NO. 1016, *supra* note 100, at 18-19, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120; Elizabeth A. Glass, *The Modern Snake in the Grass: An Examination of Real Estate & Commercial Liability Under Superfund and Sara and Suggested Guidelines for the Practitioner,* 14 B.C. ENVTL. AFF. L. REV. 381, 383 (1987).

Some members of Congress criticized the results of these studies as "sensationalism." McCarthy, *supra* note 49, at 1170 n.2 (citing 126 CONG. REC. H33,423 (daily ed. Dec. 10, 1980) (remarks of Rep. Crane); *id.* H26,231-32 (daily ed. Sept. 18, 1980) (remarks of Rep. Jeffries). They believed, somewhat naively, that such incidents were the "exception and not the rule."

[114] Alderman, *supra* note 67, at 312-13 & n.7; Giesbar, *supra* note 100, at 1297 & n.1 (citing S. REP. NO. 848, *supra* note 13, at 7, 8 (noting that the Love Canal tragedy "paints the clearest picture of just how serious the problems involving toxic chemicals can be"); 125 CONG. REC. 13,248-50 (1979) (statement of Sen. Bumpers); S. REP. NO. 848, *supra* note 13, at 8-10 (reprinting *Love Canal,* U.S.A., N.Y. TIMES, Jan. 21, 1979, § 6 (Magazine), at 23) (indicating that the *New York Times* story on the Love Canal incident "was incorporated into the record of the CERCLA debates"). One of the proposed Senate bills, S. 1480, contained language that would have compensated the victims of the Love Canal tragedy for the medical costs that they incurred. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act,* 8 COLUM. J. ENVTL. L. 1, 7-8 (1982).

[115] *See* Giesbar, *supra* note 100, at 1297-98 & n.6 (citing Amoco Oil v. Borden, 889 F.2d 664, 667 (5th Cir. 1989) (stating that CERCLA was enacted to "fill the gaps" left in the RCRA statute); Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) (describing RCRA as inadequate to regulate the cleanup of hazardous waste sites and stating that CERCLA picked up where RCRA left off); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1884) (noting that it was the "inadequacies resulting from RCRA's lack of applicability to inactive and abandoned waste disposal sites that prompted the passage of CERCLA"), *aff'd in relevant part,* 810 F.2d 726, 734 (8th Cir. 1986), *cert. denied,* 484 U.S. 848 (1987)). *See also* OVERSIGHT AND INVESTIGATIONS SUBCOMM. OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., REPORT ON HAZARDOUS WASTE DISPOSAL 7 (Comm. Print 1979) (listing the deficiencies that the subcommittee found with the RCRA: (1) prospective only; (2) no subpoena power; (3) no requirement to reveal existence of, or monitor for releases from, inactive waste disposal sites; (4) inadequate funding for state waste programs.).

With regard to pre-existing hazardous waste disposal sites, to say that "gaps" existed in the RCRA's language and that the EPA's enforcement of the RCRA was dismal would be an understatement. The RCRA severely limited the EPA's ability to require cleanups at hazardous waste sites. *See infra* note 116 and accompanying text (additional discussion). As for the EPA, Congress had tasked it in the RCRA to develop national standards governing hazardous waste disposal. Congress gave the EPA 18

compel the clean up of disposal sites to those sites presenting an "imminent hazard to health or the environment."[116] Otherwise, the EPA could only regulate the disposal of hazardous waste occurring subsequent to enactment of the RCRA. Neither the EPA nor any other agency of the federal government had statutory or regulatory authority to conduct cleanups on contaminated sites.[117]

Thus, Congress had to consider legislation that addressed both responsibility for cleaning up the sites and funding to accomplish the cleanups.[118] It took Congress almost *three years,*[119] as it experienced

---

months to create these standards. Three years later, at the time of congressional hearings concerning the hazardous waste issue, the EPA had yet to promulgate any standards. Eckhardt, *supra* note 64, at 255.

Moreover, in part as a result of the EPA's failure to meet deadlines, Congress "severely criticized EPA regulations and policy under both RCRA and CERCLA." *Developments, supra* note 50, at 1474 & nn.48-49 (citing H.R. REP. NO. 198, 98th Cong., 2d Sess. 19-20, 34, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5578-79, 5593 (criticizing EPA's slow progress in issuing waste facility permits under RCRA, terming the Agency's enforcement efforts "inadequate," and noting that EPA "has not been able to comply with past statutory mandates and timetables, not just for RCRA, but for virtually all of its programs")).

[116] 42 U.S.C. § 6903. *See* Eckhardt, *supra* note 64, at 255; Healy, *supra* note 102, at 69 ("Congress concluded that then-existing statutory authorities were inadequate because they did not allow for an immediate and large-scale response to the dangers posed by hazardous waste sites, particularly abandoned sites."); *id.* n.10 (citing 126 CONG. REC. H26,338 (1980) (statement of Rep. Florio) ("existing statutes are inadequate to cope with the inactive waste site problem. Both funds and emergency response authority to clean up problem chemical dumps are lacking under current law.").

[117] Eckhardt, *supra* note 64, at 255 ("statutory authority was needed first to permit the government to enter and clean up dumpsites if their owners or former users would not do so, and then to charge the miscreants with the cost of clean-up"). Eckhardt also notes that "an even greater obstacle to abatement of potential danger from hazardous waste sites has been the lack of money . . .". *Id.*

[118] Giesbar, *supra* note 100, at 1298; Richard C. Belthoff, Jr., *Private Cost Recovery Actions Under Section 107 of CERCLA,* 11 COLUM. J. ENVTL. L. 141, 142 (1986) (indicating again that Congress's intent in designing CERCLA was to address the gaps in the RCRA).

[119] Grad, *supra* note 114, at 1 (stating "[a]lthough Congress had worked on "Superfund" toxic and hazardous waste clean-up bills and on parallel oil spill bills *for over three years,* the actual bill which became law had virtually no legislative history at all") (citation omitted) (emphasis added).

Congress had considered many bills during this three-year period, especially in the 95th Congress, but had enacted none of them. *See id.* at 1-2 & n.3 (indicating that the Senate had considered "S. 121, 182, 687, 1057, 1187, 2083, 95th Cong., 1st Sess. (1977)," and that the House had considered "H.R. 776, 1827, 1900, 2364, 3038, 3134, 3691, 3926, 4570, 6213, 6803, 9616, 95th Cong., 1st Sess. (1977)"). The 96th Congress, after considering numerous bills, finally enacted the CERCLA.

great difficulty arriving at a consensus on what legislation would properly address the problem.[120] The result was the CERCLA.[121]

Upon its enactment, legislators and commentators alike identified CERCLA as the "missing link" in the RCRA's cradle to grave regulatory scheme for hazardous wastes.[122] The act finally confronted the increasing dangers posed by disposal sites[123]—especially those that former owners and operators had abandoned.[124] While not perfect,[125] the CERCLA finally closed the gaping hole that the RCRA had left for those hazardous wastes generated prior to the RCRA's enactment in 1976.[126]

---

120 For a thorough discussion of the complex process that Congress followed to enact legislation in this area, *see* Grad, *supra* note 114, at 1; Eckhardt, *supra* note 64, at 253 (the author of this article was the Chairman of the House Oversight and Investigations Subcommittee of the Interstate and Foreign Commerce Committee, before which the original piece of legislation that finally emerged from the process was introduced); 3 ENVTL. L. INST., SUPERFUND: A LEGISLATIVE HISTORY 163 (1982); *see also* Tom Bayko & Paul A. Share, *Stormy Weather on Superfund Front Forecast as "Hurricane SARA" Hits*, NAT'L L.J., Feb. 16, 1987, at 24 ("Although there was widespread agreement on the urgent need for funds and authority to clean up existing hazardous-waste sites, Congress was badly divided on how to accomplish this task."). *Id.*

121 The CERCLA is alternatively known as the "Superfund," a name which derives from the hazardous substance response cost fund "initially used as an immediate source of funds to pay for cleanup of dangerous sites." Birg, *supra* note 107, at n.2. *See infra* notes 131-35 and accompanying text (discussing the fund in greater detail). *See* WILLIAM TUCKER, PROGRESS AND PRIVILEGE (1982) (providing a detailed discussion of the origins of the CERCLA).

122 Birg, *supra* note 107, at 772-73 & n.4 (citing H.R. REP. NO. 1016, *supra* note 100, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6120). Congress's intent was to complete a "broad statutory program of environmental protection" with the CERCLA. The existing statutes comprising this program included the RCRA, the CWA, and the CAA. *Id.* at 772 & 774 n.3.

123 Giesbar, *supra* note 100, at 1298 & n.8 (citing United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (stating that the CERCLA was intended to provide the "tools necessary for prompt and effective response to problems of national magnitude resulting from hazardous waste disposal")).

124 *See* Enoch, *supra* note 97, at 660 (noting that many of the people responsible for creating these waste disposal sites had abandoned them); *see also* Dower, *supra* note 100, at 169 (indicating that abandoned waste sites made it particularly difficult to identify those responsible for the cleanup).

125 *See infra* notes 169-79 and accompanying text (detailed discussion of the CERCLA's deficiencies).

126 *See* Grad, *supra* note 114, at 2. Grad states:

> [w]hile deficient in many respects, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 . . . together with the hazardous waste subtitle (subtitle C) of the Resource Conservation and Recovery Act of 1976 . . . which was amended and reaffirmed by the same congressional committees during the same session of Congress, *form a sufficient authorization to begin the cleanup of old hazardous waste sites* and to avoid the consequences of new hazardous waste spills, for the protection of health and the environment.

Id. (citations omitted) (emphasis added).

Grad also indicates that "CERCLA picks up where RCRA leaves off, i.e., when untoward emergencies occur, or when spills occur at current or no longer active sites, and by making provisions for protection *after* a site has been closed." *Id.* at 35-36. (citations omitted). *See also Developments, supra* note 50, at 1471 ("RCRA and CERCLA together provide extensive regulation of the generation, transportation, storage, disposal, and cleanup of hazardous wastes.").

2. The CERCLA Defined—What does the CERCLA say? In essence, it directs that the nation's hazardous waste disposal sites *must* be cleaned up promptly[127] and provides the process[128] by which such cleanups should occur.[129] Specifically, the CERCLA grants the EPA the power "to respond to releases of hazardous waste from inactive hazardous waste sites which endanger public health."[130]

To do this, the CERCLA created a $1.6 billion fund to be used for an initial five-year period.[131] This money was designated for the restoration of natural resources and the costs of cleanups on land or

---

[127] Pursuant to the CERCLA, these cleanups are effected through "response actions." 42 U.S.C. § 9604. The act provides for two types of response actions: removal actions, or short-term procedures designed to address a release or threat of imminent release; and remedial actions, or long-term actions, designed to accomplish a permanent clean up of the hazardous waste.

[128] The CERCLA grants the President the authority, in consultation with the states, to take any action deemed "necessary to protect the public health or welfare of the environment" in *response* to the actual or threatened release of "hazardous substances, pollutants, or contaminants" *Id.* § 9604(a)(1). However, President Reagan delegated virtually all of this authority to executive agencies like the EPA. *See* Exec. Order No. 12,316, 3 C.F.R. 168 (1981), *reprinted in* 1981 U.S.C.C.A.N. B70.

The EPA is responsible for the implementation and administration of the CERCLA. However, unlike the RCRA, the CERCLA does not provide for the EPA to delegate this authority to the states. The EPA must implement the CERCLA consistent with the National Oil and Hazardous Substance Pollution Contingency Plan (NCP), which is located at 40 C.F.R. pt. 300. The NCP establishes procedures and standards for response actions. 42 U.S.C. § 9605(a). As such, costs incurred, and the clean-up standards to be achieved, must be consistent with the NCP.

[129] "An underlying tenet of CERCLA is that the polluter should pay." Enoch, *supra* note 97, at 62 & n.31 (citing United States v. Fleet Factors, Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991)) (also citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1316 (11th Cir. 1990), for the proposition that the underlying purpose of CERCLA is to make those responsible for chemical disposal pay for cleanup of hazardous waste)). *See infra* notes 146-59 and accompanying text (more detailed discussion of the "polluter must pay" tenet).

[130] H.R. REP. NO. 1016, *supra* note 100, at 6119. The House Report explains that Congress's intent was to protect human health and the environment by mandating that the CERCLA develop a "national inventory of inactive hazardous waste sites." *Id.* The CERCLA requires the EPA to develop a system for identifying and monitoring these hazardous waste sites. It also requires that the EPA assign inactive waste sites a numerical score under the Hazard Ranking System (HRS) based on the degree of hazard the site poses. If a site achieves a score of 28.5 or higher, the EPA must place that site on the National Priorities List (NPL) which is located at 40 C.F.R., part 300, appendix B. *See* 42 U.S.C § 9605. These sites then become priorities for long-term remediation, commonly referred to as the "worst first" scenario. *See* 40 C.F.R. § 300.425.

The NPL lists federal facilities separately from nonfederal facilities. Moreover, only nonfederal facility sites on the NPL are eligible for financing for remedial actions from the Superfund. *See infra* notes 131-35 and accompanying text (describing the fund). 40 C.F.R. § 300.425(b)(1). Thus, DOD facilities do not receive money from the fund.

[131] 42 U.S.C. § 9631. (This section was subsequently repealed.). This fund was entitled the "Hazardous Substance Response Trust Fund," commonly referred to as the "Superfund." *Id.* § 9601(11). The CERCLA actually created two funds, not one. The first fund, entitled the "Post-Closure Liability Trust Fund," covers the costs of cleanups at sites closed pursuant to CERCLA regulations. The Superfund covers all other costs associated with the clean up of hazardous wastes. *Id.* §§ 9607(k), 9611(a).

in the air or water.[132] Congress mandated that the money for this fund come from special excise taxes on the petroleum and chemical industries.[133] Its intent was that this fund be used only when the EPA was unable to assign responsibility for a cleanup to the individuals or facility that caused the damage.[134] Congress realized that both the amount of sites and the restoration necessary far exceeded the resources available to the federal government alone.[135]

Congress envisioned that the clean up of hazardous wastes would occur immediately upon the EPA discovering their presence in the environment. Certain events or conditions trigger the CERCLA:

> (1) The release or threat of release of a hazardous substance into the environment; *or*
>
> (2) The release or threat of release of any pollutant or contaminant into the environment that presents an "imminent and substantial danger to the public health or welfare."[136]

On the discovery of a condition which requires remedial action,[137] the EPA attempts to locate the individuals responsible for producing

---

[132] *Id.* § 27.

[133] *Id.* § 9631. ARBUCKLE, *supra* note 49, at 123. *See* Eckhardt, *supra* note 64, at 261 (Eckhardt provides a further breakdown of the source of the money for the fund: "[t]he tax on crude oil, petrochemical feed stocks [42 different hazardous feedstock chemicals], and certain inorganic chemicals comprises eighty-seven and one-half percent of the fund. The other twelve and one half-percent would come from general revenue.").

[134] 42 U.S.C. §§ 9604(a)(1), 9607(a). *See* Eckhardt, *supra* note 64, at 261. The EPA may use the fund—subject to certain limits—to begin a response action while it pursues criminal or civil suits against PRPs. 42 U.S.C. § 9604(c)(1). When the EPA recovers money from PRPs, it returns it to the fund, replenishing it so that the agency may use it to pay for future response costs at other sites. Congress wanted no delays in the clean-up process while the agency and the PRPs haggled over ultimate responsibility for the site. *See also supra* notes 127-30 and accompanying text (noting that Congress's intent with the CERCLA was to promote immediate responses to hazardous conditions).

[135] S. REP. No. 848, *supra* note 13, at 60-63 (indicating that in addition to the money provided by the fund, states and private parties would need to assist in the clean-up efforts). *See* Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 516 (W.D. Mich. 1979).

[136] 42 U.S.C. § 9604(a). The term "release" is defined in the CERCLA as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." *Id.* § 9601(22). The CERCLA defines the term "hazardous substance" at 42 U.S.C. § 9601(14) as those substances previously defined as hazardous by prior federal statutes. The terms "pollutants or contaminants" are defined in the CERCLA as any substance which after release into the environment causes death, disease, behavioral abnormalities, cancer, genetic mutation, or physiological mutations in any organism or offspring of such organism that is exposed to the substance either directly or indirectly by ingestion through food chains. Petroleum and natural gas generally are not considered pollutants or contaminants. *Id.* § 9601(33).

[137] The CERCLA requires the EPA to develop procedures for both discovering and cleaning hazardous waste sites. *Id.* § 9605. The CERCLA mandates that the EPA update the National Contingency Plan, originally developed under the Clean Water Act, "to include a national hazardous substance response plan." *Id. See* Enoch, *supra* note 97, at n.32. The National Contingency Plan is discussed in greater detail *infra* note 260 and accompanying text.

or disposing of the hazardous substance, referred to in CERCLA parlance as "potentially responsible parties," or PRPs.[138]

If the EPA can identify the PRPs,[139] the CERCLA authorizes the agency to select one of two options.[140] First, the agency may compel the PRPs to take remedial action to abate the "imminent and substantial" danger, with the oversight of the EPA.[141] The Act grants the agency the power to issue orders requiring the PRPs to conduct and fund the clean up of sites. It also allows the EPA to bring suit to compel the PRPs to perform and pay for such cleanups.[142] Second, the EPA may elect to conduct the remedial action itself,[143] and subsequently seek indemnification from the PRPs for the cost of these clean-up actions.[144] Moreover, the CERCLA also authorizes private citizens to begin remedial actions to abate an imminent threat and clean up a hazardous waste site. These private citizens then may seek to recoup any money spent on such remedial actions from any PRPs.[145]

---

138 Giesbar, *supra* note 100, at 1299.

139 As many of these hazardous waste sites are abandoned, the EPA has experienced difficulty in ascertaining the PRPs for them. Numerous PRPs are now insolvent, and many sites were the work of "midnight dumpers." *See id.* at 1299-1300; 126 CONG. REC. 26,767 (statement of Rep. Stockman) ("midnight dumpers" will transport hazardous wastes at night to avoid a state's harsh laws); *id.* at 30,942 (Congress was aware of the illegal transportation and disposal of these wastes).

140 Enoch, *supra* note 97, at 663 & nn.35-36 (citing 42 U.S.C. § 9604 (outlining response authorities available to the EPA)).

141 42 U.S.C. § 9606.

142 *Id.* § 9606(a). *See* Enoch, *supra* note 97, at 663 n.36 (stating that "[t]he EPA, after determining that the release or threatened release of hazardous material creates an imminent and substantial danger to public health, welfare or the environment, may secure orders through the local federal district court to force a private cleanup"). 42 U.S.C. § 9606(a). Violation of these court orders may result in fines of up to $25,000 per day until compliance with the orders. *Id.* § 9606(b); *see also* Mason, *supra* note 77, at 81 (stating that "[t]he specter of treble damages and fines of up to $25,000 per day for failure to obey these orders also further the goal" [of encouraging PRPs to assume the responsibility for conducting and funding cleanups]. *But see* Geoffrey Norman, *Superfund as Godzilla; Al Gore and the EPA Have Created a Monster That Even Sucks Blood out of Socialist Businessmen in Vermont*, AM. SPECTATOR, Nov. 1993, at 3 (Feature section) ("[T]hreats of $25,000-a-day fines amount to 'encouragement' in getting people to 'agree' to do what the EPA wants done. One witness would call it extortion.").

143 42 U.S.C. § 9604(a). This section of CERCLA gives the President authority to "act in response to any release or threatened release of a hazardous substance." *Id.*

144 *Id.* § 9612(c)(3).

145 *Id.* § 9607(a)(4)(B). *See* Bryan, *supra* note 80, at 179 (citing Prudential Ins. Co. of Am. v. United States Gypsum Co., 711 F. Supp. 1244, 1251 (D.N.J. 1989)) which held:

> The statute [CERCLA] embodies a bifurcated scheme to promote the cleanup of hazardous sites, spills, and releases. First, through the creation of Superfund, the federal government is provided with the tools to respond to the growing problems resulting from hazardous waste disposal. Second, the statute also authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation.

Id.

3. "Make the Polluter Pay"—Congress believed that requiring the PRPs to "internalize the costs of haphazard waste disposal" would punish them for aberrant behavior and deter similar conduct in the future.[146] Congress's clear intent, however, was to promote rapid and effective responses to the discovery of conditions that pose hazards to the American public.[147] Toward this end, Congress authorized the Hazardous Substance Response Fund (Superfund) to borrow money from the Treasury until such time as the fund obtained enough money—through the taxing structure of the CERCLA[148]—to cover the costs of cleanups.

Again, the CERCLA's most fundamental premise is to "make the polluter pay"[149]—that is, to pass on the clean-up bill to the party responsible for the hazard or damage. This is why the CERCLA gives the PRP the choice mentioned above: begin, and fund, the clean-up process itself,[150] or allow the EPA to oversee the cleanup and reimburse the agency for the costs.[151]

The CERCLA identifies four types of PRPs:

(1) Current owners and operators of hazardous waste facilities;[152]

---

[146] Mason, *supra* note 77, at 79; *see* Eckhardt, *supra* note 64, at 264, which states:

> Legislation, if it is to work, needs an internal impetus to make it work. Sometimes it is possible to convince those affected that it is to their advantage to support a program that will do so. In the long run, it is more important that the flow of hazardous waste be stemmed than that past derelictions be remedied.

Id.

[147] Mason, *supra* note 77, at 77-78 (citing Chemical Waste Management v. Armstrong World Indus., 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987); Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986)).

[148] 42 U.S.C. § 9633(c) (repealed 1986); Eckhardt, *supra* note 64, at 261.

[149] *See, e.g.*, United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."); *see also* Mason, *supra* note 77, at 74-75 (citing *Reilly Tar)* ("[o]ne of CERCLA's basic aims, however, was to ensure that PRPs would bear the cost of remedying the toxic dangers that they caused").

[150] 42 U.S.C. § 9606. Mason, *supra* note 77, at 75. The PRP may sue other PRPs to obtain their assistance in paying for the cleanup. 42 U.S.C. § 9613(f). However, this provision did not become effective until the 1986 amendments to the CERCLA. *See infra* notes 180-226 and accompanying text.

[151] 42 U.S.C. § 9607. *But see* Norman, *supra* note 142, at 2, which states:

> A trust fund—Superfund—was to be established out of special taxes on petroleum and assorted chemicals. This fund was to be used to clean up sites, after which the polluters would be billed their share of the costs by the EPA. Or, the polluters could concede responsibility and accomplish the cleanup themselves. This is the preferred course, *since nobody wants to be put in the position of letting the government decide just how much to spend on something when it will be passing the bill along to you.*

Id. (emphasis added).

[152] 42 U.S.C. § 9607(a)(1). Truly "innocent" owners may escape liability by virtue of the innocent landowner defense in the CERCLA. *Id.* § 9607(b); *See infra* note 213 (indicating that one of the changes that the 1986 amendments to the CERCLA made allowed subsequent (current) landowners to prove their innocence). However, the

(2) Former owners and operators of hazardous waste facilities (owned or operated *at the time of the disposal of any hazardous substances*);[153]

(3) Generators;[154] and

(4) Transporters.[155]

The act holds these four types of responsible parties strictly liable[156] for any and all costs connected with the release of hazardous waste, whether incurred by private citizens or the government.[157] As the CERCLA imposes no limit on costs, except for a $50 *million* ceiling on punitive damages,[158] it obviously exposes these PRPs to extensive liability.[159]

4. Liability Provisions—What is also obvious is that the CERCLA has cast its liability net quite wide. Congress created broad cat-

---

obvious purpose behind holding current owners liable is to avoid the situation where a PRP sells the contaminated site to another to avoid liability. It also avoids creating a windfall for the subsequent purchaser as the price of the land should increase after the cleanup. *See* Enoch, *supra* note 97, at 64.

153 42 U.S.C. § 9607(a)(2). *See* United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); Kelley v. United States Environmental Protection Agency, 15 F.3d 1100 (D.C. Cir. 1994); *see also* Enoch, *supra* note 97, at 659 (discussing liability for *lenders* in the wake of *Fleet Factors*).

154 Defined as "[a]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances [if the hazardous substances are actually at the facility]." 42 U.S.C. § 9607(a)(3).

155 *Id.* § 9607(a)(4). Liability is contingent on the transporters having selected the facility that is the subject of the response action.

156 Note, *Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA*, 74 CORNELL L. REV. 1152, 1156-57 (1989) [hereinafter *Limiting Judicial Review*] (citing SUPERFUND AMENDMENTS OF 1985: SEPARATE AND DISSENTING VIEWS, H.R. REP. NO. 253, 99th Cong., 1st Sess. 74 (1985)) ("CERCLA implicitly established a standard of strict liability for potentially responsible parties"). The footnote to this passage indicates that "many courts have held that the CERCLA imposes strict liability on all parties falling within the terms of section 107(a)(1-4)." *Id.* at n.31 (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO), 579 F. Supp. 823, 844 (W.D. Mo. 1984), *rev'd on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). *See infra* notes 160-66 and accompanying text (detailed discussion of liability under the CERCLA).

157 The CERCLA requires only that these costs be "consistent with the National Contingency Plan". *See* 42 U.S.C. § 9607(a)(4)(A)-(D); *see also* United States v. NEPACCO, 579 F.2d at 823.

158 42 U.S.C. § 9607(c)(1)(D).

159 "CERCLA establishes a liability scheme that is strict, retroactive, and joint and several, thus raising daunting cost concerns for those subject to its mandate." Van S. Katzman, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191, 1192-3 & nn.13-14 (citing *Review of the Hazardous Substance Superfund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 35 (1992) (statement of Peter G. Guerrero) (also noting that the "average cost of a cleanup at a Superfund site is $25 million. In June of 1992, the EPA had estimated that it would cost a total of $40 billion to clean up just those sites on the Superfund cleanup list.").

egories of liability, "to the extent that total liability for the costs of cleaning up a particular site can be imposed on anyone or any company that has ever dumped hazardous substances at a site—regardless of how much or how little a given party actually dumped."[160] Moreover, liability attaches whether or not the substance the party disposed of at the facility is even part of the threat.

The liability of PRPs under the CERCLA is joint and several,[161] unless one can prove that the damage can somehow be apportioned.[162] The PRPs are collectively or individually liable for the full amount of the costs associated with the cleanup. Again, liability under the CERCLA is also strict. Thus, there are no good-faith arguments nor defenses to liability.[163] Congress's intent was that courts not consider most defenses that otherwise would be effective in releasing a party from liability. Accordingly, claims by PRPs that they took good-faith efforts to preclude releases, that they exercised due care in the performance of their acts, that they were not at fault,[164] or that their acts were lawful when they performed them became inconsequential. The CERCLA provides only three defenses—acts of God, war, or a third party (or any combination of the three).[165] As such, the only consideration appears to be whether a party falls into one of the four groups of PRPs.[166] If it does, it is liable.

5. The CERCLA's Underlying Purpose—Congress wanted to

---

160 Sandra Steffenson, *Cleaning Up Hazardous Waste: Some Full-Text Help for Environmental Law Attorneys*, 4 DOCUMENT DELIVERY WORLD (Sept. 1993) (This article is actually a review of a database called "RODScan," a full-text retrieval system containing almost every Record of Decision (ROD) issued by the EPA. A ROD is a final decision from the EPA detailing the strategy for cleaning up a hazardous waste site or the agency's final decision on an EIS under the NEPA.).

161 The CERCLA does not mandate joint and several liability but, rather, permits it. *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 (S.D. Ohio 1983); United States v. Monsanto, 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985). *See also* Enoch, *supra* note 97, at 667 & n.73 (providing an interesting discussion of how CERCLA arrived at its standard of liability).

162 United States v. Stringfellow, 20 ERC 1905, 1910 (C.D. Cal. 1984).

163 *See* Monsanto, 858 F.2d at 167; *Shore Realty*, 759 F.2d at 1042; United States v. Northeastern Pharmaceutical & Chem. Co., 579 F.2d 823 (W.D. Mo. 1984), *aff'd in relevant part*, 810 F.2d 726, 734 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

164 "The act imposes strict liability for cleanup costs in a truly draconian fashion—liability is imposed without regard to fault." Sweeney, *supra* note 46, at 68.

165 42 U.S.C. § 9607(b). *See, e.g.*, Violet v. Picillo, 648 F. Supp. 1283 (D. R.I. 1986) (PRP must prove that it exercised due care and took all necessary and reasonable precautions against the acts of the third party). Moreover, the acts of a third party must not be directly or indirectly contractually related to the PRP; *see also* Eckhardt, *supra* note 64, at 262. The CERCLA places on the PRP the burden of proving each element of a defense by a preponderance of the evidence.

166 As previously referred to, the CERCLA, as a result of subsequent amendments, now provides for an "innocent landowner" defense as the result of the addition of the definition of the term "contractual relationship." 42 U.S.C. § 9601(35)(a).

ensure that those responsible for creating the toxic nightmares nationwide did not escape liability. The CERCLA's definition of PRPs, and the manner in which courts have interpreted that definition, is extremely broad.[167] Conversely, the CERCLA's list of defenses to liability is "short and sweet," and the courts' construction of these defenses has been extremely narrow.[168]

To understand why Congress was so determined to prevent any PRPs from escaping liability, one need only remember the context in which the CERCLA was enacted—the hysteria of toxic waste nightmares like the Love Canal. The public was demanding legislative protection from environmental hazards. No one in America wanted hazardous chemicals seeping into their drinking water. Congress recognized the enormity of the clean-up task that lay ahead—and that the nation needed curative legislation without delay.

6. The CERCLA's Drawbacks—With this dire need for new legislation as a backdrop, Congress enacted the statute with the "high-sounding title."[169] Shortly after its passage, however, the chairman of the House subcommittee that forwarded the bill which ultimately passed stated

> The act is not comprehensive. It does not compensate victims as was envisioned originally by the Senate, and it leaves liability largely to common law. Its worst aspect, however, is that it responds to environmental degradation with a fund that is only about nine percent of the figure the EPA estimates it would take in order to clean up all hazardous waste posing a danger to public health and the environment.[170]

Although some commentators might argue that the lack of funding was not the CERCLA's *worst* aspect, many would agree with the former chairman that the CERCLA was deficient in many respects.[171]

---

[167] *See* Enoch, *supra* note 97, at 667-68 (arguing that lenders suffer as the result of Congress's wide liability net); *see also Developments*, *supra* note 50, at 1465-66 ("[t]he courts have enhanced the statute's radicalism in subsequent interpretation, finding in its language and legislative history a congressional intent to adopt unusually broad and highly controversial standards of liability").

[168] *See* United States v Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (holding that torrential rainfalls causing lagoons full of toxic waste to overflow "were not the kind of 'exceptional' natural phenomena to which the narrow act of God defense . . . applies").

[169] "The Comprehensive Environmental Response, Compensation and Liability Act of 1980." Eckhardt, *supra* note 64, at 253.

[170] *Id.* at 253-54 (citing H.R. REP. NO. 1016, *supra* note 100).

[171] *See* Grad, *supra* note 114, at 2 (referring to "a hastily assembled bill and a fragmented legislative history"); Enoch, *supra* note 97, at 660 (stating that "[b]ecause of Congress's haste and a compromise atmosphere, CERCLA arrived as a complex piece of legislation, filled with vague terms and little legislative history"); *see also* Giesbar, *supra* note 100, at 1299, which indicates that "the bill was hastily assembled, the legislative history patchwork, and the language vague . . . Because of the ambiguity and

Legal commentators were not the only ones unhappy with the new legislation. Both courts and litigants disparaged the act as vague and ambiguous[172] and "not the paradigm of clarity or precision."[173]

The reasons for the CERCLA's inadequacies are easy to understand. In December 1980, Congress had been haggling over environmental legislation for more than two years, and the end of the legislative term was fast approaching. Ronald Reagan had recently defeated Jimmy Carter in the presidential election, and was to take office in January 1981.[174] This statute represented the final opportunity to enact environmental legislation on toxic waste sites prior to Reagan entering office.[175] As such, Congress agreed to numerous compromises to push the legislation through as expeditiously as possible.[176] Congress recognized that the CERCLA was far from perfect,[177] but adopted a "something is better than nothing"

---

contradictions within the statute, critics have dubbed CERCLA the 'full employment act for lawyers.'" (citations omitted) (quoting David E. Jones & Kyle E. McSlarrow, . . . *But Were Afraid to Ask: Superfund Case Law, 1981-1989*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,430 (Oct. 1989)); Bayko & Share, *supra* note 120, at 24 ("Even before its passage in December 1980, the Comprehensive Environmental Response, Compensation and Liability Act . . . was highly controversial." (citation omitted)).

[172] *See* Giesbar, *supra* note 100, at 1299 (citing United States v Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (indicating that "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history")); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1952) (characterizing the CERCLA as a "severely diminished piece of compromise legislation from which a number of significant features were deleted," thus making it difficult to interpret); *see also* Amoco Oil v. Borden, 889 F.2d 664, 667 (5th Cir. 1989) (criticizing the CERCLA's legislative history as incomplete and ambiguous); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (same).

[173] Santa Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687, 695 n.4 (E.D. Cal. 1991).

[174] *See Developments*, *supra* note 50, at 1465 (noting that "on the heels of the greatest conservative landslide in a generation, Congress enacted perhaps the most radical environmental statute in American history") (citation omitted). The article also notes that "Congress passed the statute during a 'lame duck' administration, [prompting] former EPA Administrator Douglas M. Costle [to] term CERCLA's enactment 'an extraordinary action.'" *Id.* at n.1 (citing 16 Env't Rep. (BNA) 7 (May 3, 1985) ("Current Developments" section).

[175] Congress was concerned about the change in attitude toward environmental considerations that the Reagan Administration would bring to office. It was fearful that legislation addressing environmental concerns, if they failed to enact it immediately, would never be approved by the incoming administration. *See* Reitze, *supra* note 65, at 120 (noting that "[w]hen 1981 brought to power an administration that was committed to anti-environmental policies, the people interested in environmental protection fought to keep what they already had").

[176] *See* Enoch, *supra* note 97, at 660 ("A lame-duck Congress passed CERCLA as compromise legislation in the last hours of the Carter Administration"); Deason, *supra* note 110, at 555-56.

[177] "The legislation that did pass, with all of its inadequacies, was the best that could be done at the time." Grad, *supra* note 114, at 2. *See* Brian O. Dolan, *Misconceptions of Contractual Indemnification Against CERCLA Liability: Judicial Abrogation of the Freedom to Contract*, 42 CATH. U. L. REV. 179, 181 & n.11 (1992) (noting that Congress passed the bill "despite allegations that the bill contained numerous defects and inconsistencies"). The note lists various members of Congress and their objections to the bill.

attitude.[176] It also recognized that changes to the law would be necessary in the coming years.[179]

E. The Superfund Amendments and Reauthorization Act of 1986

1. Why the SARA was Necessary—As Congress expected, the EPA's progress in cleaning up hazardous waste sites in the years following the CERCLA's enactment proved to be modest at best. Congress recognized the need to address various omissions and errors in the CERCLA, as well as the need for greater financing of the trust fund to properly confront the increasing number of sites nationwide.[180] Consequently, Congress sought to amend the CERCLA in the mid-1980s. It sought these amendments in part because the CERCLA's taxing and funding authority was scheduled to expire on September 30, 1985,[181] and in part because it was discouraged by the sluggish rate of completed cleanups.[182] Thus began another long and arduous political

---

[176] *See* Dolan, *supra* note 177, at 181 (stating that "[s]everal of the bill's supporters even expressed misgivings"); n.13 (citing 126 CONG. REC. 31,970 (1980) (statement of Rep. Breaux) (explaining that while the bill was not perfect, it was better than nothing); *id.* at 31,972 (statement of Rep. Gibbons) (suggesting "this is not a full loaf, but let us take what we can get"); *id.* at 31,979 (statement of Rep. Clinger) (stating that he supported the bill "flawed though it may be, because I am convinced that this is the last train that is going to leave the station in this session of Congress. I think that it is absolutely imperative that we be on that train."). *See also* Grad, *supra* note 114, at 1, who states:

> The bill which became law was hurriedly put together by a bipartisan leadership group of senators . . . introduced, and passed by the Senate in lieu of all other pending measures on the subject. It was then placed before the House, in the form of a Senate amendment of the earlier House bill. It was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take-it-or-leave-it basis, the House took it, groaning all the way.

[179] Prior to beginning a detailed discussion of amendments to the CERCLA, it is important to note that Congress's dissatisfaction with the CERCLA initially led to amendments to the RCRA in 1984. These amendments were collectively known as the Hazardous and Solid Waste Act of 1984 (HSWA), § 201(a), Pub. L. No. 98-616, 98 Stat. 3221 (1984) (codified at 42 U.S.C. § 6924(d)(1)). The RCRA actually was an amendment to the Solid Waste Disposal Act of 1965 (SWDA), Pub. L. No. 89-272, tit. II, 79 Stat. 992 (1965) (codified as amended at 42 U.S.C. §§ 6901-6987 (1982)). *See infra* notes 349-56 and accompanying text (discussing the HSWA in greater detail).

[180] Bayko & Share, *supra* note 120, at 24. Congress recognized that before enacting the CERCLA, it had erroneously believed that acceptable cleanups could be accomplished by "scraping a few inches of soil off the ground." H.R. REP. NO. 253, *supra* note 156, at 54.

[181] 42 U.S.C. § 9631 (repealed 1986); Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; President Reagan's State of the Union Address, 20 WEEKLY COMP. PRES. DOC. 87 (Jan. 30, 1984).

[182] *See* Mason, *supra* note 77, at 79 ("During the first five years of the Superfund program, the government and PRPs completed long-term remedial measures at only ten sites across the entire United States. Dismayed by the slow pace of these cleanups, Congress amended the CERCLA by enacting the SARA in October 1986."); *Developments*, *supra* note 50, at 1474 (stating that the "[c]leanup of hazardous waste sites has proceeded slowly"). Only 10 of 538 sites on the EPA's NPL at the end of 1984

struggle in Congress over environmental legislation.[183]

In the debates concerning the potential amendments to the CERCLA, congressional criticism of the EPA was apparent.[184] It saw the EPA as primarily responsible for the delay in the clean-up process,[185] as well as the tremendous increase in the overall costs of each cleanup.[186] To make matters worse, a scandal involving the EPA erupted during these initial years of the CERCLA, resulting in the resignation of numerous top agency officials.[187] These events caused Congress to lose faith in the ability of the EPA to implement the CERCLA without strict guidelines from Congress.[188]

Congress also recognized, however, that the EPA had experienced much of this difficulty as the direct result of significant problems with the Act.[189] Accordingly, it believed that by enacting the

---

had been cleaned up, and cleanups were in progress at only 19% of the sites. The EPA had yet to take any action at 236 sites, or 44% of the total NPL sites. Moreover, the agency had recommended adding 248 more sites to the NPL, and countless others existed that the agency had not discovered yet. *Id.* at 1474 n.47 (citing GENERAL ACCT. OFF., STATUS OF EPA'S REMEDIAL CLEANUP EFFORTS 2-3 (Mar. 20, 1985)).

[183] *See* Bayko & Share, *supra* note 120, at 24 ("After a long and highly political battle in Congress, the Superfund Amendments and Reauthorization Act (SARA) became effective last Oct 17.").

[184] *See Developments, supra* note 50, at 1474 & n.49 (citing H.R. REP. NO. 198, 98th Cong., 2d Sess. 19-20, 34, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5578-79, 5593 (criticizing the EPA's slow progress in issuing waste facility permits under RCRA, terming the Agency's enforcement efforts "inadequate," and noting that the EPA "has not been able to comply with past statutory mandates and timetables, not just for RCRA, but for virtually all of its programs"); H.R. REP. NO. 253, *supra* note 156, at 257 (terming clean-up efforts under CERCLA "tragically disappointing and ineffective" and placing responsibility, in part, on the EPA's "propensity to let private parties escape their fair legal liability for the damages caused by Superfund sites").

[185] *See* SENATE FINANCE COMM REP., S. REP. NO. 73, 99th Cong., 1st Sess. 12 (1985) [hereinafter S. REP. NO. 73].

[186] Congress learned that during the CERCLA's first five years of operation, the average cost for the clean up of a site had increased approximately six million dollars. SENATE COMM. ON ENV'T AND PUBLIC WORKS, SUPERFUND IMPROVEMENT ACT OF 1985. REPORT TO ACCOMPANY S. 51, TOGETHER WITH ADDITIONAL AND MINORITY VIEWS, S. REP. NO. 11, 99th Cong., 1st Sess. 2 (1985).

[187] *See Developments, supra* note 50, at 1474 n.50; *Burford Resigns from EPA Post Under Fire,* 1983 CONG. Q. ALMANAC 332 (1983). The scandal revolved around allegations of diversion of Superfund money by EPA officials. The scandal and resulting investigation led to the eventual firing and subsequent imprisonment of Rita Lavelle, the EPA's top administrator for hazardous waste programs, and the resignation of Anne Burford, the EPA Administrator, and more than 20 high-level EPA officials. *See also* N.Y. TIMES, Mar. 10, 1983, at A1; N.Y. TIMES, Dec. 2, 1983, at A1; H.R. REP. NO. 253, *supra* note 156, at 55, *reprinted in* U.S.C.C.A.N. at 2837.

[188] *See* S. REP. NO. 73, *supra* note 185, at 12.

[189] *See* Whitney, *supra* note 56, at 188 (stating that "the circumstances of its [CERCLA] enactment produced important omissions as well as textual defects which impaired its effective and prompt implementation . . . such as provisions setting cleanup goals and governing selection of remedies to achieve these goals"); Mason, *supra* note 77, at n.40 (citing Ellen J. Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments,* 14 ECOLOGY L. Q. 365, 373 (1987) (indicating that the "floor debates leading to the Superfund program's reauthorization reflected Congress's awareness that the CERCLA contained significant gaps, and that, as a

necessary changes to the CERCLA,[190] and providing the trust with an infusion of funding, the CERCLA could operate effectively to combat the growing hazards posed by toxic waste sites.[191] Once Congress was able to address all of its concerns, the Superfund Amendments and Reauthorization Act of 1986[192] (SARA) was signed into law, and took effect on October 17, 1986.[193]

2. The SARA Defined—

a. Increased Funding and New Schedules—The SARA extended the Superfund program for five additional years and expanded its resources markedly. It increased the trust fund more than five times, from its original $1.6 billion figure to an $8.5 billion amount for the five years following the SARA's enactment.[194] The Act also provided schedules mandating the completion of certain phases of response activities "to the maximum extent practicable."[195] The SARA required the EPA to complete preliminary assessments[196] at all sites listed on the Comprehensive Environmental

result, the EPA had encountered problems during its six years of enforcing the law."); *Developments*, *supra* note 50, at 1474 n.51 (citing H.R. REP. NO. 253, *supra* note 156, at 55). A "committee report on the proposed CERCLA amendments recently passed by the House observed" the following:

> The resources given to the EPA were simply inadequate to fulfill the promises that were made to clean up abandoned hazardous wastes in this country. With political pressure on EPA to treat every site discovered as a high priority, EPA was virtually guaranteed to fail from the moment CERCLA passed in 1980.

Id. at 55.

190 *See* Mason, *supra* note 77, at 75 (stating that the "SARA is an attempt to overhaul the CERCLA while preserving the features that made the CERCLA effective. It retains the CERCLA's basic structure and goals, but makes several major changes in the original law."); *see also infra* notes 194-226 and accompanying text (detailed discussion of the changes the SARA made to the CERCLA).

191 *See* Bayko & Share, *supra* note 120, at 25.

192 Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.).

193 *See Reagan Signs Superfund Bill*, WASH. POST, Oct. 18, 1986, at A1.

194 42 U.S.C. § 9611(a). The CERCLA originally created the "Hazardous Substance Response Trust Fund." 42 U.S.C. § 9631. The SARA modified the name of the trust fund to the "Hazardous Substance Superfund," as the fund was commonly referred to, prior to the enactment of the SARA, as the "Superfund." 26 U.S.C. § 9507(a). *See* Mason, *supra* note 77, at 79-80 & n.41 (citing Timothy B. Atkeson et al., *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,413-14 (1986) (for the remainder of this article, I will refer to the reprinted version of Atkeson's article, which appears in SUPERFUND DESKBOOK 1 (1992) [hereinafter *Annotated Legislative History of SARA*]); *see also* S. REP. NO. 73, *supra* note 185, at 13 (a detailed breakdown of the sources of the $8.5 billion).

195 42 U.S.C. § 9616(a). Bayko & Share, *supra* note 120, at 25.

196 The preliminary assessment is the first phase of the Installation Restoration Program (IRP), designed to identify potential sites with hazardous waste contamination. It involves examination of all readily available information concerning current and former activities of a site. It concentrates on identifying releases of contamination, and the need for any response action. These PAs can take from 18 months to six years to complete. ISSUES & OPTIONS, *supra* note 19, at 21.

Response, Compensation, and Liability Information System (CERCLIS)[197] within a little over one year.[198] It further required completion of a site inspection (SI)[199] at all facilities requiring one within just over two years.[200] Finally, the SARA compelled the EPA to conduct a final evaluation,[201] within four years, on all sites on the CERCLIS at the time of the SARA's enactment, to determine if the agency should include them on the NPL.[202]

Congress also set goals for the commencement of investigations and studies, as well as remedial action, at sites listed on the NPL. The SARA mandated that RI/FSs take place at no less than 275 sites within the first three years after the SARA's enactment.[203] Moreover, the Act required the EPA to commence physical on-site remedial action at 175 sites within the SARA's first three years.[204] These were lofty goals for an agency that had completed cleanups at only fifteen sites during the first five years after the CERCLA's enactment. However, Congress's design was that, with increased funding and stricter guidelines concerning the evaluation and clean-up process, the pace of clean-up activities might improve dramatically.[205]

---

197 The Comprehensive Environmental Response, Compensation and Liability Information System, originally known as the Emergency and Remedial Response Information System (ERRIS) is a computerized system used to keep track of those hazardous waste sites eligible for remedial action. To obtain information from the CERCLIS, telephone the CERCLIS hotline at 1-800-424-9346. Henley, *supra* note 74, n.76.

198 42 U.S.C. § 9616(a)(1). Congress gave the EPA until January 1, 1988, to complete PAs on all of the sites listed on the CERCLIS as of the date of the SARA's enactment. The PAs would determine if a site inspection was necessary.

199 *Id.* § 9605(a)(8)(A)-(B),(d). The SI also is part of the first phase of the IRP, designed to identify potential sites with hazardous waste contamination. It involves field reconnaissance, sampling, and analysis. Where possible, individual sources of contamination should be identified by the PA/SI process. *See* AR 200-2, *supra* note 65, para. 9-7.

200 42 U.S.C. § 9616(a)(2). The SARA gave the EPA until January 1, 1989, to complete an SI on all those sites at which the preliminary assessment identified such a need.

201 Once the EPA is notified of a site on which there has been a release of a hazardous substance in an amount constituting a reportable quantity, *see* 42 U.S.C. § 9602, the EPA will use the Hazard Ranking System (HRS) to evaluate the site for possible inclusion on the NPL. Once the EPA places a site on the NPL, a Remedial Investigation/Feasibility Study (RI/FS) must commence within six months of the date of listing. *Id.* § 9620(e)(1). An RI/FS is the phase of the IRP at which the nature and extent of contamination of a hazardous waste site are determined and clean-up strategies are analyzed. *Id.*

202 *Id.* § 9616(b). The SARA required the EPA to conduct these final evaluations, in accordance with the NCP, within four years of the SARA's enactment on all sites listed on the CERCLIS at the time of enactment, or within four years of listing if it occurs after the SARA's enactment.

203 *Id.* § 9616(d). If the EPA could not meet this deadline, Congress wanted the RI/FSs conducted at an additional 175 sites within four years, and at another 200 sites within five years, for a total of 650 sites within five years of the SARA's enactment. *Id.*

204 *Id.* § 9616(e).

205 *See* Bayko & Share, *supra* note 120, at 25.

b. New Clean-up Standards—The most important change brought about by the SARA, aside from the increased funding, was its establishment of new, more detailed clean-up standards designed to answer the fundamental question: "How clean is clean?"[206] The CERCLA had allowed the EPA to determine these clean-up standards prior to the SARA, requiring only that remedial actions be "cost-effective and consistent with the NCP."[207] Now Congress required that the EPA ensure that remedial actions complied with

> (1) any standard, requirement, criteria, or limitation under any Federal environmental law . . . ,[208] or
>
> (2) any promulgated standard, requirement, criteria, or limitation under a State environmental law or facility siting law that is more stringent than any Federal standard . . .[209]

Congress's purpose in enacting these new provisions was to place greater emphasis on *permanent* cleanups.[210] Note, however, that this provision severely restricted the EPA's discretion to determine the appropriate remedial action.[211] Moreover, both commentators

---

206 42 U.S.C. § 9621. *See also* Bayko & Share, *supra* note 120, at 32.

207 42 U.S.C. § 9604(c)(4) (1982). This is another example of congressional lack of confidence in the ability of the EPA to manage the Superfund program. *See Annotated Legislative History of SARA*, *supra* note 194, at 9 ("the refusal by many House members to give EPA much discretion on standard setting produced a strong preference for 'permanent' cleanup methods and 'national' cleanup standards based on the requirement that all legally applicable or relevant and appropriate federal (or more stringent state) environmental standards be met") (citations omitted); *id.* at n.121 (citing Representative James J. Florio (D-N.J.), *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980s*, 3 YALE J. REG. 351 (1986) (arguing that "Congress itself has had to assume the role of regulator, making some of the detailed technical and administrative determinations typically left to the implementing agency" because "Congress is no longer confident that the Environmental Protection Agency (EPA) will exercise such discretion as intended by Congress.") (citations omitted).

208 42 U.S.C. § 9621(d)(2)(A)(i).

209 *Id.* § 9621(d)(2)(A)(ii). Thus, the SARA "codified the concept that the requirements of other laws are potentially applicable and relevant and appropriate. Decisions about which laws and regulations are ARARs are made on a site-by-site basis." Noskin, *supra* note 26, at 173. The term "ARARs," or Applicable or Relevant and Appropriate Requirements, refers to clean-up standards from federal, state, and local laws and regulations on the environment that the SARA will "borrow"—if they are deemed to be "ARAR"—for use as clean-up standards at sites. 40 C.F.R. §§ 300.430(d)-300.430(f) (listing nine criteria on which remedy selection must be based, to include protection afforded to human health and the environment, long-term effectiveness and permanence, and cost).

210 *See Annotated Legislative History of SARA*, *supra* note 194, at 2 ("[t]he emphasis in SARA § 121 on permanent cleanups is new and based on very little engineering experience").

211 The EPA need not comply with these rigid clean-up standards in every case. *See* 42 U.S.C. § 9621(d)(4). Known as the "waiver clause," it allows the EPA to select a remedial action that does not attain the standards required in section (d)(2)(A). However, the EPA must provide, for public review and comment, a detailed explanation of why it selected the particular remedial action over one that would comply with the new standards. *Id.* § 9621(4)(A)-(F). *See also infra* notes 424-29 and accompanying text (discussing how federal facilities and the EPA have lost even more flexibility in the wake of *United States v. Colorado*).

and law makers viewed such rigid standards as much too difficult to comply with. They also saw them as responsible for both extensive delays in the commencement/completion of cleanups and driving the cost of cleanups "through the roof."[212]

c. Additional Changes—The SARA mandates many additional changes that have profoundly affected the Superfund program. It makes possible an "innocent landowner" defense for current land or facility owners by redefining the term "contractual relationship" in the CERCLA.[213] The SARA facilitates the voluntary settlement of cleanups with PRPs by granting the EPA settlement authority,[214] and by allowing the EPA to issue nonbinding preliminary allocation of responsibility (NBAR) decisions.[215] The CERCLA had failed to address these settlement issues properly, and Congress

---

[212] "Due to the SARA's new and stringent cleanup standards, the cost of cleanups has increased dramatically." *Limiting Judicial Review*, *supra* note 156, at 1159, 1164 (citing 17 Env't Rep. (BNA) 778-79 (Sept. 26, 1986)) (indicating that cleanups would cost $600 million per site, and that litigation expenses may reach astronomical levels).

See Millan, *supra* note 35, at 373 (citing SUPERFUND: COST GROWTH ON REMEDIAL CONSTRUCTION ACTIVITIES 15 (GAO-RCED 88-69) (1988)) (noting that the EPA experienced a 25% cost growth in two years in remedial construction activities under the SARA's new standards).

[213] 42 U.S.C. § 9601(35). The definition of the term is critical under 42 U.S.C. § 9607(b)(3), which holds liable "a person who by *contract* . . . arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party or entity and containing such hazardous substances." *Id.* § 9607(b)(3) (emphasis added). In sum, the new definition of the term allows a current landowner—a PRP—to prove that it acquired the land subsequent to the hazardous substances being placed on the land or in the facility, and that (1) it neither knew nor had reason to know that the land or facility had the substances in or on it; or (2) that it inherited the site; or (3) that it is a government entity that acquired it through eminent domain, escheat, or any other involuntary transfer or acquisition. *Id.* § 9601(f)(35).

[214] *Id.* § 9622. The SARA authorizes the EPA to enter into both de minimis and "mixed-funding" settlements. *Id.* § 9622(g), (b)(1). De minimis settlements concern those PRPs that have little actual responsibility with regard to the amount of hazardous waste at a site. The EPA tends to promptly settle with these PRPs, subject to certain exceptions. *Id.* § 9622(g). Mixed funding settlements are agreements with PRPs concerning payment of "orphan shares," or the amount attributed to unknown or unavailable PRPs. The Superfund will finance the amount of the cleanup not borne by the settling PRPs, and will seek reimbursement from any remaining PRPs. *Id.* § 9622(b)(1).

[215] *Id.* § 9622(e)(3). This grant of authority to the EPA allows it to notify PRPs, in the NBAR, of their potential responsibility at a site. Allocation of liability always has presented difficulties concerning settlements. *See* Bayko & Share, *supra* note 120, at 30. The article indicates:

> A major problem in reaching settlement in a multi-PRP site is the allocation of liability among PRPs. The EPA never has considered this allocation to be its problem, and the PRPs frequently are not able to deal objectively with this issue.
>
> Volume is one measure of allocation, but differing toxicity of wastes—and the question of how to factor in transporters and site owners—makes a simple formula elusive. In some situations, a neutral arbitrator has been used, but parties are not always willing to trust an outside party.

Id. By notifying PRPs of their potential responsibility early on in the process, Congress hoped to promote more settlements.

believed that enacting these changes to the CERCLA would simplify and assist the settlement process, thereby expediting the overall clean-up process. The SARA also adopted statutory rules concerning PRPs seeking contribution from other PRPs,[216] community right-to-know and emergency planning provisions,[217] and the expansion of health assessments at Superfund sites.[218]

Finally, the SARA greatly expanded the states' (and citizens') role in the Superfund program,[219] making it much less of a federal program than it was with the original legislation.[220] The SARA makes "the states the EPA's partner at each stage of cleanup or settlement."[221] Moreover, the SARA's new clean-up standards, requiring compliance with all state ARARs (clean-up standards),[222] mean that the states are now involved in every phase of the clean-up process.[223] One commentator, shortly after the SARA's enactment, wrote that "the strengthened state involvement reflects a congressional belief that each Superfund site is a local concern that merits local input."[224] However, this strengthened state involvement has instead led only to increased costs and slower cleanups.[225]

---

[216] *See supra* notes 149-50 and accompanying text (discussing indemnification provisions that the SARA added to the CERCLA which allows PRPs to seek contribution from additional PRPs).

[217] 42 U.S.C. § 9604(i)(6)(B). Adopted in response to the deadly release of chemicals in Bhopal, India, in December 1984, Title III of the SARA, known as the Emergency Planning and Community Right-to-Know Act of 1986, contains certain requirements for emergency planning and release of information to the public concerning the dangers of hazardous substances within a community. *See Annotated Legislative History of SARA, supra* note 194, at 13; EPA, TITLE III FACT SHEET, EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW (1987); Elkins & Makris, *Emergency Planning and Community Right-to-Know*, 38 J. AIR POLLUTION CONTROL ASS'N 243 (1988); *see also* Galanter, *When Worlds Collide: Reflections on Bhopal, The Good Lawyer, and the American Law School*, 36 J. LEGAL EDUC. 292 (1986); Montgomery, *Reducing the Risk of Chemical Accidents: The Post-Bhopal Era*, 16 ELR 10300 (Oct. 1986); *but see* Burtis, *Title III Compliance May Not Be Enough: Lessons Learned from a Chemical Fire in Seabrook, NH*, ENVTL. MANAGER'S COMPLIANCE ADVISOR 1 (1988).

[218] 42 U.S.C. § 9604. The Act requires the Agency for Toxic Substances and Disease Registry (ATSDR) to conduct a health assessment at every NPL site, which will immediately report any toxic substances at a site that pose serious risks to the surrounding community. The EPA must then eliminate, or mitigate to a high degree, the danger to the population. *Annotated Legislative History of SARA, supra* note 194, at 13-14.

[219] 42 U.S.C. § 121(f).

[220] *Annotated Legislative History of SARA, supra* note 194, at 12.

[221] *Id.*

[222] *See supra* notes 208-11 and accompanying text (discussing the SARA's new clean-up standards that incorporate state ARARs).

[223] *See* 42 U.S.C. § 9604(d)(1) (discussing cooperative agreements that the EPA must enter into with states).

[224] Bayko & Share, *supra* note 120, at 31.

[225] *See infra* notes 401-29 and accompanying text (discussing the role that the states are playing in the clean-up process at federal facility NPL sites and its ramifications).

The same might be said about many of the SARA's amendments to the CERCLA. Congress designed these amendments with the ultimate goal of expediting the clean-up process. However, the overall effect has been to further shackle those to whom Congress entrusted the program, slowing the process down while simultaneously increasing the costs tremendously.[226] Congress would soon realize, however, that the Superfund program was not the "ready fix" that it imagined and that additional changes would be necessary.

III. The DOD and Hazardous Waste

> *To the victors in the Cold War go the spoils—and the spoilage. It's in the form of fouled soil, contaminated drinking water, and acres of wilderness pocked with unexploded bombs. The Pentagon's arsenal, assembled over 40 years to keep the lid on superpower conflict, has left deep scars on the home front.*[227]

A. The Early Years (or, "The Military's Toxic Legacy"[228])

The military's record in protecting the environment has paralleled the nation's record—that is, appalling.[229] As the nation's largest industrial organization, the Department of Defense (DOD) also was one of the nation's largest polluters.[230] As an integral part of the growth in industry spawned by the World Wars, the military manufactured, or required the manufacture of, massive amounts of

---

[226] Studies indicate that, on average, it takes over 14 years to move from the identification of contaminated sites to the completion of the remedial design/remedial action (RD/RA) period of the clean-up process. Wegman & Bailey, *supra* note 2, at 889 & n.140 (citing ISSUES & OPTIONS, *supra* note 19, at 21). *See supra* note 29 (discussing the inordinate amount of time spent on the early phases of the clean-up process at the Twin Cities Army Ammunition Plant (TCAAP) and the Rocky Mountain Arsenal). *See also supra* note 20 (indicating that the average cost of cleaning up a Superfund site ranges from $25 to $30 million).

[227] Turque & McCormick, *supra* note 24, at 20.

[228] I use this phrase "tongue in cheek," as it is certainly one of the most overused phrases in the area of military environmental law.

[229] *See supra* notes 46-52 and accompanying text.

[230] *See supra* notes 53-58 and accompanying text. In 1990, the "military's 871 domestic installations, strung across 25 million acres of land, produce[d] more tons of hazardous waste each year than the top 5 U.S. chemical companies combined." Turque & McCormick, *supra* note 24, at 20. Up until 1989, the military generated almost 750,000 tons of hazardous wastes per year. Michael Satchell, *Uncle Sam's Toxic Folly*, U.S. NEWS & WORLD REP., Mar. 27, 1989, at 20, 21. I used the word "was" because, as described later, the military has made a tremendous effort toward reducing its output of hazardous wastes. *See infra* notes 235-37 and accompanying text.

chemicals, munitions, and other goods. Many of the by-products of this manufacturing were extremely hazardous to human health. This process continued for decades after the wars' end.[231]

The military disposed of the hazardous wastes it created by methods acceptable at the time, but that now would create public outrage.[232] Moreover, America's Cold War role mandated sufficient military power

---

[231] Through its wartime agencies, the government regulated prices, wages, production, consumption, and the flow of scarce raw materials . . . These regulations forced private firms to manufacture increased quantities of products such as rubber, steel, aluminum, and rayon. These products were then sold to the government for profit, fueling the war effort and propelling the nation out of the Great Depression.

Katzman, *supra* note 159, at 1191 (citing 1 CIVILIAN PRODUCTION ADMINISTRATION, INDUSTRIAL MOBILIZATION FOR WAR: HISTORY OF THE WAR PRODUCTION BOARD AND PREDECESSOR AGENCIES, 1940-1945, at 964-66 (1947)) (citations omitted). The article concludes this passage by indicating that "[i]n the process, however, privately owned facilities generated and disposed of massive quantities of industrial waste, hazardous to both human health and the environment." *Id.* at 1191-92 (citation omitted).

See Calhoun, *supra* note 20, at 60. The article notes that the hazardous materials produced by the military industrial complex "include[d] acids, alkalines, contaminated sludge, corrosives, cyanide, degreasers, dioxins, explosive compounds, fuels, heavy metals, herbicides, low-level radioactive waste, lubricants, nitrates, oils, paints, paint strippers and thinners, pesticides, polychlorinated biphenyls (PCBs), solvents, and unexploded ordinance." *Id.* Furthermore, the military produces many of these toxic substances through the result of ordinary, everyday activities at military installations—maintaining vehicles and aircraft, painting and stripping paint, and using weapons, fuel, vehicles, and aircraft. *Id.*

[232] The military disposed its hazardous waste in this manner because no one was aware of any adverse consequences. *See* Calhoun, *supra* note 20, at 60. The article notes:

> In the past, like much of civilian industry, the military employed methods of handling, storing, and disposing of hazardous materials and wastes, that, while accepted procedure at the time, would be considered environmentally unsound today. For example, it was common practice on bases to dump untreated wastes into unlined landfills and trenches. Chemical solvents used as cleaning agents, degreasers, and paint strippers were permitted to drain directly into the ground. In fire training areas, waste oils purposely were poured into the ground and set ablaze to train firefighters.

Id. Apparently, we should not excuse the use of all of these methods as uninformed actions of days gone by. On October 1, 1993, the EPA issued a Notice of Violation to one Army installation, under the RCRA, for failing to obtain a permit and properly dispose of hazardous substances. The notice sought $1.3 million in penalties. It appears that the installation, among other violations, allowed firefighters to train with hazardous substances dispersed on the ground and set on fire. *National Defense Authorization Act for Fiscal Year 1995: Hearings on S. 2182, H.R. 4301 and Oversight of Previously Authorized Programs Before the House Comm. on Armed Services, Division B—Military Construction: Hearing on H.R. 4302 Before the Subcomm. on Military Installations and Facilities of the House Comm. on Armed Services*, 103d Cong., 2d Sess. 1, 37-38; *see also* Kassen, *supra* note 24, at 1499-1500.

See Earl Lane and Marie Cocco, *The Poison Touch: Charged as the Premier Protector of the Environment, the Federal Government Has in Fact Been a Spoiler of Untold Proportions*, NEWSDAY, Feb. 4, 1990, at 4. The article responds to the query, "How did the government get into this mess?" by stating:

> It is in part a legacy of a time when, for example, it was routine for workers at government laboratories to bury animal carcasses that had been irradiated for experiments alongside chemical wastes and other

to resist any threats to the nation's welfare. Thus, "national security concerns took precedence over ecological ones."[233] As a result, "portions of virtually every major United States military base and many minor facilities are contaminated and in need of a cleanup."[234]

> toxins in the same shallow, unlined pit. During World War II, it was common for testing-ground workers to dig a large pit, dump in unexploded ammunition and cover it up.

Id. However, the article notes that in private industry similar practices led to widespread pollution. Thus, it was not only the military that was unaware of the dangers posed by such disposal methods. *Id.*

See also Richards & Pasztor, *Why Pollution Costs of Defense Contractors Get Paid by Taxpayers*, WALL ST. J., Aug. 31, 1992, at A1 (arguing that defense contractors had little to no incentive to exercise care in handling toxic wastes, because the government would eventually absorb the costs of the contractors' cleanups).

[233] Calhoun, *supra* note 20, at 60. Another commentator noted:

> For over two centuries, the armed services, most recently under the Department of Defense, have been entrusted with the defense of the country. For forty years, the primary mission of the Department of Energy and its predecessor agencies was to build nuclear weapons for the national defense. Historically, Congress has given the agencies responsible for the country's military protection far greater leeway for complying with applicable laws than other federal agencies.

Kassen, *supra* note 24, at 1478 (citing OFFICE OF ENVTL. MGMT., U.S. DEP'T OF ENERGY, CLOSING THE CIRCLE ON THE SPLITTING OF THE ATOM 4 (1995) [hereinafter CLOSING THE CIRCLE]) (citations omitted). "For more than 50 years, DOE and its predecessors focused on producing nuclear weapons, giving relatively low priority to managing waste, whether hazardous (toxic) or radioactive or both (mixed waste)." Babich, *supra* note 4, at 1526 (citing NATIONAL PRIORITIES, *supra* note 11, at 10).

Courts also have "tread lightly in the area of national security." *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (indicating that the "Court exercises 'a healthy deference to legislative and executive judgments in the area of military affairs'").

[234] Calhoun, *supra* note 20, at 60. Many of the DOD's thousands of contaminated sites present only slight hazards to the public. However, many still exist that pose significant threats. For example, the DOD has over 100 sites on the NPL (the DOE has 16) out of over 1200 on the list. The total number of federal facilities that contain contamination exceeds 21,000. FEDERAL FACILITIES ENVIRONMENTAL RESTORATION DIALOGUE COMMITTEE, INTERIM REPORT: RECOMMENDATIONS FOR IMPROVING THE FEDERAL FACILITY ENVIRONMENTAL RESTORATION DECISION-MAKING PROCESS AND SETTING PRIORITIES IN THE EVENT OF FUNDING SHORTFALLS (1993) [hereinafter FFERDC INTERIM REPORT]. *See* SHULMAN, *supra* note 4, at 1; DERP 1994 REPORT, *supra* note 10, at B6-1.

"Today, DOD facilities are laced with almost every imaginable contaminant: Toxic and hazardous wastes, fuels, solvents, and unexploded ordnance." Miller, *supra* note 8, at 1 (quoting the Deputy Under Secretary of Defense (Environmental Security) in testimony before the House Armed Services subcommittee on May 13, 1993).

A special report conducted for the New York Times concluded:

> The military industry has produced the most toxic pollution in the country and virtually every military installation has been extensively contaminated . . . . The problems were caused by more than four decades of environmental neglect. The haphazard disposal of toxic wastes in lagoons, leaking underground storage tanks and dump sites caused acres of ground to become saturated with hazardous chemicals that also seeped into underground water supplies. Among the toxic constituents are heavy metals from electroplating, diesel and jet fuel, solvents and degreasing agents from operating machinery and chemical byproducts from munitions manufacturing.

Keith Schneider, *Toxic Pollution at Military Sites Is Posing a Crisis*, N.Y. TIMES, June 30, 1991, at 1, col. 1.

Since the late 1980s, however, the DOD has demonstrated a sincere commitment to environmental clean-up efforts[235] and it has made steady progress in certain areas.[236] Yet much remains to be done.[237] Now, in this post-Cold War era of declining defense budgets and base closures, the military is still confronted with a massive clean-up task.[238]

Approximately 60% of the DOD sites that need cleanup contain contamination from fuels and solvents (most from leaking underground storage tanks), 30% contain "explosive compounds and other toxic and hazardous industrial wastes such as heavy metals," 8% have unexploded ordnance, and 2% contain low-level radioactive wastes. *Military's Toxic Legacy*, *supra* note 20, at 62.

235 "Defense and the environment is not an either/or proposition To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns. The real choice is whether we are going to build a new environmental ethic into the daily business of defense." Major Michele McAnich Miller, *Defense Department Pursuit of Insurers for Superfund Cost Recovery*, 138 MIL. L. REV. 1, 1 (1992) (citing Address by Secretary of Defense Dick Cheney to a national environmental conference, Sept. 4, 1990, *quoted in* Dianne Dumanoski, *Pentagon Takes First Steps Toward Tackling Pollution*, BOSTON GLOBE, Sept. 9, 1990, at 79).

The Clinton Administration also evidenced its resolve to address defense environmental issues by creating in 1993 the high-level position of Deputy Under Secretary of Defense (Environmental Security) (DUSD)(ES), presently occupied by Sherri Wasserman Goodman. Calhoun, *supra* note 20, at 62.

236 *See* Calhoun, *supra* note 20, at 63 (indicating that the Pentagon claims that between 1987 and 1991, it reduced its annual disposal of hazardous wastes by more than *one-half*; that more than 90% of military installations now recycle; and that over 5000 full-time environmental professionals currently work for the military).

See also Calhoun, *supra* note 12, at 21, which related:

> As part of a September 1990 Defense and the Environment Initiative, President Bush's Defense Secretary Dick Cheney declared that "the primary mission of the Department of Defense is no excuse for ignoring the environment." Under Cheney, DOD resolved to become the "federal leader" in environmental compliance and protection and to make environmental concerns part of the daily business of military bases.

237 *See*, *e.g.*, Bettigole, *supra* note 4, at 683-89 (detailing ominous conditions at numerous DOD installations and DOE nuclear weapons facilities).

238 In its annual report to Congress for fiscal year 1995, the DOD indicated that 21,145 military installation sites had been identified as still containing hazardous wastes, and that a total of 123 military installation sites had been placed on the NPL. DERP 1994 REPORT, *supra* note 10, at A8. The military faces a "multi-billion dollar, decades long cleanup task at nearly 20,000 contaminated sites on hundreds of military and weapons-production installations." SHULMAN, *supra* note 4, at 1.

See Lane & Cocco, *supra* note 232, at 4, which states:

> A three-month Newsday study of the federal government's pollution record found a huge catalog of leaching landfills, leaking underground tanks, radioactive waste piles and lab disposal pits at U.S. facilities, installations and public lands. It is a record of widespread environmental neglect, going far beyond the well-publicized decay in the Department of Energy's nuclear weapons factories and revealing a government that has broken the same pollution laws it enforces on others.

See also Katie Hickox, *Swords into Bankshares: How the Defense Industry Cleans up on the Nuclear Build Down*, WASH. MONTHLY, Mar. 1992, at 31-32 (discussing the tremendous opportunities presented to the defense industry by the closure of military installations replete with toxic contamination); *Washington Cleans up Its Act*, 100 CHEMICAL ENGINEERING 31 (May 1993) (quoting Kathleen Hain, Director of the DOE's Office of Demonstration, Testing, and Evaluation, "[T]his mammoth cleanup task is going to take decades, at a cost of billions of dollars a year, and is probably the country's biggest industry.").

B. The Defense Environmental Restoration Program

1. The Installation Restoration Program—Despite its poor record on the disposal of hazardous wastes, the military actually played a lead role in creating environmental programs designed to address hazardous waste issues.[239] In 1975, the Army created a trial Installation Restoration Program (IRP) to confront its significant hazardous waste problems. This, in turn, led to an expansion of the program within the DOD in 1976.[240] However, difficulties soon arose in the implementation of this program, requiring congressional action.

First, section 120 of the CERCLA made federal facilities—that is, the DOD—liable for hazardous waste contamination at these facilities.[241] As such, the DOD had to develop methods to comply with the CERCLA's response action requirements. Under the IRP, each department within the military had adopted its own methods, which led to inconsistent efforts and results.[242] The military needed one program that would develop a uniform method for use by all of the services.

A second difficulty concerned funding for these remediation efforts. The CERCLA limited the financing of remedial actions from

---

[239] Major David N. Diner, *The Army and the Endangered Species Act: Who's Endangering Whom?*, 143 MIL. L. REV. 161, 196 (1994). Major Diner indicates:

> In 1975, the Army, on its own initiative, formed an organization that ultimately would become the United States Army Toxic and Hazardous Materials Agency (USATHAMA). By 1979, USATHAMA was engaged in a nationwide study of Army installations to detect, stabilize, and ultimately remediate contamination problems caused by past waste disposal practices. This program became known as the Installation Restoration Program, and predated the passage of the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as the "Superfund," by almost three years. When enacted, the Superfund adopted many of the procedures pioneered by USATHAMA.
>
> By 1991, the Installation Restoration Program included 10,578 Army sites, of which 5054 needed restoration work. Interagency agreements, governing clean-ups at all 30 Army sites listed on the National Priorities List, were completed.

Id. at n.227. Major Diner notes that the military "did not fully appreciate the magnitude of the environmental challenges it confronted" at this time, however, and that its "compliance record was inconsistent" and it lacked an "overall strategy . . . for incorporating environmental objectives into the . . . mission." *Id.* at 197.

[240] *See* Kyle E. McSlarrow, *The Department of Defense Environmental Cleanup Program: Application of State Standards to Federal Facilities After SARA*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,120 (Apr. 1987). The article indicates that the Army created the IRP to address the toxic waste contamination at various Army installations, most notably the Rocky Mountain Arsenal in Colorado. *See infra* notes 375-400 and accompanying text (describing the Army's Rocky Mountain Arsenal's horrendous conditions and the legal battles surrounding the Arsenal).

[241] The CERCLA imposed liability for all costs associated with a release or threatened release of a hazardous substance on any person who, inter alia, owned or operated a facility at the time of release 42 U.S.C. § 9607. Moreover, the CERCLA defines "person" to include the United States government. *Id.* § 9601(21).

[242] SHULMAN, *supra* note 4, at 10.

the Superfund to nonfederal sites listed on the NPL.[243] Consequently, "funding for each military department's installation restoration program came directly out of agency operations and maintenance (O&M) funds."[244] In the early days of the military's environmental efforts, environmental programs did not fare well in competing for funding. This was especially true when they were pitted against certain O&M expenses—such as training, maintenance, and the everyday requirements necessary to run an installation—oil, gas, electricity, food, and many other expenses.[245]

Congress recognized that the military's clean-up program needed proper funding to comply with the CERCLA's requirements.[246] In response, it created an environmental restoration account in 1983.[247] Congress intended for this account to provide the funding necessary for CERCLA response activities. However, Congress was only just beginning to recognize the magnitude of the toxic waste problem on *military* lands. As such, it also recognized the need for a comprehensive program to control the clean-up process at these sites. Consequently, the formation of the DOD's IRP in the 1970s and its subsequent work to investigate, identify, and, where necessary, perform site cleanups[248] ultimately resulted in the creation of the Defense Environmental Restoration Program (DERP) in 1986.

2. The DERP Defined—The SARA established the DERP[249] to "promote and coordinate efforts for the evaluation and cleanup of

---

[243] "No money in the fund shall be available for remedial action . . . with respect to federally owned facilities." 42 U.S.C. § 9611(f); 40 C.F.R. § 300.425(b)(1).

[244] Henley, *supra* note 74, at 17-18. Major Henley's thesis also notes that O&M funds are yearly funds that come from DOD appropriations acts—usually good for only one year. *Id.* at n.162.

[245] *See* S. REP. NO. 292, 98th Cong., 1st Sess. 73 (1983) [hereinafter S. REP. NO. 292]; *see also* Henley, *supra* note 74, at 18 & n.163.

[246] S. REP. NO. 292, *supra* note 245, at 73.

[247] Department of Defense Appropriations Act for Fiscal Year 1983, Pub. L. No. 98-212, 97 Stat. 1421, 1427 (1983). *See* National Defense Authorization Act for Fiscal Year 1984, Pub. L. No. 98-94, 94 Stat. 614 (1983). Congress funded this account as a line-item appropriation for FY 1983, 1984, and 1985. *See* Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-473, 98 Stat. 1904, 1910 (1984); Department of Defense Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-190, 99 Stat. 1185, 1192 (1985); *see also* Henley, *supra* note 74, at 18 & nn.169, 171-73. Congress initially named the account "EDRA," or the "Environmental Defense Restoration Account," but subsequently changed its name to "DERA," or the "Defense Environmental Restoration Account" in 1986. *Id.* at n.168.

[248] "The Installation Restoration Program (IRP) is the program under which the Department of Defense (DOD) identifies, assesses, investigates, and cleans up hazardous substances, pollutants, and other contaminants associated with past activities." Harold E. Lindenhofen et al., *Measuring Progress in DOD's Installation Restoration Program*, 4 FED. FACILITIES ENVTL. J. 167, 168 (Summer 1993).

[249] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, Title II, § 211(a)(1)(B), 100 Stat. 1613, 1719 (codified as amended at 10 U.S.C. §§ 2701-2707 (1995)).

contamination at [DOD] installations."[250] The DERP actually encompasses two[251] separate, subordinate programs—the IRP[252] and the Other Hazardous Waste (OHW) Operations Program.[253] Distilled to its purest form, the DERP mandates the "investigation and cleanup of contaminated defense sites and formerly used properties."[254] It also describes the process by which DOD agencies should comply with this mandate.

In the statutes governing the DERP,[255] Congress directed that the Secretary of Defense, in consultation with the EPA, "carry out a program of environmental restoration at facilities under the jurisdiction of the Secretary . . . known as the Defense Environmental Restoration Program."[256] Congress also listed in these statutes the goals of the DERP, which included the following:

> (1) Addressing hazardous waste contamination (identification through cleanup);
>
> (2) Correcting other environmental damage (such as unexploded ordnance); and

---

250 DERP 1994 REPORT, *supra* note 10, at B6-1. As of 1994, the DOD reported that in excess of 21,000 potentially contaminated sites existed at over 1700 military installations. *Id.*

251 If Building Demolition and Debris Removal (BDDR) projects are considered a program, the number is actually three. These projects involve "demolishing and removing unsafe buildings and structures at DOD installations and formerly used properties." DERP 1993 REPORT, *supra* note 9, at 1.

252 The IRP investigates and, as necessary, conducts site cleanups at DOD contaminated facilities. *Id.* at 1-2. The IRP actually encompasses programs directed at facilities still in use (IRP) and former facilities, or formerly used defense sites (FUDS) no longer in use—such as installations and bases, arsenals, ammunition plants, depots, equipment manufacturing plants, proving grounds, shipyards, forts, and camps. These FUDS are properties "transferred over to the private sector for which the DOD retains some cleanup responsibilities." *Federal Facilities: New Technologies*, 26 [Current Developments] Env't Rep. (BNA) 1903 (Feb. 2, 1996) [hereinafter *New Technologies*]. The number of potential sites in the FUDS program totals almost 8320. DERP 1994 REPORT, *supra* note 10, at B6-1. The Army Secretary is the executive agent for these sites and, as such, is "responsible for environmental restoration activities under DERP on lands formerly owned or used by any DOD component." *Id.* However, the United States Army Corps of Engineers has the ultimate responsibility for executing the program. *Id.*

The IRP, consistent with the NCP, consists of the preliminary assessment stage, *see supra* note 196, the remedial investigation/feasibility study (RI/FS) stage, *see supra* note 201, and the remedial design/remedial action (RD/RA) stage, where, "[a]fter agreement is reached with appropriate EPA and/or state regulatory authorities on how to clean up the site . . . work begins. During this phase, detailed design plans for the cleanup are prepared and implemented." DERP 1993 Report, *supra* note 9, at 2. The IRP presently is responsible for over 2000 contaminated installations.

253 The OHW conducts "research, development, and demonstration programs aimed at improving remediation technology and reducing DOD waste generation rates." DERP 1993 REPORT, *supra* note 9, at 1.

254 Larry Grossman, *The Big Toxic Waste Cleanup*, A.F. MAG., Oct. 1991, at 62.

255 10 U.S.C. §§ 2701-2707.

256 27 U.S.C. § 2701(a)(1),(3).

(3) Demolishing and removing unsafe buildings and structures.[257]

More importantly, Congress used this statute to impose some of its own direction and control over the DOD's restoration program. Congress required that "activities of the program shall be carried out subject to, and in a manner consistent with, section 120 of the . . . CERCLA."[258] Section 120 of the CERCLA mandates that federal facilities comply with the provisions of the CERCLA "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity."[259] Moreover, Congress directed that the DOD's program must be consistent with the NCP.[260] Thus, for NPL sites (governed by the CERCLA),[261] the DOD must comply with all of the CERCLA's standards and requirements the same as any other entity.[262] For non-NPL sites (governed by

---

[257] 10 U.S.C. § 2701(b)(1)-(3). *See* Henley, *supra* note 74, at 19 ("[b]ecause these are program goals and not requirements, DOD retains discretion to prioritize its cleanup activities among these three categories of environmental damage") (citations omitted); *id.* at n.181 (citing Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981), *as amended by* Exec. Order No. 12,418, 48 Fed. Reg. 20,981, revoked by and current delegation of authority at Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987)); 40 C.F.R. §§ 300.120(b), 300.175(b)(4) (1993) (indicating that "while most of the President's CERCLA authority has been delegated to the EPA pursuant to 42 U.S.C. § 9615 (1988), the President delegated his CERCLA response authority under §§ 9604(a)-(b) with respect to DOD facilities to the Secretary of Defense").

[258] 10 U.S.C. § 2710(a)(2).

[259] 42 U.S.C. § 9620(a)(1).

[260] *Id.* § 9605(d). "When the military agencies carry out their cleanup responsibilities, they adhere to a basic three-step process outlined by the National Contingency Plan (NCP): (1) preliminary assessment/site inspection (PA/SI); (2) remedial investigation/feasibility study (RI/FS); (3) remedial design/remedial action (RD/RA)."). Hanash, *supra* note 18, at 115.

All DOD facilities must be screened for past use of, and contamination by, hazardous substances—the PA/SI process. If hazardous substances are found in reportable quantities, the EPA must be notified. The EPA will rank the facility on the HRS and, if warranted, propose it for inclusion on the NPL. Once the facility is placed on the NPL, a RI/FS must be started within six months. *See* Diner Interview, *supra* note 79 (discussing the requirements of the NCP); 42 U.S.C. §§ 9602, 9603, 9620(e)(1). *See also* 40 C.F.R. §§ 300-373.3 (the National Contingency Plan).

[261] Unlike other statutes governing hazardous waste, the CERCLA does not provide for the EPA to delegate its regulatory authority to the states. The SARA allowed for the integration of state and local requirements into the remedy selection process at NPL sites if the lead agency (the agency leading the cleanup) determines that the requirements are applicable and relevant or appropriate (ARAR). 42 U.S.C. § 9621.

[262] *See id.* § 9620. The DOD, in conjunction with the EPA, must establish a Federal Agency Hazardous Waste Compliance Docket, which lists all federal facilities at which hazardous substances have been treated, stored, or disposed, or at which reportable quantities of these hazardous substances have been released. *Id.* § 9620(c); James Woolford, *EPA's Federal Facility Program—An Insider's Perspective*, 3 FED. FACILITIES ENVTL. J. 383, 385 (Winter 1992-93). Currently, 2070 facilities are on this docket. Telephone Interview on the Superfund, RCRA, and EPCRA Hotline (which replaced the unfunded CERCLIS Hotline) (Feb. 27, 1996) (for updated information, the number is 1-800-424-9346). Once the EPA places a facility on the docket, the process required under the NCP commences, and the federal facility conducts an assessment.

state law),[263] the DOD must comply with all applicable state standards and requirements, no matter how onerous.[264] In sum, the statutes require that DOD agencies, in carrying out their program to identify, evaluate, and clean up DOD sites, "comply with all applicable or relevant and appropriate federal and state laws"[265] (ARARs)—that is, federal, state, and local clean-up standards.

3. The Defense Environmental Restoration Account—A separate congressional appropriation—the Defense Environmental Restoration Account (DERA)—funds DERP clean-up activities conducted at active installations.[266] The DERA receives its funding from two separate sources:[267] appropriated funds from Congress,[268] and monies recovered through court actions against liable PRPs. In

---

If the HRS score for a facility warrants such action, the site is placed on the NPL. The CERCLA then mandates that the DOD begin investigations and studies to determine the "nature and extent of contamination." Woolford, *supra* at 387.

[263] State and local standards apply at non-NPL sites. Generally, states will have their own hazardous waste programs ("mini-Superfunds"). 42 U.S.C. § 9620(a)(4). Many states utilize their authority under the RCRA permitting process to regulate activities at sites that are considered TSDFs. *Id.* § 6924(u). *See supra* notes 82-85 and accompanying text (discussing the RCRA permitting process in more detail); *see also* Diner Interview, *supra* note 79 (discussing administrative authority at NPL/non-NPL sites).

[264] State laws can be, and are, more stringent than federal laws. However, the SARA mandates that states not apply more stringent requirements to federal facilities than they apply to nonfederal facilities at non-NPL sites. Thus, states must treat the DOD consistent with their treatment of other public and private entities at these sites. 42 U.S.C. § 9620(a)(4).

[265] David B. Guidenzopf, *Applying the National Historic Preservation Act to the Defense Environmental Restoration Program*, 4 FED. FACILITIES ENVTL. J. 319, 319-20 (Autumn 1993) (calling the DERP a "highly visible element of Defense agency environmental programs).

[266] 10 U.S.C. § 2703. Congress created the DERA as part of the SARA legislation in 1986. The account funds those cleanups conducted at domestic operating bases only. *See* Wegman & Bailey, *supra* note 2, at 889-90.

[267] The process formerly mandated that once funds entered the DERA, they were transferred from this appropriations account to each of the DOD component's appropriations accounts—such as O&M, Research, Testing & Development (RT&D), or Procurement. The funds then became available for the same amount of time as the funds in that particular account (*e.g.*, O&M funds are available for one year). However, the funds could be used only for environmental restoration activities. *Id.* § 2703(c). *See* Henley, *supra* note 74, at 21-22 & nn.203, 210.

However, Congress has now distributed these appropriations directly to the Services (and Defense wide) by virtue of the Defense Appropriations Act. In FY 1996, the breakdown was as follows:

United States Army: $631.9 million*

United States Navy: $365.3 million

United States Air Force: $368 million

Defense-wide account: $57 million

* The Army's allocation includes $209.4 million for the clean up of FUDS, which the Army is responsible for, but which the Army Corps of Engineers manages. *See* Department of Defense Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-61, 109 Stat. 636 (1995); *see also Defense Department Gets Its Money*, 6 DEF. CLEANUP 1 (Dec. 8, 1995) [hereinafter *DOD Gets Its Money*].

[268] 10 U.S.C. § 2703(a)(1).

these court actions, the government is reimbursed for the cost of cleanups paid for by the DOD.[269] A separate account, the Base Closure Account (BCA), provides appropriated funds for cleanups at installations selected for closure by the Base Realignment and Closure (BRAC) Commission.[270]

a. Funding—Congressional funding for the DERA steadily increased from the account's inception in 1984 through FY 1994.[271] Congress undoubtedly was aware of the magnitude of the cleanups required on military installations because it increased the DERA's funding an extraordinary $1.8 billion during this period.[272] In 1984,

---

[269] 42 U.S.C. § 9607. *See supra* notes 149-50 and accompanying text (discussing indemnification provisions of the CERCLA).

[270] The Base Realignment and Closure Program (BRAC) refers to DOD installations closed by four pieces of legislation enacted in 1988, 1991, 1993, and 1995 that need to be transferred to the private sector. BRAC sites need to be cleaned up before transferring the installations over to the private sector. Although the BRAC expires in 2001, sectors of DOD responsible for BRAC sites will still be responsible for closing and realigning bases.

New Technologies, *supra* note 252, at 1903. Defense Base Closure & Realignment Act of 1990, Pub. L. No. 101-510, §§ 2905(a), 2906, 104 Stat. 1808, 1815 (1990).

Base closure has helped increase environmental budgets, as Congress provides these funds as separate appropriations. Statutes governing BRAC environmental issues require that funding for the clean up of those installations or bases approved for closure must come from the BRAC account, not from the DERA. This causes difficulty when the list of bases recommended for closure is not approved until after money is appropriated for the FY. Because Congress has made no specific appropriations to the BRAC account for those bases, no money exists to pay for the cleanup. The DOD then must attempt to take the money from the DERA, which results in Anti-Deficiency Act concerns. *See Clinton Vetoes Defense Authorization Bill*, 7 DEF. CLEANUP 1, 1 (Jan. 5, 1996).

Defense environmental officials had requested that Congress place a "BRAC funding provision" into subsequent legislation, which would allow for a smooth transition of DERA funds to the BRAC account. This would have avoided any additional delays in the clean-up process at these closing bases. *Id.* Unfortunately, even though the Senate version of the 1996 Defense Appropriations Act contained such a provision, the final version did not. Those bases selected in the BRAC 95 process will have difficulty funding environmental restoration activities without subsequent action by Congress. *See* Department of Defense Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-61, 109 Stat. 636 (1995). Congress provides almost four times as much money to the DERA as it does to the BCA, as the number of contaminated sites at active installations far exceeds those at installations on the BRAC list. *See* Wegman & Bailey, *supra* note 2, at 890.

[271] Funding for the DERA gradually expanded from its relatively small beginning. By FYs 1989 and 1990, the account had grown to $500 million and $600 million, respectively. *See* John J. Kosowatz & Paul Kemezis, *Spending Will Be Cooling Down Along with East-West Tensions*, 224 ENGINEERING NEWS-REC. 48, 48 (Jan. 25, 1990). During the first few years of the 1990s, the DERA even remained unaffected by the DOD's decision to reduce defense spending, from 1990-1995, by $180 billion. *Id.* (indicating that Secretary of Defense Richard Cheney had announced in November, 1989 that the DOD would slice spending by more than $180 billion). Congress and the President increased the DERA in FY 1991 from $600 million to $817 million, a 36% increase.

[272] President Bush, who labeled himself "the environmental president," repeatedly reminded the American public that the environmental budget for cleaning up federal facilities had tripled during his tenure in office. *See, e.g.*, *Federal Facilities*, 1992 DAILY REP. FOR EXECUTIVES 199, 199-200 (Oct. 14, 1992). This amount included a supplemental appropriation for the DERA in FY 1993 totalling $450 million. *Id.*

Congress began funding the DERA at $150 million,[273] yet by FY 1994, this funding had ballooned to $1.9 billion.[274] However, FY 1995 marked the beginning of a downward trend in congressional support for the DERA and other environmental programs.

b. Budget Reductions—In FY 1995, Congress began to seriously question the high cost and slow pace of the DOD's clean-up efforts.[275] The cut in the DERA's budget for FY 1996 represented the second consecutive year that Congress reduced the DERA budget. From a high of $1.9 billion in FY 1994, FY 1995 produced a budget of $1.48 billion,[276] and the most recent cuts resulted in a $1.41 billion budget for FY 1996.[277] Moreover, most legal commentators predict that ongoing operations in Bosnia will force the President to slice more out of the DERA to cover costs incurred by the 20,000 troops keeping the peace.[278] These recent reductions have brought the

---

[273] Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, 97 Stat. 1421, 1427 (1983).

[274] Department of Defense Appropriations Act for Fiscal Year 1994, Pub. L. No. 103-139, 107 Stat. 1418, 1425 (1993).

[275] *See* Michael A. West, *The 104th Congress and Federal Facility Environmental Activities: A Preliminary Assessment*, 6 FED. FACILITIES ENVTL. J. 1, 2-4 (Summer 1995).

[276] Congress initially had carved $400 million out of the DERA budget request in its appropriation for FY 1995, providing the DERA with $178 billion. Department of Defense Appropriations Act for Fiscal Year 1995, Pub. L. No. 103-335, 108 Stat. 2599 (1994). Subsequently, Congress sliced another $300 million from the account as part of legislation that President Clinton signed on April 10, 1995. Emergency Supplemental Appropriations and Recissions for the Department of Defense to Preserve and Enhance Military Readiness 1995 Act, Pub. L. No. 104-6, 109 Stat. 73 (1995). The DOE also suffered a $200 million loss in clean-up funding as part of the recissions package. *See* Tom Ichniowski, *Federal Programs on Block*, 234 ENGINEERING NEWS-REC. 11, 11 (Apr. 10, 1995).

In sum, the DERA lost $700 million in funding in FY 1995, a figure that represents a loss of almost one-third of the DOD's budget request for the DERA for FY 1995. (The DOD had requested $2.2 billion prior to the recissions package in April 1995). *See* West, *supra* note 275, at 2-3.

[277] Department of Defense Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-61, 109 Stat. 636 (1995). The $1.41 billion figure represents a cut of about 13% from FY 1995 (almost 4% after the recissions), but over 12%, or $211 million, less than the President had requested.

Similarly, Congress slashed the DOE's environmental restoration budget request as well. The President's $6.6 billion request was reduced by approximately seven percent. Congress gave the DOE $5.7 billion, which actually increased the agency's funding by approximately $65 million over the previous FY.

[278] *See* Michael A. West, *104th Congress and Federal Facility Environmental Activities: 1st Session Wrap-Up*, 6 FED. FACILITIES ENVTL. J. 1 & n.1 (Winter 1995/96) (this article presents an excellent analysis of recent congressional developments concerning environmental issues). Mr. West states:

> Due to the unfunded contingency costs associated with the deployment of U.S. military forces to Bosnia, a great deal of uncertainty remains about the ultimate allocation of FY 1996 Defense appropriations. Given the high probability that DOD funding offsets will be used to fund most of these unfunded contingency costs, combined with the prevailing attitude on Capitol Hill toward Defense environmental programs, further funding reductions affecting DOD environmental activities are likely.

DERA's budget well below FY 1993 funding levels.[279] The FY 1995 cuts alone exceeded the amount of the entire annual appropriations for the DERA prior to FY 1991.[280] Why the sudden change after years of steady increases in the DERA budget? A variety of reasons exist.

c. Why Now?—Initially, the Republican-controlled Congress, elected in November 1994, saw a federal facility's environmental restoration budget as "just another cleanup program" that wasted good money. As such, Congress "went after it to cut it."[281] The high visibility of the program,[282] coupled with the frustration caused by what was perceived as poor management[283] and the slow pace of cleanups,[284] caused Congress to take a scalpel to the DERA budget request.

Moreover, "the growing recognition that the DOD budget is under the greatest strain since the years immediately following the Vietnam War"[285] prompted Congress's concern over the DERA's effectiveness. In its attempt to balance the budget by, in part,

---

Id. Those tasked with implementing the DOD's environmental programs are concerned about these forecasts. *See New Technologies, supra* note 252, at 1903. Budget analysts are closely monitoring the situation. Some predict that President Clinton could "tap as much as $300 million from the DERA to augment $1 billion he is requesting from Congress." *Clinton OKs DOD Funding*, 236 ENGINEERING NEWS-REC. 16 (Feb. 19, 1996).

279 West, *supra* note 275, at 3.

280 *See id*; *see also supra* note 252 (indicating that the DERA's FY 1990 budget was $600 million).

281 *New Technologies, supra* note 252, at 1903 (quoting Jim Werner, Director of Strategic Planning and Analysis with the DOE's Office of Environmental Management).

282 Congress could see that the DERA was receiving almost two billion dollars per year, a figure that had grown from only $150 million in ten years. *See* West, *supra* note 275, at 5-6. Even so, Congress did not fear any political fallout from these budget reductions. It knew that the public focused more on pollution prevention and protection from immediate threats to its health and safety. Moreover, Congress believed that the DERA was so large that a "modest reduction" would not cause any great disturbance. *Id.*

283 Many in Congress saw the DERA as having a penchant for fraud, waste and abuse. *See id.* at 6-7.

284 Some members of Congress appear to be recoiling from the sticker shock associated with the cleanup of long-term . . . contamination, which, provided appropriate containment measures are taken and institutional controls put in place, *do not pose a threat to human health and the environment.* A senior representative said that there was not much support for funding a program that was 70% overhead. While this observation is neither accurate nor fair to what has been accomplished by DERA over the past decade, members of Congress are frustrated by the paucity of tangible results in terms of completed site cleanups.

Id. at 7 (emphasis added).

285 *Id.* at 3.

decreasing defense spending,[286] Congress has placed "nontraditional" defense environmental programs in direct competition with "traditional" military programs that is more fierce than ever.[287] Now, procurement, research, testing and development (RT&D), quality of life (QOL), and O&M programs compete with environmental programs for greatly reduced defense dollars.[288] This competition does not even consider the affect of humanitarian and peacekeeping missions—like Bosnia—on the overall budget.

Additionally, the BRAC process has paradoxically increased defense costs because of the amount of work required to turn the land over to the private sector.[289] Together, these factors raise serious questions about the future of congressional funding for defense environmental programs.

---

[286] "Defense spending on procurement and research and development has decreased by about 7 percent each year since 1984, and a continuation of this 'free fall' jeopardizes modernization efforts," and, ultimately, the overall readiness of the military. *Id.* (citing ISSUES AND OPTIONS, *supra* note 19, at ix).

Defense spending in FY 1996 actually increased by $1.7 billion over FY 1995. However, "[t]aking inflation into account, this actually represents a decline in real spending for the Pentagon." *New Defense Law Contains Alaska Projects,* CONG. PRESS RELEASES, Dec. 5, 1995 (a press release from Sen. Ted Stevens (R.- Alaska), Chairman of the Defense Appropriations Subcommittee). The Clinton Administration initially sought at least seven billion dollars in reductions to the defense spending bill. It relented, however, and signed the measure into law to get the $1.5 billion necessary for military operations in Bosnia. *See DOD Gets Its Money, supra* note 267, at 1.

[287] Sound environmental policies are critical for today's armed forces. However, I find myself agreeing with Mr. West when he observes that "[u]ntil the rules of conflict are changed to award the palm of victory to the most environmentally sensitive armed force, we will need military forces that are willing to go in harm's way and capable of fighting and winning." West, *supra* note 275, at 4.

Sherri Wasserman Goodman, DUSD (ES), raises an equally effective counterargument. "We have responsibilities and liabilities, which are the legacy of many decades of operations at these sites. We are using our sites more intensively today because of base closures and the return of foreign troops. If we don't have access to the air, land, and water, we can't use these sites and that's integral to readiness. We must be good stewards." *Rubin, supra* note 2, at 36 (quoting the DUSD (ES)).

[288] The competition between DOD's environmental programs and other military programs for finite defense dollars presents some difficult choices. It is important that the military be provided with sufficient weapons and training to enable it to carry out its primary mission of defending the nation. Whenever possible, however, fulfillment of this mission should not be obtained at the expense of the environment.

Calhoun, *supra* note 12, at 26.

[289] Congress believed that the BRAC reductions would decrease defense costs significantly. Instead, they have resulted in increased costs in the near-term due to the tremendous up-front costs of preparing the bases for transfer as quickly and as safely as possible. *See* West, *supra* note 278, at 2-3 (citing H.R. REP. NO. 137, 104th Cong., 1st Sess. 34-35 (1995) (noting Congress's concern with BRAC environmental activities and that, "As is the case with DERA, the appropriations committees want DOD to aggressively explore ways to reduce cleanup costs while expediting the cleanup process.")).

4. The Future—What *do* all of these concerns portend for the future of the DERA and military environmental programs? Not even the environmental experts agree on the answer.[290] Although the cuts to the FY 1996 DERA budget were not as deep as anticipated, Congress's disenchantment with what it perceives as an overfunded, ineffective program will surely result in continued budget reductions or, at the least, the status quo.[291] This does not bode well for the ultimate success of the military's clean-up efforts.

Despite dramatic increases in DERA funding from FY 1984 through FY 1994,[292] the amount was woefully insufficient when compared with the enormity of the DOD's task.[293] A top-level Clinton Administration task force on federal facilities environmental restoration recently released an eye-opening report on future federal environmental efforts.[294] The report indicated that it will cost

---

[290] Mr. West originally predicted that "the committees having jurisdiction over the DOD budget are going to subject DOD environmental programs to intense scrutiny to target areas where funding can be cut. . . . DERA will remain the most likely source of cuts, and they could be on the order of $300-$400 million." West, *supra* note 275, at 7. After the first session of the most recent Congress, which made adjustments to the DERA that he termed "modest," Mr. West has toned down his concern somewhat, but is still sure that "congressional DERA funding levels are likely to continue to decline in the foreseeable future." *Id.*

However, an "unnamed senior DOD official" does not expect the DOD's clean-up budget to decrease in FY 1997. *New Technologies*, *supra* note 252, at 1903. "DERA funds will still be in the $1.4 billion to $1.5 billion range," the article quotes the official as saying. However, it also indicates that the DOD is monitoring the Bosnia situation closely. *Id.*

[291] "The recent 1994 election underscores the importance of adopting reforms, since the new congressional leadership has already made it clear that, at a minimum, it will subject DOD environmental programs to even greater congressional scrutiny." Wegman & Bailey, *supra* note 2, at 890-91; *see also supra* note 2.

[292] A recent report from the Congressional Budget Office (CBO) indicated that the DOD had spent approximately $11 billion since 1984 to investigate and begin cleanups at contaminated sites. Rubin, *supra* note 2, at 36-37. "To keep these numbers in perspective, funding for defense environmental restoration represented approximately 0.1% of the total DOD budget in 1988. By 1994, restoration funding had risen to the level of approximately 1% of the DOD budget." Wegman & Bailey, *supra* note 2, at n.69 (citing *DOD's Envtl. Cleanup: Hearings Before the Subcomm. on Military Readiness & Defense Infrastructure of the Senate Comm. on Armed Services*, 103d Cong., 1st Sess. 2-3 (1994) (prepared statement of Neil M. Singer, Acting Assistant Director, Nat'l Sec. Div., Congressional Budget Office)).

[293] Currently, the average cost of a cleanup at an NPL site is $25 to $30 million. Prestley, *supra* note 14, at 65.

[294] The task force, appointed by President Clinton in 1993 and named the "Federal Facilities Policy Group," is an interagency panel cochaired by Alice Rivlin, Director of the Office of Management and Budget (OMB), and Katie McGinty, Director of the CEQ.

In addition to providing an ominous forecast for the future of federal facilities cleanups, the report called for statutory (CERCLA and RCRA), regulatory (land-use, risk-based priorities), and management (streamlined workforce, reduced overhead, consistent funding) reforms. It also pointed to the need for increased technology development and use. *Top Officials Call for Cleanup Reforms*, 6 DEF. CLEANUP 1, 1 (Oct. 20, 1995) [hereinafter *Top Officials*].

between $234 billion and $399 billion to clean up "61,000 sites under four department secretaries and one administrator."[295] One need not be overly skilled in mathematics to discern that current funding levels—which are set forth in detail at Appendix D[296]—pale in comparison to the amount that federal facilities need.[297]

Consequently, if complying with the CERCLA and the RCRA was difficult prior to these budget reductions, it is not going to get any easier. The Deputy Under Secretary of Defense (Environmental Security), Sherri Wasserman Goodman, summarized the problem well when she said, "recission[s] [and reductions] are unfunded mandates on DOD. We continue to be subject to the same laws and regulations, but Congress is taking away the money to do the work. If we don't perform this work, who will?"[298] The simple truth is that federal facilities cannot afford to conduct cleanups at NPL sites at their present pace and cost.[299] Congress must either provide the necessary funding[300]—which is unlikely[301]—or develop a method for conducting cleanups more efficiently and economically.

Numerous reasons exist to explain why the process of cleaning federal facilities is so painstakingly slow and expensive. Budget constraints, the lack of technology, the hazards posed by the various

---

295 *Id.* The report estimates that the DOD's cleanup will take about 20 years and cost $26.2 billion. *Id.* I believe that the DOD's costs will be much greater than the figures presented by the task force.

296 *See infra* Appendix D (chart depicting federal facilities environmental restoration spending).

297 In what may have been the "understatement of the year," Rivlin told a White House press gathering that "[t]here is a tension between the magnitude of the problem and the resources available." *Top Officials*, *supra* note 294, at 1.

However, the group pointed to department inefficiencies as a part of the overall problem, and indicated that the Clinton Administration will have to work extremely hard to overcome the difficulties presented by severe budget constraints. *Id.*

Remember that the number of sites being identified, the amount of contamination at each site, and the cost of the technology needed to remedy the contamination are all subject to change in the coming years.

298 Rubin, *supra* note 2, at 36.

299 "Recent signals from the Clinton Administration and the 104th Congress suggest that policy-makers faced with current fiscal realities, competing legislative priorities, and the possibility of civil and criminal sanctions, may be preparing to throw in the towel and abandon the concept of federally equivalent compliance altogether." Kassen, *supra* note 24, at 1513.

The article also notes that Thomas Grumbly, the OMB's Principal Assistant Deputy for Energy and Environment, indicated that, due to funding restrictions, his organization will likely not be able to meet its environmental obligations in the near future. *Id.*

300 *See id.* at 1515 (asserting that Congress must be committed to providing the funding federal facilities need to comply with environmental regulations, or environmental strategies will never succeed).

301 *See, e.g.*, *GOP Senators Would Abolish Defense Environmental Restoration Programs*, DEF. ENV'T ALERT, Dec. 14, 1994, at 11.

materials being removed, and the onerous requirements for investigations, inspections, studies, assessments, and reviews prior to actual cleanup[302] are but a few of these reasons. However, "regulatory gridlock"[303] is perhaps the most significant reason why federal facility cleanups are so costly and take so long to complete. Regulatory gridlock arises for federal facilities because of the RCRA/CERCLA interface.

IV. The Problem: An Analysis of the RCRA/CERCLA Interface

A. The Overlapping Nature of the RCRA and the CERCLA

The question appears simple on its face. "Do states have authority to enforce RCRA requirements[304] during CERCLA cleanups at federal facility NPL sites?" Unfortunately, the answer has not been so simple. In the RCRA and the CERCLA, Congress failed to clarify which statute governs cleanups at these federal facility sites. As such, the application of federal environmental laws to the sites has been piecemeal. Congress also failed to indicate whether states or the EPA assume control at the sites. Consequently, the question remained unanswered for many years.[305]

---

[302] Fiscal year 1995 marked the first time that the DOD spent more on actual cleanups than it did on studies and administrative overhead. The DOD spent 61% on cleanups, up from 41% in FY 1994. Congress also set a goal that the DOD spend 80% of appropriated funds on cleanups, and only 20% on studies and investigations and administrative overhead. *See DOD Cleanup Cuts Eyed*, 234 ENGINEERING NEWS-REC. 13, 15 (Mar. 13, 1995); *Defense Program Conferees Trump Administration's Defense Plan, Authorize First Increase in Spending in Decade*, 64 FED. CONT. REP. 22, 22 (Dec. 18, 1995).

But see Rubin, *supra* note 2, at 37. Simply spending all of the money that Congress appropriates to the DERA for restoration activities is not the answer. Budget reductions and funds earmarked solely for cleanup "have the effect of eliminating site characterization studies, leaving remediation contractors shooting in the dark. If you don't know the extent of the contamination, how can you effectively choose a remedy?" *Id.* (quoting David Wang, Chief, California Department of Environmental Protection's special military facilities office).

[303] *See* Calhoun, *supra* note 20, at 60. Calhoun uses this phrase to describe the overlap of responsibilities between the EPA headquarters, its ten regional offices, the environmental departments of 50 states, and county and local air and water boards.

[304] *See, e.g.*, infra notes 344-56 and accompanying text (discussing RCRA requirements imposed by authorized state hazardous waste programs).

[305] *See* Margaret N. Strand, *Federal-State Authority Disputes at Federal Facility Sites: A Study in Legislative Failure*, 4 FED. FACILITIES ENVTL. J. 9, 10 (Spring 1993). "Twelve years after enactment of Superfund, eight years after major amendments to RCRA, six years after SARA, and even after passage of the Federal Facilities Compliance Act of 1992, federal law remains unsettled on a critical, federal facilities issue: the authority of states to control cleanups at federal property listed on the National Priorities List (NPL)." *Id.*

Either the CERCLA, or the RCRA, or both, *could* apply at a federal facility hazardous waste site listed on the NPL.[306] The inability to reconcile the two statutes was at the core of the controversy surrounding federal facility NPL site cleanups until April, 1993. Then, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) answered the question in the affirmative in *United States v. Colorado*.[307]

Accordingly, federal facilities, depending on the circumstances, *are* subject to both federal and state control of their cleanups. Federal control occurs when the EPA implements the CERCLA, while states may use their delegated RCRA authority attempting to control the cleanup.[308] This overlapping authority results in increased requirements for federal facilities. This increase, in turn, causes greater costs, delays, and frustration in the clean-up process.

1. How the Overlap Occurs—Congress designed the RCRA to be prospective, or preventative,[309] and the CERCLA retroactive, or curative.[310] Congress wanted the RCRA to regulate the generation, treatment, storage, and disposal of hazardous wastes, and the CERCLA to confront the disturbing problem of hazardous wastes disposed of prior to the RCRA's enactment. Ideally, the RCRA and the CERCLA would "complement each other to address comprehensively the management of newly-generated hazardous wastes and the cleanup of old wastes."[311]

In theory, Congress's plan for comprehensive coverage of the hazardous waste problem was sound. Yet, considering the profound differences between the two statutes, "one would hope that the law would clearly delineate where each statute should apply. It does not."[312] Congress's failure to indicate the circumstances in which each statute applies and who assumes control over the clean-up process has resulted in significant practical problems due to the

---

306 *See* Noskin, *supra* note 26, at 173 (indicating that "[a]lthough RCRA and CERCLA have some very distinct differences, the two laws frequently interact"). The article provides a "general overview of several specific aspects of RCRA's applicability to CERCLA cleanups." *Id.*

307 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 216 (1994). *See supra* notes 375-407 and accompanying text (providing a detailed discussion of the case).

308 "A hazardous waste site at a federal facility may be subject to either CERCLA or RCRA, or perhaps both, and state environmental laws; depending on the environmental problem, other federal laws may come into play as well." Strand, *supra* note 305, at 9, 10.

309 *See supra* notes 78-81 and accompanying text.

310 *See supra* notes 122-26 and accompanying text. *See also* B.F. Goodrich v. Murtha, 958 F.2d 1192, 1201 (2d Cir. 1992) (indicating that "RCRA is preventative, CERCLA is curative").

311 Noskin, *supra* note 26, at 173.

312 Strand, *supra* note 305, at 13.

overlapping nature of the statutes. These problems are discussed in detail at the conclusion of Part IV.[313]

Congress actually created this ambiguity through the delegation of authority language that it placed in each statute.[314] Congress allowed the EPA to delegate much of its regulatory authority under the RCRA to the states. As such, the states were free to impose more stringent standards on TSDFs—such as federal facilities—than those contained in federal regulations.[315] Congress also included a waiver of sovereign immunity in the RCRA. This waiver subjects federal facilities to the states' authority.[316]

However, with the CERCLA, Congress gave the EPA the authority to administer and implement the Act without allowing for any provision for delegating this authority to the states.[317] The CERCLA, at the very least, suggested that the EPA should control at NPL sites. The Act indicated that non-NPL federal facility sites were subject to state management of the clean-up process.[318] The implication was that federal facility NPL sites were *not* subject to state management—that is, that the CERCLA left management of these sites to the EPA. As such, the EPA controlled cleanups at CERCLA sites, *unless* the sites warranted application of the RCRA. When states attempted to apply the RCRA's provisions to the sites, conflicts arose over who controlled the cleanup and whether the states could enforce RCRA requirements at the sites.

B. Applying Environmental Laws to Federal Facilities

Prior to a more detailed discussion of the RCRA/CERCLA interface and the problems it presents, one need understand how environmental laws—federal, state, or local—apply to federal facilities.

Over the years, federal facilities have asserted a number of

---

313 *See infra* notes 408-29 and accompanying text.

314 One commentator indicated that the statutes were drafted so poorly that Congress must have created the ambiguity "on purpose." "Indeed, the legal structure is so blatantly flawed as to support the notion that design rather than inadvertence is responsible. Congress must have knowingly decided that enhanced political mileage was available by subjecting federal agencies to a hopelessly confused and inadequate legal structure, under which environmental cleanup was doomed to repeated failure." Strand, *supra* note 305, at 9-10.

315 *Id.* at 12. *See* Wegman & Bailey, *supra* note 2, at 900-02 & n.205 (indicating that many states—such as California—have standards that are more stringent than federal standards).

316 Strand, *supra* note 305, at 12. *See* 42 U.S.C. § 6961(a); *see also infra* notes 328-39 and accompanying text (discussing RCRA's waiver of sovereign immunity).

317 Strand, *supra* note 305, at 12; 42 U.S.C. § 9620(a)(4). Had either the CERCLA or the RCRA stated this clearly, the issue may never have arisen.

318 42 U.S.C. §§ 9620(a)(4), 9622(e)(6); Strand, *supra* note 305, at 12.

arguments in support of their contention that environmental laws do not apply to them as they do to private entities.[319] They have based their arguments on, among other things, the unitary executive theory,[320] sovereign immunity,[321] national security,[322] and "the vagaries of federal budgeting that preclude the expenditure of money for activities that Congress has not authorized and for which the Congress has not appropriated funds."[323]

1. The Unitary Executive Theory—In short, this "theory" was based on a Justice Department ruling during the Reagan Administration that one branch of the federal government could not sue another branch.[324] Obviously, this ruling "severely hamstrung the enforcement capabilities" of the EPA.[325] Under the theory, only the President—not any single agency—had the power to resolve interagency (*i.e.*, DOD and EPA) disputes. Legal commentators have identified two reasons for this approach:

> (1) The EPA lacked the power to compel a sister agency to act; or

---

[319] *See* Kassen, *supra* note 24, at 1477-78. "As Senator Stafford characterized the federal agencies' stance during the floor debate on the amendments to Superfund: 'No loophole, it seems, is too small to be found by the federal government.'" *Id.* at 1478 & n.12 (citing 132 CONG. REC. S14,903 (daily ed. Oct. 3, 1986), *reprinted in* Adam Babich, *Does the Sovereign Have a License to Pollute?*, 6 NAT. RESOURCES & ENV'T, Summer 1991, at 28).

[320] *See infra* notes 324-27 and accompanying text.

[321] *See infra* notes 328-39 and accompanying text.

[322] In recognition of the unique conditions under which defense agencies operate, Congress has consistently recognized the potential need to exempt certain military activities from compliance with environmental laws. Thus, virtually every environmental statute contains a provision that authorizes the President to exempt an activity from compliance, if to do so is in the "paramount interest" of the United States.

Kassen, *supra* note 24, at 1479. The President has granted exemptions based on the "paramount interest" clause less than ten times, all in cases of natural disasters. *Id.* at 1479 & n.22. Courts quickly dismiss these claims because the government must seek the exemption from the President, not the court. *Id.* at 1479. Thus, the defense has not proved to be that useful for the government. Nevertheless, the government continued to assert that it need not comply with certain environmental statutes because of its national security interests.

[323] *Id.* at 1478 (citation omitted). Federal facilities frequently use "insufficient funds" as a defense for their failure to comply with various environmental statutes. These facilities claim that the Anti-Deficiency Act prohibits them from spending money "in excess of appropriations made by Congress for that fiscal year." Pub. L. No. 59-28, § 3679, 34 Stat. 27, 49 (1906); 31 U.S.C. § 1341; Kassen, *supra* note 24, at 1477-78.

[324] *See* Calhoun, *supra* note 20, at 60. "The Department of Justice (DOJ) succinctly articulated its version of a unitary executive before Congress in 1983 and 1987." Millan, *supra* note 35, at 345 & n.14 (citing OFFICE OF FED. ACTIVITIES, EPA, FEDERAL FACILITIES COMPLIANCE STRATEGY, III-6, app. H (letter from R. McConnell, DOJ, to Rep. John Dingell, and statement of F. Habicht, II, DOJ) (1988)). Professor Millan's article provides an excellent discussion of the unitary executive theory. *See id.* at 340-70.

[325] Calhoun, *supra* note 20, at 60.

(2) No case or controversy existed to invoke federal court jurisdiction when the government sued itself.[326]

Congress failed to accept the theory as legitimate, however, and continued to grant the EPA authority to enforce environmental regulations against other executive branch agencies. Nevertheless, the EPA used this grant of authority sparingly.[327]

2. Sovereign Immunity—When Congress enacted the first environmental statutes giving state and local authorities certain regulatory powers,[328] federal facilities initially claimed that the doctrine of sovereign immunity relieved them of the duty to comply. They also claimed that the doctrine immunized them from paying fines and penalties for their failure to comply.[329] Two well-known instances exist in which this occurred. The first involves the DOD's resistance to the state of Colorado's enforcement of the RCRA at the Rocky Mountain Arsenal.[330] The second concerns the DOE's resistance to the state of Ohio's attempts to enforce the RCRA and the Clean Water Act (CWA) at the Department of Energy's (DOE) Fernald Plant near Cincinnati, Ohio.[331]

Initially, courts had unanimously held that Congress had not adequately waived sovereign immunity in either the CWA or the Clean Air Act (CAA).[332] As a result, when Congress enacted the

---

326 Millan, *supra* note 35, at 340.

327 Kassen, *supra* note 24, at 1484.

328 In the Clean Water Act, 33 U.S.C. § 1323 (1970), the Clean Air Act, 42 U.S.C. § 7418 (1972), and, ultimately, the Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1976), Congress provided for federal facility compliance with state laws.

329 This doctrine, "in its most fundamental terms . . . comes from the historical tradition that 'the king can do no wrong.'" Laurent R. Hourcle & William J. McGowan, *Federal Facility Compliance Act of 1992: Its Provisions and Consequences*, 3 FED. FACILITIES ENVTL. J. 359, 360 (Winter 1992-93). The article also indicates that in its present application, the term "means that the United States and its agencies can be held accountable to states or citizens for their actions only to the extent that the United States permits itself to be held accountable. Federal agencies need not comply with (or are immune from) state and local laws or other legal requirements unless the U.S. Congress expressly legislates away that immunity." *Id.*

See Kassen, *supra* note 24, at 1491 (citing Hancock v. Train, 426 U.S. 167, 179-80 (1976)) (stating that "for a state to sue a federal agency for enforcement of an environmental statute, the federal government must waive its sovereign immunity from such a suit").

330 *See id.* at 1485 & n.58; *see also infra* notes 375-407 and accompanying text (discussing the Army's Rocky Mountain Arsenal litigation).

331 *See* Kassen, *supra* note 24, at 1485 & n.58; *see also* Linda C. Dolan, *Looking Ahead at the Fernald Environmental Management Project*, 3 FED. FACILITIES ENVTL. J. 197, 199-200 (Summer 1992) (discussing the DOE's Fernald Environmental Management Project).

332 *See* Hancock v. Train, 426 U.S. 167, 198 (1976) (Congress did not adequately express its waiver of sovereign immunity in the CAA); Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 210, 227 (1976) (a waiver of sovereign immunity must be "clear and unambiguous" in its statutory context. Congress did not adequately express it waiver of sovereign immu-

RCRA in 1976, it included "the most explicit waiver of sovereign immunity that it could conceive at the time."[333] Nevertheless, federal facilities continued to assert that states could not enforce the RCRA at federal facility sites.[334] A number of federal courts agreed with the federal facilities' assertions.[335]

The Supreme Court considered this issue in *United States Department of Energy v. Ohio*.[336] The Court held that the waivers of sovereign immunity in "the then-current Clean Water Act and the solid and hazardous waste provisions of RCRA . . . were not broad enough" to allow states to enforce provisions of the statutes on federal facilities.[337] Accordingly, Congress recognized the need to enact legislation "to clarify—or reaffirm—the broad scope of the RCRA waiver."[338] In 1992, Congress did just that, passing the Federal

---

nity in the CWA.). *See also* Lieutenant Commander Marc G. Laverdiere, *Another Victory in the Unwinnable War over Civil Penalties:* Maine v. Department of the Navy, 142 MIL. L. REV. 165, 167-68 (1993) (discussing case law standard for sovereign immunity); Kassen, *supra* note 24, at 1492 & n.111 (citing Robert Percival, *Interpretive Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes*, 43 WASH. U. J. URB. & CONTEMP. L. 221 (1993) ("general discussion of how narrowly the Supreme Court, in particular, and federal courts, in general, have read sovereign immunity waivers in environmental statutes")).

333 Kassen, *supra* note 24, at 1492; 42 U.S.C. § 6961(a). The RCRA waiver of sovereign immunity states, in part:

> Each department, agency, and instrumentality of the executive . . . branch of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements.

42 U.S.C. § 6961(a).

334 President Carter even issued an executive order in 1978 directing that all federal facilities comply with environmental orders. However, federal facilities largely ignored the order. *See* Calhoun, *supra* note 20, at 60.

335 *See* Mitzenfelt v. Department of the Air Force, 903 F.2d 1293, 1294-95 (10th Cir. 1990) (no waiver of sovereign immunity in RCRA); McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601 (E.D. Calif. 1986) (same).

336 112 S. Ct. 1627 (1992).

337 Hourcle & McGowan, *supra* note 329, at 361.

338 Kassen, *supra* note 24, at 1493 (citing H.R. REP. NO. 886, 102d Cong., 2d Sess. 1, 17 (1992)). *See* Hourcle & McGowan, *supra* note 329, at 361 (indicating that the primary purpose of the Act was to ensure a complete waiver of sovereign immunity); *see also* 138 CONG. REC. H8864 (daily ed. Sept. 22, 1992), which stated:

> The Conference substitute also makes clear that sovereign immunity is expressly waived with respect to any substantive or procedural provision of the law. In doing so the conferees reaffirm the original intent of Congress that each department, agency, instrumentality, agent employee and officer of the United States shall be subject to all of the provisions of federal, state and local solid waste and hazardous waste laws and regulations.

Facilities Compliance Act of 1992 (FFCA).[339]

3. The FFCA and Sovereign Immunity—The FFCA expressly waived the sovereign immunity of the United States under the RCRA.[340] As such, states could now fine federal facilities for failure to comply with state-authorized RCRA programs at federal facility sites.[341] Thus, one of the obstacles to full state participation in federal facility cleanups had been removed.[342]

The one remaining obstacle involved how the EPA and federal facilities construed the CERCLA and the SARA. Their interpretation of these statutes "relegated to [the] states a largely advisory role" in the cleanups of federal facilities.[343] However, the Tenth Circuit's decision in *United States v. Colorado* "clarified" the states' role, rejected the government's assertions, and agreed with Colorado's interpretation of the statutes. Prior to analyzing the issues considered in the Tenth Circuit's decision, however, a brief look at the affect of the RCRA, CERCLA, and SARA on federal facilities' compliance is necessary.

4. The RCRA—Pursuant to the FFCA's waiver of sovereign immunity as to the RCRA, states have the right to enforce their

---

339 Pub. L. No. 102-386, 106 Stat. 1505 (1992) (codified at scattered sections of 42 U.S.C.). The Act was signed into law by the President on October 6, 1992. The FFCA only concerns the waiver of sovereign immunity under the solid and hazardous waste provisions of the RCRA. It does not apply to the waiver of sovereign immunity under the CAA, the CWA, or any other environmental statute. *See* Hourcle & McGowan, *supra* note 329, at 359 & n.2 (providing an excellent analysis of the FFCA).

340 [T]he federal government . . . shall be subject to and comply with, all Federal, State, interstate and local requirements . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements . . . .

. . . .

The Federal, State, interstate and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

42 U.S.C. § 6961(a). *See* Kassen, *supra* note 24, at 1493-94; Hourcle & McGowan, *supra* note 329, at 363-64.

341 John F. Seymour, *Tenth Circuit Rules that States May Enforce RCRA Requirements during Federal Facility Cleanups*, 4 FED. FACILITIES ENVTL. J. 245, 245 (Summer 1993).

342 *Id.*

343 *Id.*

authorized RCRA programs at federal facilities. This translates into fines, penalties, and criminal prosecution for those military bases and personnel who do not comply with the states' mandates under their RCRA programs.[344] States need only obtain the EPA's approval to run their own hazardous waste programs.[345] To grant approval, the EPA must determine that the state's program is no less rigorous than, and consistent with, the EPA's program, other authorized state programs, and subtitle C of the RCRA.[346] Congress has granted the states the "right to administer the regulatory program and/or the authority to impose standards more stringent than the federal environmental statute required."[347] States frequently exercise a greater range of enforcement tools at federal facilities than the EPA can, or will.[348]

a. The RCRA "Corrective Action" Requirements—In 1984, Congress amended the RCRA's sections dealing with permits.[349] As such, RCRA permits now must require a TSDF operator or owner[350] to take "corrective action" to stop ongoing releases of hazardous waste, from any solid waste management units (SWMU), that pose a threat to human health and the environment.[351] The amendments also mandated that permits require corrective action to clean up past releases of such wastes from any SWMU.[352]

The EPA has not issued final implementing regulations for these amendments yet. However, it did issue proposed regulations in 1990, which states currently use to draft corrective action require-

---

344 Calhoun, *supra* note 12, at 21.

345 42 U.S.C. § 6926(b). *See* Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1375 & n.10 (1994) (indicating that the EPA has authorized over 40 states to administer the CAA, CWA, and RCRA, that they have agreed to incur the costs associated with administering the program, and that they are willing to do so to gain primary enforcement authority in lieu of the EPA).

346 42 U.S.C. § 6929; 40 C.F.R. pts. 271-72; *see* Diner Interview, *supra* note 79 (discussing state hazardous waste programs); *see also Federalism and Hazardous Waste*, *supra* note 4, at 1534 & n.70 (discussing EPA approval of state programs).

347 Organ, *supra* note 345, at 1374-75 (citing the RCRA, 42 U.S.C. § 6926).

348 The EPA is somewhat limited in the enforcement actions it can take, whereas the states are not. Diner Interview, *supra* note 79.

349 Hazardous and Solid Waste Act of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) (codified as amended at scattered sections of 42 U.S.C.). These amendments pertained to all RCRA permits issued after November 8, 1984.

350 Most federal facilities fall squarely within this category.

351 42 U.S.C. § 6924(u); 40 C.F.R. § 264.101(a). Diner Interview, *supra* note 79 (providing a detailed discussion of RCRA's corrective action provisions). A SWMU is any area on a facility where hazardous waste was collected, separated, stored, transported, processed, treated, recovered, or disposed of. *Id.*

352 42 U.S.C. § 6924. The corrective action requirements can, and do, extend beyond the federal facility's boundaries if such action is required to protect human health and the environment. *Id.* § 6924(v).

ments for permits.[353] These regulations indicate that on determining that a release has occurred, RCRA-regulated facilities must complete a RCRA Facility Assessment[354] (RFA)—the functional equivalent of the preliminary assessment/site inspection (PA/SI) under the CERCLA. If the RFA determines that a SWMU is releasing hazardous wastes into the environment, the regulations require a RCRA Facility Inspection[355] (RFI)—again, the parallel of a remedial investigation (RI) under the CERCLA. Finally, the regulations require a Corrective Measures Study[356] (CMS)—contingent on the findings of the RFI—which is almost identical to the feasibility study (FS) under the CERCLA.

On completion of these assessments, studies, and investigations, RCRA regulators will select a remedy for the cleanup. They are not required to consider the cost effectiveness of a potential remedy, as required by the CERCLA, except in cases where two or more remedies are otherwise equal. As a result of *United States v. Colorado,* states can enforce these RCRA corrective action requirements at federal facility clean-up sites, even if the facility is already conducting a cleanup pursuant to the CERCLA.

5. The CERCLA and the SARA—The CERCLA's statutory mandates place essentially the same requirements on federal and private facilities. Pursuant to the Superfund amendments in 1986 (SARA), Congress added section 120 to the CERCLA.[357] Again, this section subjects federal facilities to the CERCLA in the same manner as private facilities, to include liability for hazardous waste sites.[358] Section 120(a) "dictates that the same substantive and pro-

[353] 55 Fed. Reg. 30,852, 30,978 (1990). Diner Interview, *supra* note 79 (discussing the EPA's proposed regulations).

[354] 55 Fed. Reg. 30,852, 30,978 (1990).

[355] *Id.*

[356] *Id.*

[357] 42 U.S.C. § 9620.

[358] Henley, *supra* note 74, at 12. Major Henley also indicates:

> [w]hile subject to the same provisions of CERCLA, there are several fac tors distinguishing federal/military facilities from privately owned sites. First, cleanup of federal sites usually involves a program that is national in scope and often similar to EPA's Superfund program, such as the Defense Environmental Restoration Program. This means hundreds of sites across the country are competing for scarce resources. Second, taxpayer dollars are the exclusive source of revenue to pay for cleanup activities at federal facilities. This means availability and allocation of resources is contingent upon annual congressional appropriation decisions. Third, federal ownership implies a level of permanence and stability not found at privately owned sites. Fourth, existing use and access restrictions usually exceed those present at privately owned sites. This means risks based on exposure can be more easily controlled and the range of realistic future uses for federal facilities easier to predict. Fifth, sections 120 and 121 require federal facilities to comply with procedures and requirements inapplicable to privately owned sites.

Id. at n.119.

cedural requirements applicable to private parties apply to federal entities as well."[359] However, the SARA also set out certain unique requirements for federal facilities.[360]

a. The Cleanup Process—The SARA created a clean-up process which all federal facilities must follow.[361] This process includes establishing a Federal Agency Hazardous Waste Compliance Docket (HWCD),[362] which is a listing of all federal facilities at which hazardous wastes have been treated, stored, or disposed, or at which reportable quantities of hazardous wastes have been released.[363] Once the EPA places a facility on the docket, the SARA requires that the federal facility begin a preliminary assessment of the site within eighteen months, for possible inclusion on the NPL.[364] If the EPA includes the site on the NPL, the SARA

---

[359] Robert A. Weissman & Christina A. Maier, *Liability and Cost Allocation at Federal Facilities*, 3 FED. FACILITIES ENVTL. J. 163, 163 (Summer 1992). Section 120(a)(1) states:

> [e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

42 U.S.C. § 9620(a)(1).

[360] *See* Woolford, *supra* note 262, at 386; 42 U.S.C. § 9620; Exec. Order No. 12,136, 3 C.F.R. § 168 (1981), *reprinted in* 1981 U.S.C.C.A.N. B70 (indicating that the DOD is now liable under CERCLA for hazardous waste spills from installations or vessels).

[361] Federal facilities must follow "all guidelines, rules, regulations, and criteria . . . applicable to evaluations . . . under the NCP . . . and inclusion on the NPL." 42 U.S.C. § 9620(a)(2). Note, however, the potential problems that arise in attempting to follow the NCP. The 1990 revised NCP excluded the section dealing with the environmental restoration programs at federal facilities. *See* Henley, *supra* note 74, at 12 & n.121.

[362] 42 U.S.C. § 9620(c). The SARA assigned this responsibility to the EPA. *See* 58 Fed. Reg. 7298 (1993) (indicating purposes of HWCD).

[363] Woolford, *supra* note 262, at 387. Presently, the EPA has listed 2070 federal facilities on the HWCD. *See supra* note 197 (discussing the CERCLIS Hotline).

[364] 42 U.S.C. § 9620(d). The EPA will score a facility on the Hazard Ranking System (HRS)—which measures the threat posed by a site—based on the sampling data that the federal facility obtains in the PA. *See* Woolford, *supra* note 262, at 386.

The EPA generally will list a facility, such as a military installation, "fenceline-to-fenceline." *See* West, *supra* note 275, at 4; Woolford, *supra* note 262, at 387 (referring to this as "fence-to-fence"). The term "fenceline-to-fenceline" refers to listing the entire military installation "even if the actual contaminated areas comprise only a small portion of the facility." *Id.* The EPA's procedure has caused problems for installations identified for closure under BRAC. In response, the EPA issued two memoranda on August 10, 1995, in an effort to alleviate this problem. *See NPL Site Listings Clarified Through EPA Guidance Documents*, Nat'l Envtl. Daily (BNA) (Aug. 14, 1995).

The first memorandum clarifies that the EPA does not list sites on a fenceline-to-fenceline basis, but only considers contaminated portions of a facility superfund sites. *Id.* The second memorandum transmits a "Model Comfort Letter" for distribution to purchasers of land at BRAC sites. The letter indicates that "liability will not be imposed on purchasers of property just because the parcel of land lies within the area

requires that the federal facility commence a remedial investigation/feasibility study (RI/FS) within six months.[365]

The purpose of the RI is to acquire sufficient information from which the federal facility may develop potential remedies.[366] The FS phase allows the facility to further develop and evaluate these potential remedies.[367]

Once the RI/FS is complete, the federal facility has 180 days to enter into an interagency agreement (IAG) with the EPA.[368] These IAGs are designed to govern the cooperative efforts of the EPA and the federal facility, and many times the states.[369] The IAGs offer the *potential* to avoid the almost inevitable disputes between states and federal facilities over cleanups at federal facility NPL sites.

Finally, the EPA required that the federal facility, after notice to the public and an opportunity to comment, publish a Record of Decision (ROD) announcing the remedy selected.[370] The SARA required that the facilities' remedy selections be "protective of human health and the environment, *cost-effective,* and use permanent solutions and alternative treatment technologies to the maximum extent practicable."[371] The EPA must concur with the selected remedy because the SARA granted the agency final decision-making

---

imposed on purchasers of property just because the parcel of land lies within the area used to describe an NPL site. Liability is based on the presence of contamination." *Id.*

The EPA considers the clarifications in its memoranda sufficient to remedy any concerns over the listing of federal facilities on the NPL. However, the EPA requires the federal facility to prove that these contaminated areas "represent the full and actual area of contamination." Woolford, *supra* note 262, at 387. Due to the sheer size of many installations, especially when compared to most privately owned waste sites, the burden on federal facilities to prove that all other areas are not contaminated is enormous.

365 42 U.S.C. § 9620(e)(1).

366 40 C.F.R. § 300.430(d).

367 *Id.* § 300.430(e).

368 42 U.S.C. § 9620(e)(2). The DOD's policy (as well as the EPA's) is to enter into the IAG when the EPA proposes the site for inclusion on the NPL, or even during the RI/FS phase. Woolford, *supra* note 262, at 388.

369 Violation of these IAGs can result in the EPA issuing a fine against the federal facility. 42 U.S.C. § 9609(a)(1)(E). The DOE paid $100,000 for violating the IAG at its plant in Fernald, Ohio. *See* Dolan, *supra* note 331, at 199-200. Note that the DOD's policy is to encourage state involvement in the IAG, in an attempt to avoid significant problems later in the clean-up process. *See also infra* notes 464-69 and accompanying text (discussing IAGs in greater detail).

370 40 C.F.R. §§ 300.430(f)(3), 300.430(f)(4), 300.430(f)(5). The factors that the EPA requires federal facilities to consider in the ROD are found at *id.* § 300.430(f)(5)(ii).

371 42 U.S.C. § 9621(b)(1) (emphasis added). If the selected remedy does not meet the permanency criteria, the SARA also requires that the facility publish an explanation as to why it does not. *Id.*

authority on remedies at NPL sites.[372]

b. Funding—The SARA prohibits the use of Superfund money for remedial activities at federal facility sites.[373] Federal facilities use separate appropriations to fund the costs associated with the clean up of hazardous waste sites. The DERA must fund all remedial activities at the DOD's hazardous waste sites, except at those sites identified for closure under BRAC.[374]

Now, with an understanding of congressional intent as to the application of these environmental laws to federal facilities, I will consider the Tenth Circuit's application of them in *United States v. Colorado*.

C. United States v. Colorado: *An Aberration?*

Pursuant to the Tenth Circuit's decision in *United States v. Colorado*,[375] states may enforce their RCRA authority (state hazardous waste programs) at federal facility clean-up sites that also fall under the CERCLA's control. The Tenth Circuit rejected the government's argument that "states are precluded from enforcing RCRA requirements at federal facilities *during Superfund remediations*."[376] The decision grants states the authority to enforce their RCRA programs *even* if the facility is on the NPL and has started an RI/FS under the CERCLA.[377]

1. Rocky Mountain Arsenal—Located approximately ten miles from downtown Denver, Colorado, the Rocky Mountain Arsenal is the former home to incendiary and chemical weapons manufacturing.[378] Owned by the government since 1942, the Army operated the Arsenal until the mid-1980s.[379] In the early 1950s, local farmers

---

372 *Id.* § 9621(a). The SARA "divides states' jurisdiction between NPL and non-NPL federal facilities, giving states lead responsibility at federal facilities that were not on the NPL." Kassen, *supra* note 24, at 1495. The SARA "also provided that the EPA Administrator shall allow 'state and local officials the opportunity to participate in the planning and selection of the remedial action.'" *Id.*; *see also* 42 U.S.C. §§ 9620(a)(4), (f), and 9621(f). States participate in this process by recommending ARARs—applicable or relevant and appropriate requirements (state cleanup standards)—for use at the site. As the lead agency, the federal facility determines which clean-up standards are ARAR.

373 42 U.S.C. § 9611(e)(3). Nonfederal sites listed on the NPL qualify for Superfund money. *Id.* § 9611.

374 *See supra* note 270 and accompanying text.

375 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 216 (1994).

376 Seymour, *supra* note 341, at 245 (emphasis added).

377 *Id.* at 245. *See infra* notes 408-12 and accompanying text (discussing the RCRA/CERCLA interface).

378 Ensign Jason H. Eaton, *Creating Confusion: The Tenth Circuit's* Rocky Mountain Arsenal *Decision*, 144 MIL. L. REV. 126, 132 (1994).

379 990 F.2d at 1565.

complained that the Arsenal had contaminated their wells.[380] In response, the Army constructed Basin F, a "ninety-three acre surface impoundment area designed to keep toxins from entering the earth."[381] Unfortunately, the basin's liner leaked.[382] Wastes spilled into the surrounding lands and contaminated both ground and surface waters adjacent to the Arsenal.[383] The litigation between Colorado and the Army focused on Basin F.

2. *The Prior Litigation*—During the early 1980s, Colorado had served the Army with several deficiency notices requiring it to prepare a closure plan for the basin under the state's authorized RCRA program.[384] The Army's reply indicated that it was conducting an interim clean-up action pursuant to the CERCLA. As such, the Army believed that Colorado was precluded from enforcing its RCRA authority at the site.[385]

Colorado responded by issuing its own closure plan for the basin. The Army informed Colorado that it would not implement this plan, questioned Colorado's authority over the Army's cleanup,[386] and indicated that it would continue with its CERCLA interim response action.[387] Colorado subsequently filed suit in state court.[388] Once removed to federal court, the United States District Court for the District of Colorado found for the state, basing its holding on the government's failure to place the site on the NPL.[389]

The EPA listed the basin on the NPL one month after the district court's order. The government then sought reconsideration of this order, but subsequently filed a second suit seeking a declaration that the state had no authority to enforce its hazardous waste laws

---

380 Eaton, *supra* note 378, at 132 (citing Daigle v. Shell Oil Co., 972 F.2d 1527, 1531 (10th Cir. 1992)).

381 *Id.* The basin, a phosphorescent toxic lake that glowed "ominously beneath the majestic Rocky Mountains," was considered "the centerpiece of a forsaken tract of land some believe to be the earth's most toxic square mile." SHULMAN, *supra* note 4, at xi.

382 Eaton, *supra* note 378, at 132 (citing Vicky L. Peters, *Can States Enforce RCRA at Superfund Sites? The Rocky Mountain Arsenal Decision*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,419 (July 1993)).

383 *Id.*

384 Seymour, *supra* note 341, at 246. The EPA had approved Colorado's hazardous waste program in lieu of the RCRA, pursuant to 42 U.S.C. § 6926(b). *See* Eaton, *supra* note 378, at 132 & n.61 (citing 49 Fed. Reg. 41,036 (Oct. 19, 1984); COLO. REV. STAT. §§ 25-15-303—25-15-310 (1993)).

385 Seymour, *supra* note 341, at 246.

386 United States v. Colorado, 990 F.2d at 1565, 1568 (10th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 216 (1994).

387 *Id.*; *see also* Eaton, *supra* note 378, at 133.

388 Colorado v. Department of Army, 707 F. Supp. 1562 (D. Colo. 1989). The Army removed the action to the United States District Court for the District of Colorado.

389 *Id.* at 1562, 1569-70 (citing 42 U.S.C. § 9620(a)(4)). Section 120(a)(4) provides that state hazardous waste programs control at non-NPL sites.

on the federal facility.[390] This time, the federal district court held for the Army, indicating that CERCLA section 113(h) barred Colorado's enforcement of its Health Department's order[391] as an impermissible challenge to a CERCLA response (clean-up) action.[392] However, the Tenth Circuit reversed the district court's decision.[393]

3. Analyzing the Tenth Circuit's Decision—

a. Section 113(h)—The Tenth Circuit initially disagreed with the district court on CERCLA section 113(h)'s limitations. The Tenth Circuit found that Colorado's actions did not constitute a "challenge" but, instead, a "legitimate enforcement of independent state laws."[394] Thus, it held that section 113(h) did not preclude Colorado from enforcing its hazardous waste program.

---

[390] United States v. Colorado, 1991 WL 193,519 (D. Colo. 1991), *rev'd in part*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 U.S. 922 (1994). *See* Eaton, *supra* note 378, at 128.

[391] The Colorado Department of Health (CDH) had issued the deficiency notices mentioned previously to the Army requiring it to develop a closure plan for the basin.

[392] United States v. Colorado, 1991 WL 193,519 (D. Colo. 1991), *rev'd in part*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 U.S. 922 (1994). Section 113(h) of the CERCLA states as follows: "No federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 . . . or to review any order issued under 9606(a)." 42 U.S.C. § 9613(h). Section 113(h) "limits federal court jurisdiction to review challenges to CERCLA response actions." Seymour, *supra* note 341, at 246-47. *See* Alabama v. Environmental Protection Agency, 871 F.2d 1548, 1557-59 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989) (section 113(h) precludes judicial review until clean-up process is complete); Schalk v. Reilly, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990) (same). *See also* Eaton, *supra* note 378, at 131 (discussing section 113(h) in detail).

The Colorado District Court accepted the government's argument that section 113(h)'s restriction on pre-enforcement review barred the state from enforcing its hazardous waste program at the site (which the court considered an attempt to obtain pre-enforcement review). *See id.* at 133.

The Colorado District Court also based its decision in favor of the Army on the EPA's listing of the basin on the NPL. In doing so, it impliedly relied on 42 U.S.C. § 9620(a)(4) (which dictates the CERCLA's application to federal facilities) and, at the least, impliedly ruled that the CERCLA controls cleanups at NPL sites. United States v. Colorado, 990 F.2d 1565, 1569 (10th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 216 (1994).

[393] United States v. Colorado, 990 F.2d at 1565.

[394] Seymour, *supra* note 341, at 247. The Tenth Circuit believed that Congress, in section 113(h), was trying to prevent dilatory, interim lawsuits that would ultimately slow down the clean-up process. The court held that Colorado's actions sought only to force the Army to comply with its order, not to delay the clean-up process. *Id.* at 247-48.

The Tenth Circuit looked to CERCLA sections 302(d) and 114(a) in making its decision. Section 302(d) (the "savings provision") states that "nothing in [the CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law." 42 U.S.C. § 9652(d). The Tenth Circuit interpreted this as saying that "the CERCLA was designed to work with, and not repeal, other hazardous waste laws." Eaton, *supra* note 378, at 135 (citing United States v. Colorado, 990 F.2d 1565, 1575 (10th Cir. 1993).

The Tenth Circuit also cited section 114(a), which states that "nothing in the [CERCLA] shall be construed or interpreted as preempting any State from imposing

b. Section 120(a)(4)—The Tenth Circuit also disagreed with the district court on the limitations contained in CERCLA section 120(a)(4). The Tenth Circuit found the district court's holding—that this provision barred state enforcement at an NPL site during a Superfund remediation—inconsistent with CERCLA section 120(i).[395] The Tenth Circuit read the latter to require that the RCRA was "independently enforceable" at NPL and non-NPL sites and that Congress had preserved RCRA-enforced obligations within the CERCLA.[396] As such, the EPA's subsequent listing of the basin on the NPL had no bearing on which statute applied to the cleanup.

c. The ARARs (Clean-up Standards) Process—The government also argued before the Tenth Circuit that CERCLA section 121(d)(2)(a)[397] allowed the states to take part in both remedy selection and the cleanup only through the ARARs process.[398] The Tenth Circuit disagreed, stating that it had found nothing in the CERCLA to indicate that Congress intended that the ARARs process be the exclusive means of state involvement.[399] The ARARs process, it held, was designed to provide for state input at those sites at which the state was not controlling the clean-up process.[400]

4. The Effect of the Tenth Circuit's Decision—The ramifications of the circuit court's decision have been, and will continue to be, significant. The recent reductions in federal facilities' environmental budgets, and the forecast of greater cutbacks in the near future,[401] only serve to magnify the effect of the decision. Increases in the costs and length of cleanups while funding for them is decreasing

any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a).

The Tenth Circuit held that the district court's decision violated both of these provisions. First, the decision modified the Army's obligations and liabilities under Colorado's hazardous waste program (section 302(d)). Second, it preempted the state from imposing additional requirements on the release of hazardous substances (section 114(a)). The Tenth Circuit viewed these two provisions as preserving Colorado's authority to take action consistent with its own EPA approved hazardous waste laws. Seymour, *supra* note 341, at 247-48.

395 Seymour, *supra* note 341, at 248. Section 120(i) states that "nothing in [the CERCLA] shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [the RCRA]." 42 U.S.C. § 9620(i).

396 Seymour, *supra* note 341, at 248.

397 42 U.S.C. § 9621(d)(2)(a).

398 *See supra* note 206-12 and accompanying text (discussing this section of the CERCLA and the ARARs process in general).

399 Seymour, *supra* note 341, at 249.

400 The Tenth Circuit also pointed to CERCLA sections 114 and 302, indicating that they demonstrated that the CERCLA was designed for use with other hazardous waste laws. As such, state involvement could not be limited only to the ARARs process. Eaton, *supra* note 378, at 137-38.

401 *See supra* notes 275-80 and accompanying text (discussing recent cuts in environmental spending within federal agencies).

can only signify additional difficulties ahead. Overall, the decision has created the following impediments to cleaning up federal facility hazardous waste sites:

> (1) States and federal facilities are unable to clarify who controls the clean-up at federal facility sites;[402] and
>
> (2) Federal facilities have lost the ability to select cost-effective, timely, and sensible remedies to clean up their facilities;[403] and
>
> (3) States are imposing inconsistent clean-up standards on federal facilities, because each state has its own separate standard;[404] thus,
>
> (4) States are defeating the CERCLA's stated purpose—to promptly clean hazardous waste sites.[405]

The Tenth Circuit hoped to clarify the RCRA's application to federal facility NPL site cleanups. Unfortunately, it only made it more difficult to ascertain which statute controls and who manages the cleanups. Its decision has resulted in more, not less, disputes between states and federal facilities. Only now, the debate is not over whether the RCRA applies, but which statute, and which entity, controls the cleanups.[406]

In sum, the Tenth Circuit's decision granted the states a total partnership in CERCLA cleanups at federal facility NPL sites.[407] In so doing, it ensured that the RCRA/CERCLA interface would occur more frequently. This new state RCRA authority at these sites has thus resulted in overlapping statutory authorities—the RCRA/CERCLA interface—which has negatively impacted the clean-up process.

D. An Analysis of the Interface and the Problems It Causes

By now it should be evident that two EPA-administered statutes govern cleanups at federal facilities—the CERCLA and the

---

402 Eaton, *supra* note 378, at 139, 145-46.

403 *See* Seymour, *supra* note 341, at 252-54.

404 *See* Eaton, *supra* note 378, at 142-44.

405 *See id.* at 140 (citing Dickerson v. Administrator, EPA, 834 F.2d 974, 978 (11th Cir. 1987)). *See also supra* notes 127-30 and accompanying text (identifying Congress's purpose in enacting CERCLA).

406 The Tenth Circuit's attempt to clarify the RCRA's and CERCLA's respective roles in the clean-up process at federal facility NPL sites failed. The Tenth Circuit's holding simply "interjects more uncertainty into an already confusing statutory scheme." Eaton, *supra* note 378, at 138.

407 Seymour, *supra* note 341, at 254.

RCRA.[408] Also evident is that the EPA typically enforces the requirements of the CERCLA and delegates authority to the states to enforce the requirements of the RCRA.[409] Inevitably, problems arise because almost all federal facilities generate, store, or dispose of hazardous waste to some extent. As such, they are frequently subject to the RCRA's requirements. Many of these facilities also contain hazardous waste disposal sites regulated under the CERCLA.[410] When both the CERCLA and the RCRA apply to a federal facility hazardous waste site, a struggle for advantage begins "between regulatory agencies with different agendas."[411] As such, a duplication of efforts occurs, disputes arise over what clean-up standards apply, and costs, the length of the cleanup, and frustration increase dramatically.[412]

1. Unnecessary Duplication of Efforts—The CERCLA clean-up process and the RCRA's "corrective action" requirements are essentially the same. As such, neither the states nor the federal government acquire additional environmental benefits from expensive duplication of efforts under both statutes.

The usual scenario at a federal facility cleanup mirrors the course of events at the Rocky Mountain Arsenal. The federal facility, in conjunction with the EPA, begins a clean-up action on a hazardous waste site conducted under the CERCLA. It performs a preliminary assessment, after which the EPA places the site on the NPL.[413] The federal facility then begins additional studies and remedial investigations in the RI/FS phase, and may even begin actual clean-up work. Then, an event may occur that triggers application of the RCRA permitting process.[414] Once the state issues the RCRA permit through its EPA-authorized hazardous waste program, the corrective action requirements previously discussed apply.[415]

---

[408] Draft Memorandum from Sherri W. Goodman, Deputy Under Secretary of Defense (Environmental Security), to the RCRA Information Center, Environmental Protection Agency (June 12, 1995) (on file with author) (concerning the EPA's RCRA Streamlining Initiative).

[409] *Id.*

[410] Even if the RCRA does not currently regulate a federal facility, CERCLA clean-up actions frequently trigger the RCRA through the treatment, storage, or disposal of wastes at the site.

[411] Kassen, *supra* note 24, at 1506.

[412] *Id.*

[413] Listing on the NPL did not occur at the Rocky Mountain Arsenal until after the district court's first decision.

[414] A triggering event includes any action concerning the treatment, storage, and/or disposal of hazardous waste. *See supra* notes 82-87 and accompanying text. In many situations, the RCRA permit already is in place when the EPA places the site on the NPL. Once a site is on the NPL, the EPA and federal facilities adopt the position that the CERCLA controls.

[415] *See supra* notes 344-48 and accompanying text.

Accordingly, the state requires the facility to perform all of the assessments, inspections, and studies required by the corrective action provisions of the RCRA permit and the EPA's implementing regulations.[416] The facility must conduct this costly, repetitive remedial work to comply with the state's RCRA requirements, or subject itself to fines and penalties. Yet this additional work is unlikely to be of significant environmental value, as it only parallels what the federal facility has previously done under the CERCLA. A timely clean-up is not performed because the parties spend most of their time, effort, and money on the investigative process instead of the clean-up process. This duplication of efforts is not cost-effective, and the delays it causes conflict with the CERCLA's central purpose—the prompt clean up of hazardous waste sites.[417]

2. Disputes Over Applicable Clean-Up Standards and Remedy Selection—The overlapping authorities also create a conflict over which clean-up standards apply—the essential question of "How clean is clean?" Although the ultimate goal is to make every site 100% clean, such goals are not reasonable. Federal facilities, in conjunction with the EPA, have the responsibility to consider all contaminated federal facility sites and, with limited resources, conduct response actions and remediate as many as possible. This process involves risk assessment and cost effectiveness, two factors that the RCRA and the CERCLA do not always agree on.

Alternatively, states want all of their sites 100% clean as quickly as possible, regardless of how much money and effort federal facilities have to spend. State regulations under the RCRA tend to be extremely stringent. Some have described the level of clean up required as "drinkable leachate" and "edible soil."[418] "You made the mess on our land, now you clean it *all* up," tends to be their philosophy. Countering this argument can be difficult at times. After all, federal facilities *are* responsible for contaminating the sites. However, the states' view does not consider the realities of a limited environmental budget and a nation-wide list of sites awaiting clean up. Corrective action procedures under the RCRA do not require consideration of the cost effectiveness of a clean-up remedy. Thus, states "only" require that federal facilities return to them sites that need no further care after the facilities complete their remedial action—regardless of what it costs to comply with the states' requirements.

---

[416] *See supra* notes 349-56 and accompanying text (discussing the RCRA's corrective action provisions).

[417] "This requirement for state involvement has the potential to make the whole process more cumbersome and slow." Bayko & Share, *supra* note 120, at 30.

[418] Seymour, *supra* note 341, at 253. The article indicates that "RCRA regulations on clean closure (removal and decontamination) require all waste residues and contaminated containment system components (e.g., liners), contaminated subsoils, and structures and equipment contaminated with waste and leachate to be removed and managed as hazardous waste before the site management is completed." *Id.*

With limited funding and a mandate under the CERCLA to consider cost effectiveness when selecting a remedy,[419] federal facilities are hampered in obtaining 100% solutions at all sites. Unfortunately, they do not have the technology to clean up all of the wastes. Accordingly, federal facilities are attempting to address this problem by applying systems that prioritize sites for cleanups after evaluating relative risk.[420] The Defense Priority Model (DPM) is aimed at dealing with sites within each state on a "worst-first" basis.[421]

Unfortunately, states enforcing their RCRA requirements are not bound by the priority assigned to their sites by the federal facility system. As such, they can still seek immediate clean up of their sites even if the system prioritizes them below those of other states. States seeking compliance through fines and penalties pose a serious threat to the federal facility system and force it away from its "worst-first" strategy. In response, the DOD actively seeks to complete memoranda of agreement between the states and the DOD (DSMOAs).[422] These agreements guarantee the state a certain amount of funding for cleanups in return for agreeing to abide by the priorities set by the DPM. However, this system and the state-federal agreements are outstanding in theory, but do not work in reality.

Finally, the RCRA, unlike the CERCLA, does not provide a dispute resolution mechanism for disagreements between federal facilities and states. However, the CERCLA instituted a mechanism whereby disputes between federal facilities and the EPA can proceed to the Office of Management and Budget (OMB) for resolution.[423]

---

[419] The EPA must consider the cost effectiveness of all potential remedies. 42 U.S.C. §§ 9620(a)(2), 9604(a)(1), 9605(a)(7).

[420] Seymour, *supra* note 341, at 251 (citing Longo et al., *DOE's Formal Priority System for Funding Environmental Cleanup*, 1 FED. FACILITIES ENVTL. J. 219 (Summer 1990); Thomas E. Baca, *DOD Environmental Requirements and Priorities*, 3 FED. FACILITIES ENVTL. J. 333 (Autumn 1992)).

[421] *See* 54 Fed. Reg. 43,104 (1989). Developed by the Air Force, the DPM became operational in FY 1990. It is a waste site hazard-ranking system for toxic sites that "evaluates relative risk based on information gathered during the Preliminary Assessment/Site Inspection and the Remedial Investigation/Feasibility Study." *Id.* By assessing the risk at each of its sites, the DOD can ensure that it addresses sites "on a worst-first basis nationwide with the funding available from the Defense Environmental Restoration Account." *Id.*

The DOD's DPM is more accurate in reflecting current site conditions than the EPA's system. This accuracy stems from the DPM incorporating information from the investigations and studies into its assessment. John J. Kosowatz, *Cleaning up After the Military*, 222 ENGINEERING NEWS-REC. 82, 82 (May 25, 1989). "Watchdog groups such as the congressional Office of Technology Assessment (OTA) give the DOD system high marks." *Id.*

[422] Kosowatz, *supra* note 421, at 82; Diner Interview, *supra* note 79.

[423] The EPA initially established the Federal Facilities Dispute Resolution Process to provide federal facilities with an opportunity to contest any EPA decisions concerning their facilities. If the two parties could not resolve the conflict in this process, the issue would proceed to the OMB.

The RCRA has no similar mechanism. As such, disputes between federal facilities and states languish while the clean-up process stalls and the public's frustration grows.

3. Federal Facilities Lack of Freedom in the Clean-Up Process—The CERCLA's intent was to provide states the opportunity to participate in remedy selection and the determination of clean-up standards through the ARARs process.[424] The ARARs process required that the entity managing the cleanup—usually federal facilities—incorporate federal, state, and local requirements into the clean-up standards. Through the process, the CERCLA afforded states "substantial and meaningful involvement in the initiation, development, and selection of remedial actions."[425] The entity managing the cleanup still had the authority, however, to waive certain standards if it determined that they were "technically impracticable" or "unduly expensive."[426]

The RCRA/CERCLA interface severely restricts federal facilities' freedom to waive compliance with the states' hazardous waste laws (*i.e.*, their ARARs), even when they are unduly burdensome on, or unreasonably expensive for, the facilities.[427] The overlap of statutory authority causes this situation by allowing the states to require that facilities comply with their often onerous requirements. As such, states can, and do, demand compliance with stringent standards that "threaten to exhaust the agencies appropriations and disadvantage other states."[428]

Federal facilities no longer can depart from these strict state standards—even when they are "practically unachievable or impractically expensive"[429]—for fear of fines and penalties for noncompli-

---

See Exec. Order No. 12,088, 3 C.F.R. § 243 (1979), *reprinted in* 42 U.S.C. § 4321 (1988) (funding and scheduling issues); Exec. Order No. 12,146, 3 C.F.R. 409 (1980), *reprinted in* 28 U.S.C. § 4339 (1988) (legal issues). *See infra* notes 464-70 and accompanying text (discussing IAGs and the OMB's role as arbiter). *See also* Millan, *supra* note 35, at 375 ("When necessary, prior to a selection of a remedial action by the Administrator under Section 120(e)(4)(A) of the Act, Executive agencies shall have the opportunity to present their views to the Administrator after using the procedures . . . of Executive Order No. 12,088 . . . [OMB] shall facilitate resolution of the issue.").

[424] 42 U.S.C. § 9621. *See supra* notes 206-12 and accompanying text (describing the ARARs process).

[425] 42 U.S.C. § 9621(f)(1).

[426] *Id.* § 9621(d)(4); *see supra* note 211 and accompanying text (discussing the "waiver clause"); *see also* Seymour, *supra* note 341, at 252.

[427] *See* Seymour, *supra* note 341, at 252.

[428] *Id.* at 253. States also might insist on more stringent clean-up standards at federal facilities than they do at private facilities. Although states are not required to contribute to federal facility cleanups, they might be required to contribute at private sites if orphan shares exist (the amount attributed to unknown or unavailable PRPs). The higher they drive the costs of the cleanup at private sites, the more money they will have to pay. *Id.*

[429] *Id.* at 253-54.

ance. Thus, facilities' have lost the flexibility to select cost-effective, technologically sound clean-up remedies.

4. Summary—As a direct result of the interface between these two statutes, states and the EPA have sought to control federal facility cleanups, causing overlapping regulatory authorities. This overlap has resulted in disputes over the parties' respective roles in the cleanups, conflicts regarding the appropriate clean-up standards and remedies, and wasted time, money, and effort by all involved in the clean-up process.

These conflicts and disputes must be resolved if the nation hopes to one day see federal facilities free of the toxic messes that presently plague them. This is especially true in 1996 as the government continues to close and transfer many facilities for both public and private use. However, nothing will be resolved until Congress addresses the regulatory gridlock caused by the interface of the two statutes.

V. Solutions

A. Potential Solutions

Four potential remedies to the RCRA/CERCLA interface problem exist:

> (1) First, Congress could amend the RCRA and CERCLA to indicate that states, under EPA-delegated CERCLA authority, control the clean-up process at federal facility NPL sites.[430]
>
> (2) Second, Congress could amend the statutes to mandate that the EPA, under its CERCLA authority, controls the clean-up process at these sites.[431]
>
> (3) Third, Congress could maintain the status quo—dual control of the sites under the CERCLA and RCRA. It could require triparty interagency agreements between the states, the EPA, and federal facilities. As such, the parties could attempt to resolve their differences and reach agreements on the clean-up process through negotiation.[432]
>
> 4) Finally, Congress could amend the CERCLA to create a National Environmental Committee (NEC), granting it

---

[430] *See* Henley, *supra* note 74, at 46-57 (arguing for state control of these sites under the CERCLA); *see also infra* notes 434-49 and accompanying text.

[431] *See infra* notes 450-63 and accompanying text.

[432] *See infra* notes 464-77 and accompanying text.

complete authority over all federal facility NPL sites.[433]

The last option would establish a committee with the authority to create national regulations governing the clean-up process at federal facility NPL sites, removing any doubt as to what entity, and what standards, control the cleanup. In establishing the NEC, Congress must amend the CERCLA and RCRA to indicate that neither the states nor the EPA control federal facility NPL site cleanups. Congress also must amend the RCRA to render its "corrective action" provisions inapplicable to federal facility NPL sites. In so doing, Congress would remove the potential for any federal-state, RCRA/CERCLA interface—that is, disputes and conflicts—at these sites.

I strongly recommend that Congress select the final alternative and amend the CERCLA and RCRA to establish the NEC. Before discussing this committee option in detail, however, I will analyze the four potential remedies.

B. Grant the States Control of the Clean-Up Process

1. The Benefits—The practical aspect of this alternative (as well as with the second and fourth alternatives) is that control rests with only one entity. Thus, the potential for parties or statutes to be in conflict greatly decreases. At times, both the EPA and federal facilities have indicated that, even if Congress amended the CERCLA and RCRA to grant control to the states, such a clear statement of congressional intent would be better than the present state of uncertainty and conflict.[434]

State control also would avoid the difficulties associated with dual regulation and "changing horses in midstream."[435] Moreover, in this era of increasing states' rights and the "end of big government,"[436] Congress would do well to leave to state management a problem that does not "routinely transcend the boundaries of a single state."[437]

---

433 *See infra* notes 478-81 and accompanying text.

434 *See* Strand, *supra* note 305, at 23.

435 *See* Henley, *supra* note 74, at 57. The duplication of efforts should cease. Changing lead agency authority in the middle of the clean-up process inevitably leads to a repetition of the same work, and wastes valuable time and funding that could be spent cleaning up these sites.

436 In his State of the Union Address in January 1996, President Clinton announced that the "era of big government is over." E. Thomas McClanahan, *Find Out If He Means It*, KANSAS CITY STAR, Feb. 1, 1996, at C10.

437 James P. Young, *Expanding State Initiation and Enforcement Under Superfund*, 57 U. CHI. L. REV. 985, 996 (1990). *See* Percival, *supra* note 59, at 1141 (discussing states' rights, and indicating that "states argue that they should be given more freedom and flexibility to develop environmental standards tailored to local circumstances"). Note, however, that the article subsequently indicates that "[c]urrent efforts to reduce the size of government and to return greater power to the states have not been driven by any principled articulation of a methodology to determine which level of government is best suited to perform which functions." *Id.* at 1179. *See also infra* notes 540-46 and accompanying text (providing a more detailed discussion of the states' rights argument).

2. The Drawbacks—Congress and the EPA historically have resisted delegating complete authority to the states to perform management functions under the CERCLA.[438] This resistance was primarily due to concern over the states' ability to commit Superfund[439] money without some level of federal oversight.[440] Even with federal oversight,[441] state control of cleanups translates into significant difficulties for federal facilities.

State control would result in inconsistent clean-up standards and inconsistent quality in the clean-up process.[442] It also will likely lead to uneven treatment of federal facilities as compared to private entities. Unless Congress tasked the EPA to establish national clean-up standards,[443] each state would possess its own unique standards, which it would be free to impose on federal facilities. States would continue to burden federal facilities with onerous requirements—that is, "drinkable leachate and edible soil."[444]

Assuming that Congress mandates compliance with national standards along with granting control of the process to states, other concerns still exist. First, states have no incentive to view the clean-up process on a national level. States are afflicted with "stubborn local particularism,"[445] or the inherent bias to protect their own backyard at all costs.[446] States are not concerned about the numerous contaminated federal facility sites that remain nationwide after its own sites have been restored to almost pristine conditions. Furthermore, state governments are subject to regional economic and political pressures that hamper their ability to effectively man-

---

[438] 55 Fed. Reg. 8783 (1990).

[439] Defense Environmental Restoration Account (DERA) money would be used for DOD cleanups and Environmental Management Fund (EMF) money would be used for DOE cleanups.

[440] *See* Henley, *supra* note 74, at 52 & n.317.

[441] This oversight would take the form of the EPA, pursuant to the RCRA or the CERCLA.

[442] By allowing every state to apply its own unique standards to federal sites within its borders, Congress is ensuring that states will apply inconsistent standards that will result in inconsistent quality in the cleanups.

[443] These national clean-up standards would have to specifically preempt federal, state, and local ARARs. If not, any state that did not conclude that a national standard was stringent enough could simply use its delegated authority to force the federal facility to comply with the more stringent standard.

[444] *See* Seymour, *supra* note 341, at 253.

[445] *See* Percival, *supra* note 59, at 1171 (citing Carol M. Rose, *The Ancient Constitution vs. The Federalism Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 99 (1989)).

[446] A genuine concern exists over whether states will be reasonable in establishing requirements or in prioritizing cleanups. If they are not, they have the ability to require the immediate clean up of hazardous waste sites within their own states, thereby delaying the clean up of additional—and potentially more dangerous—hazardous waste sites within other states. Diner Interview, *supra* note 79.

age environmental programs.[447]

Finally, the budget "crunch" has affected not only federal facility budgets, but those of the states as well. Placing more of the administrative cost burden on the states' environmental programs to manage these cleanups taxes "financially-strapped" state governments and places the quality of these environmental programs at federal facility sites into question.[448]

3. Summary—Under a scheme of state control, states would fail to consider risk assessment, prioritization, future land use,[449] the cost effectiveness of the selected remedy, and a host of other concerns. This approach would result in a few states' sites being clean enough to avoid any after care, an exhausted federal facilities' environmental budget, and scores of dangerous sites still to confront. In the final analysis, state control is not a reasonable alternative.

C. Grant the EPA Control of the Clean-Up Process

1. The Benefits—Giving control of the process to the EPA provides benefits similar to those in the first alternative. Control placed in one identifiable decision maker removes the condition of uncertainty and precludes the inevitable struggle for regulatory control. It also avoids the possibility of changing the managing authority after substantial progress has already been made under a different authority.

Additionally, the EPA would be able to consider priorities on a national level and, with the adoption of national clean-up standards, would likely treat federal facilities in the same manner as other federal facilities and private facilities. Moreover, the CERCLA requires that the EPA consider the cost-effectiveness of a remedy.[450] The EPA thus may be more reasonable than the states in selecting a remedy. For these reasons, federal facilities would prefer working with the

---

[447] *See* Percival, *supra* note 59, at 1178 (indicating that "history demonstrates that state and local officials generally are too vulnerable to local economic and political pressures . . . to be given exclusive responsibility for environmental protection); *see also Federalism and Hazardous Waste*, *supra* note 4, at 1525 (stating that "it is unrealistic to expect municipalities [or states, for that matter] to enforce federal mandates aggressively against companies that make up a good part of the municipalities' tax and employment bases").

[448] *See* Percival, *supra* note 59, at 1175 (citing UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000 (1990)).

[449] Requiring that *all* sites be 100% clean does not take the future plans for the contaminated land into account. It does not make sense to compel federal facilities to remediate a site to an "edible soil" standard when it will be subsequently used as a landfill.

[450] Listing on the NPL means that the CERCLA's concepts control the clean-up process. The CERCLA requires selection of a cost-effective remedy. 42 U.S.C. § 9605(a)(7).

EPA. Considering and adopting sensible, cost-effective remedies provides welcome relief to shrinking federal facility environmental restoration budgets.

Finally, the CERCLA provides a dispute resolution mechanism to address contentious fiscal or legal issues arising between federal facilities and the EPA. The states, under their RCRA authority, have no similar method of resolving their disputes with federal facilities.[451]

2. The Drawbacks—The EPA's record in managing the Superfund program since Congress's enactment of the CERCLA is "less than stellar."[452] In the years between CERCLA's enactment and congressional consideration of the SARA, "EPA implementation of the federal hazardous waste statutes . . . had a tortured history."[453] The general perception of the agency is that it has difficulty with its current role.[454]

States certainly are not in favor of EPA control. Although Congress has refused to allow federal agencies to hide behind the unitary executive theory,[455] the EPA has sparingly employed its authority to "enforce federal environmental laws against its sister agencies."[456] Many states "have expressed skepticism that the EPA can regulate federal agencies as vigorously as it regulates private or local government polluters."[457]

Many factors have combined to limit the EPA's ability to func-

---

451 *See supra* note 423 and accompanying text.

452 Given the EPA's history of inefficiency, mismanagement, and questionable conduct, there must be a check placed on this agency's power. Perhaps one day the EPA will have the structure, expertise, and manpower to deal effectively and efficiently with the problems of hazardous waste. Until then, we must act to preserve two valuable resources: American industry and the environment.

Limiting Judicial Review, *supra* note 156, at 1178.

453 *Developments*, *supra* note 50, at 1474, revealing that the EPA missed statutory deadlines for promulgating policy and guidelines and cleanups proceeded slowly. Congress attributed these difficulties to, among other things, "the intrusion of partisan politics into Agency operations, the inadequacy of Agency resources, and the magnitude of the Agency's task." *Id.* *See also supra* note 207 and accompanying text (discussing Congress's lack of confidence in the EPA).

454 *See EPA in Sad Shape: New Boss Testifies*, WASH. POST, Mar. 11, 1993, at A18; *see also supra* note 207.

455 In sum, the theory holds that one federal agency is prohibited from enforcing laws against another federal agency. *See supra* notes 324-27 and accompanying text.

456 Kassen, *supra* note 24, at 1484.

457 *Id.* at 1484-85 (citing H.R. REP. NO. 111, 102d Cong., 1st Sess. 6-12, *reprinted in* 1992 U.S.C.C.A.N. 1257, 1292-98 (1990)) "[S]tatements by state attorneys general and state program officials advocating the adoption of the Federal Facilities Compliance Act and arguing that the Act, which would give states enforcement power, is necessary because federal facilities have been and are 'the very worst violators of environmental laws.'" *Id.*

tion as effectively as Congress originally intended. Limited resources, ambiguous environmental statutes, and a burgeoning workload have precluded the agency from making steady progress.[458] Consequently, to place more "bricks in the rucksack" of an already overburdened and understaffed federal agency would not make good sense. Conversely, to remove some of that burden from the EPA, by placing control of federal facility NPL sites under a separate entity, seems logical.

Moreover, the EPA is subject to political pressures as well. As a result, the agency has not maintained a cost-effective disposition. Although the CERCLA requires consideration of cost when selecting a remedy, the EPA frequently has responded to pressure to demonstrate results by throwing more money into cleanups[459] and adopting a "Cadillac" approach to remedy selection.[460] Additionally, the EPA Administrator is a political appointee. As such, the agency's ability to use its discretion and manage cleanups is limited by the need to follow the President's policies and guidance.

Finally, budget reductions have affected the EPA as much, if not more, than the states.[461] Congress has reduced the agency's funding drastically in recent years.[462] This alternative would place more financial requirements on an already overtaxed federal agency. The EPA has "little incentive to assume programs that would add to the agency's own responsibilities at a time when it is having difficulty finding funds for its existing programs."[463]

---

458 *See* Woolford, *supra* note 262, at 391 (a "lack of resources places the EPA in a difficult position of trying to fulfill its statutory mandates without an appropriate level of resources").

459 One commentator noted that under the Superfund program, the "EPA reacted to unrealistic congressional goals by spending huge amounts of money while attempting to meet cleanup standards that varied inexplicably from site to site." Adam Babich, *What Next?*, ENVTL. F., Nov.-Dec. 1994, at 48-50.

460 *See Limiting Judicial Review*, *supra* note 156, at 1170 (predicting, in 1989, that the pressure on EPA to show results coupled with the SARA's "tightening" of clean-up standards would cause the agency to spend more money and adopt a "Cadillac" approach to clean-up decisions). The article also noted that its numerous criticisms of the EPA revealed that the agency was "an unorganized bureaucracy lacking the manpower and structure to make intelligent and cost-effective decisions concerning appropriate remedial action for each Superfund site." *Id.* at 1171.

461 *See* Woolford, *supra* note 462, at 391 ("[The] EPA's federal facility Superfund budget of $30 million was only about .3% of the combined DOD and DOE environmental budgets. In order to be an effective regulator and to assist in providing national environmental leadership, the EPA maintains that this ratio should be approximately 1%.").

462 *See* Damon Chappie, *GOP Seeks to Cut EPA Funds by One Third, Eliminate CEQ, Slash Compliance Monies*, Nat'l Env't Daily (BNA) (July 12, 1995) (indicating that Congress wanted to reduce the EPA's overall budget for FY 1996 to $4.87 billion, down $2.4 billion from FY 1995 and $2.5 billion less than the Clinton Administration requested).

463 Percival, *supra* note 59, at 1175.

3. Summary—In light of the excess burdens that exclusive control of federal facility NPL site cleanups would place on an agency already perceived as incapable of regulating them, granting control to the EPA is not a reasonable alternative.

D. Maintain the Status Quo

The third alternative suggests keeping the status quo—dual regulation of sites under both the RCRA and CERCLA by the states and the EPA. Implicit in this suggestion is that Congress will mandate the use of binding triparty IAGs as a method of resolving disputes between the parties through negotiation and cooperation.

Should readers not accept my central thesis—that Congress must create a national committee to resolve the myriad problems associated with federal facility NPL site cleanups—then, at the very least, they must accept this third alternative. Although not perfect, through the required use of binding IAGs, it provides many more benefits than do the first two alternatives.

1. The Benefits—Presently, the CERCLA requires that federal facilities enter into IAGs with the EPA within 180 days after completing the RI/FS.[464] These agreements control the combined efforts of the parties during the clean-up process.[465] They allow the parties to effectively organize and plan the clean-up process by both setting priorities and "establishing long-term schedules and milestones . . . [that] provide benchmarks against which to measure cleanup progress."[466] The CERCLA requires only the federal facility and the EPA to sign the IAGs.

Practicality dictates, however, that in light of *United States v. Colorado*, the EPA and federal facilities want to include the states as signatories.[467] Properly drafted IAGs should define the respective "roles, authorities, and responsibilities of the parties, thereby promoting greater coordination in implementing the requirements of

---

[464] 42 U.S.C. § 9620(e)(2). Federal facilities often seek to negotiate these agreements as soon as the EPA proposes a site for listing on the NPL. *See supra* notes 368-69 and accompanying text (discussing IAGs).

[465] "Cleanup and compliance agreements provide the framework for determining how and where resources are to be applied over the long term." Woolford, *supra* note 262, at 388.

[466] *Id.* at 389. The article also indicates that IAGs are a "very important way of improving the credibility of the federal government with respect to meeting its environmental management responsibilities." *Id.* Facilities gain credibility through the tremendous commitments that they make in the IAGs.

[467] 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 216 (1994). If courts will allow states to enforce their hazardous waste laws at federal facility cleanups, the EPA and federal facilities need to include them in every phase of the cleanup.

these agreements."[468] Conducting negotiations through IAGs on disputed issues makes it less likely that states will attempt to control the clean-up process through their corrective action authority under the RCRA.[469]

Thus, the status quo presents the potential for enhanced cooperation between the regulatory parties and a substantial role for each of them in federal facility NPL site cleanups. This is especially true for the states,[470] although this alternative still provides for federal oversight of state activities. However, the status quo still fails to address numerous concerns.

2. The Drawbacks—The negative aspects of the status quo consist of all of the problems previously detailed in this article. Unless the EPA, states, and federal facilities use the IAG process at *every* federal facility NPL site at which both the RCRA and CERCLA apply, the clean-up process is still subject to the RCRA/CERCLA interface and all of its attendant problems. Thus, the same disputes and conflicts occur, which translates into greater costs and delays in the clean-up process.

Moreover, even when the parties use the *current* IAG process, it provides no guarantee of success. States are not bound by IAGs, which means that they are always free to reject the terms of the agreement and demand immediate compliance with their hazardous waste laws. Again, no dispute resolution authority exists to mediate disagreements between the states and other parties.

Of course, this places the EPA and, more frequently, federal facilities in a inferior negotiating posture—especially after *United States v. Colorado*. Now that states have an independent right to enforce their RCRA authority at federal facility sites, they are less likely to enter into IAGs. Consequently, federal facilities end up "giving away the farm"[471] to reach agreements with regulators and

---

[468] Woolford, *supra* note 262, at 389.

[469] *See* 42 U.S.C. § 6924(u). States also may refrain from challenging the selected remedy at a subsequent time if they are included in the IAG process. *Id.* § 9613. Diner Interview, *supra* note 79 (discussing the IAG process).

[470] Enhanced cooperation should make it less likely that disputes will erupt because no single entity is managing the cleanup. *See* Kassen, *supra* note 24, at 1506. Ms. Kassen's article provides examples of the "advantages and the problems that can occur as a result of states' overlapping authority under RCRA's corrective action provisions," citing to the DOE's Rocky Flats site and the DOD's (Army's) Rocky Mountain Arsenal. *Id.* at 1506. The collaboration between the DOE, EPA, and Colorado worked well at Rocky Flats. However, the lack of collaboration between the EPA and Colorado at Rocky Mountain led to "a decade [spent] fighting each other for regulatory advantage." *Id.* at 1507.

[471] The Twin Cities Army Ammunition Plant (TCAAP), located north of Minneapolis-St. Paul, Minnesota, provides an excellent example of this occurrence.

maintain their credibility with both Congress and the public.[472] To be effective, IAGs must have statutory authority to bind *all* parties to the agreement. Additionally, the IAGs must have "teeth" to ensure that the parties abide by their provisions. Thus, the agreements must identify, and allow for the imposition of, sanctions for failure to comply with the terms of the IAG.

The IAGs also must identify a dispute resolution mechanism to resolve conflicts that inevitably will arise between the parties. I propose that Congress create—much as it did for endangered species—a "God Squad" committee[473] to act as the dispute resolution authority between the parties.[474] The IAGs must provide any party to the agreement the right to request review by this committee, once an administrative law judge (ALJ) has certified the disputed issue as proper for such review.[475] The decisions of this committee would be final—subject to judicial review—and binding on all parties.[476]

---

[472] Federal facilities want to maintain their credibility by appearing cooperative and willing to work toward cleaning up their environmental messes. *See supra* note 466 and accompanying text.

[473] In 1978, Congress created the Endangered Species Committee (ESC) and tasked it with reviewing disputes over requests for exemption from the Endangered Species Act's provisions. It was "[k]nown variously as the 'God Committee' or the 'God Squad' for its supposedly divine power over endangered species." Diner, *supra* note 239, at 192 (citing 16 U.S.C. § 1536(e)).

[474] Do not confuse this dispute resolution committee with the National Environmental Committee (NEC) proposed and discussed later in this article. This dispute resolution committee would be patterned after the ESC, which is "chaired by the Secretary of the Interior and comprised of six cabinet level officials and one member, appointed by the President, from each state affected by the decision." *Id.* The Secretaries of the Departments of Agriculture and Army, the Administrators of the EPA and National Oceanic and Atmospheric Administration, and the Chairman of the Council of Economic Advisors fill the cabinet-level positions. *Id.* at n.205 (citing 42 U.S.C. § 1536(n)).

I would replace the Army Secretary with the Secretary of Defense, and add an additional member—the Chairman of the CEQ. Accordingly, the states affected by the decisions, the EPA, and federal facilities would all have representation on the committee.

[475] *See* 50 C.F.R. § 452.03. The Secretary of the Interior currently has the authority to appoint an ALJ to conduct a hearing to elicit information, for an administrative record, that the ESC will review. *Id.* In my proposal, the ALJ would fulfill two functions:

> (1) Elicit information for subsequent review by the committee (compile an administrative record) and, in so doing;
>
> (2) Evaluate the issue proposed by the parties to determine if it is a proper issue for the committee to consider (gate-keeping).

Congress must task the EPA to develop criteria that the ALJs will use in determining the propriety of an issue for review. The agency will then set these out in the *Code of Federal Regulations*.

[476] Congress granted the ESC "broad authority to receive evidence" and make decisions, yet these "decisions are subject to judicial review." Diner, *supra* note 239, at 192 (citing 42 U.S.C. § 1536(n)). *See* Jared des Rosiers, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825, 845-46 (1991) (providing a detailed discussion of the ESC).

Binding IAGs, with sanctions for failure to comply, coupled with this proposal to address disputed issues, will alleviate many of the problems with the current IAG process and make it much more effective. Nevertheless, this alternative still poses significant problems.

First, the parties would still set clean-up standards on a site-by-site basis. The ARARs process, by allowing many parties to play a role in determining clean-up standards for a particular site, dictates use of this method.[477] As such, standards for, and the quality of, federal facility cleanups will never be consistent. Additionally, states and the EPA will continue be subject to the same biases and economic and political pressures that hamper their effectiveness. Finally, this alternative still financially overburdens the states and the EPA, although to a lesser extent than the first two alternatives.

3. Summary—This third alternative has the potential to succeed should Congress act on these proposals and (1) mandate use of the IAG process, (2) make IAGs binding on all parties with enforceable provisions for failure to comply, and (3) provide a method for resolving disputes between the parties. However, Congress must also address, at the least, issues involving the consistency of clean-up standards and quality and proper funding for the states, the EPA, and federal facilities to manage the clean-up process. Until Congress deals with these and all of the issues previously discussed, this alternative is not viable.

One apparent concern with this dispute resolution committee is that it would be required to review too many disputes between parties to make it feasible. I have three responses:

> (1) Congress, in legislation creating the new IAG process and the dispute resolution committee, will strongly encourage parties to resolve conflicts in drafting their IAGs. It will indicate that—much like the ESA's God Squad—it is a committee of last resort. (The ESC has considered very few requests for exemption in its history).
>
> (2) Congress will direct the ALJs to be gate-keepers/mediators. Congress will encourage them to resolve conflicts at this lower level.
>
> (3) Once the committee begins issuing decisions on issues that consistently present conflicts between IAG parties, it will set precedents that ALJs will rely on at their lower level. These early decisions may even deter parties from requesting review once they know how the committee has ruled on a particular issue.

477 Stakeholders—including states, local governments, potentially liable parties, and ideally, potentially affected members of the surrounding community—negotiate with the Agency about a separate cleanup plan for each contaminated site. Thus, in its current design, the Superfund program cannot provide citizens with a minimum level of protection regardless of whether the federal government or the states administer it.

Federalism and Hazardous Waste, *supra* note 4, at 1538 (citing Douglas J. Sarno, *Risk and the New Rules of Decision-Making: The Need for a Single Risk Target*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,402 (July 1994) ("arguing for a single national risk target to assure adequate and consistent levels of protection in all communities")) (citations omitted).

E. Create a National Environmental Committee

The fourth and final alternative recommends that Congress create a new entity called the National Environmental Committee (NEC). Congress must provide this committee with the authority to regulate the clean-up process at federal facility NPL sites without interference from the RCRA and CERCLA. Consequently, it also must amend the two statutes to indicate that the NEC controls cleanups at such sites. Moreover, it must amend the RCRA to indicate that its "corrective action" provisions do not apply to federal facility NPL sites.[478] Should Congress grant this new committee such authority, the clean-up process at these sites would reap significant benefits.

1. The Benefits—With the NEC regulating cleanups, control rests with only one entity. Thus, dual regulation and a duplication of efforts under two or more regulatory authorities are no longer concerns. The NEC also represents federal oversight of federal facility environmental restoration program funds. Moreover, the NEC will develop and implement national cleanup standards and presumptive remedies, avoiding inconsistency in clean-up standards or quality. The NEC also can evaluate contaminated sites on a national level, using risk assessment to prioritize cleanups on a "worst-first" basis.[479]

Additionally, the NEC will consider future land use, cost-effectiveness, and risk-assessment in selecting an appropriate remedy, thereby (in part) avoiding the "the last 10%" problem.[480] With only one party managing the cleanup, all roles are defined and the IAG process becomes unnecessary. Thus, there are no negotiations and no need for a dispute resolution authority. Moreover, the entity in control of the cleanup will not be affected by local biases or economic or political pressures. Finally, the NEC will not be overburdened or overtaxed because it will only deal with federal facility NPL sites. Having the committee control the clean-up process will reduce federal clean-up expenditures substantially by reducing regulatory gridlock. In so doing, it will more than pay for itself.

2. The Potential Drawbacks—Opponents undoubtedly will argue that the formation of the NEC poses potential concerns. Before I address these potential concerns, readers should have a basic understanding of this new committee and how it will work to

---

[478] *See supra* notes 349-55 and accompanying text.

[479] *See supra* notes 420-22 and accompanying text (discussing the Defense Priority Model (DPM), which prioritizes contaminated sites on a "worst-first" basis).

[480] *See* BREYER, *supra* note 33, at 11. Justice Breyer questions the logic in spending an inordinate amount of money to clean up "the last 10%" of contamination at a site when doing so will realize no significant environmental benefits. If the site will not contain "dirt-eating children" after completion of the cleanup, why clean it to a level such that "babies can eat dirt?" Consideration of the future use of the site will assist in determining the need to clean up the last ten percent of contaminants. *See also infra* notes 532-39 and accompanying text.

resolve the problems created by the present system. Accordingly, Part VI will address these concerns once I have laid the foundation for the NEC.[481]

VI. Recommendations

Congress must immediately amend the CERCLA to create the NEC. Congress must also direct that this committee assume responsibility for, and control over, the clean-up process at federal facility NPL sites. These amendments will provide federal facilities with immediate relief from the regulatory gridlock that they now experience due to overlapping statutory and regulatory authorities. The following subparts both define the NEC and indicate how it will provide such relief.

A. The National Environmental Committee

1. The NEC Defined—The NEC will be patterned after the Board of Governors of the Federal Reserve System (Federal Reserve Board).[482] It will consist of twelve members (including a chairman and a vice-chairman) appointed by the President, by and with the advice and consent of the Senate.[483] The President will appoint

---

[481] *See infra* notes 540-46 and accompanying text.

[482] *See* Federal Reserve Act, ch. 6, 38 Stat. 251 (codified as amended at 12 U.S.C. § 226 (1913)). The Federal Reserve Act, signed into law on December 23, 1913, by President Woodrow Wilson, originally named the board the "Federal Reserve Board." The Banking Act of 1935, ch. 614, 49 Stat. 684 (1935), in section 203(a), changed the name to the "Board of Governors of the Federal Reserve System." However, the board is still commonly referred to as the "Federal Reserve Board."

Among its many stated purposes, Congress indicated that the board was designed "to establish a more effective supervision of banking in the United States." *Id.* Congress must design the NEC "to establish *a more effective supervision* of the restoration process at federal facility Superfund sites." *See also* Boyce Brainerd, *Northeast Bancorp, Inc. v. Board of Governors: Green Light For Regional Interstate Banking*, 35 AM. U. L. REV. 387, 387-88 & nn.2, 4 (1986).

[483] *See, e.g.*, 12 U.S.C. § 241 ("The Board of Governors of the Federal Reserve System . . . shall be composed of seven members, to be appointed by the President, by and with the advice and consent of the Senate."). Unlike the Federal Reserve Board, the NEC will consist of 12 members, representing the ten environmental jurisdictions, or EPA regions, across the nation. In selecting these members, the President "shall have due regard to a fair representation of the financial, [environmental,] agricultural, industrial, and commercial interests, and geographical divisions of the country." *Id.* The President should select highly qualified individuals that bring unique knowledge, skills, and experience to the committee. Expertise in environmental issues is not a prerequisite for selection. Some members may have superior abilities in financial, industrial, scientific, and legal matters, for example, all of which will be vital to the effective operation of the committee.

See also infra note 545 and accompanying text (discussing the importance of appointing members from each environmental region, to ensure that each geographical area—that is, the states—has proper representation on the committee).

these members for fourteen-year terms, to be removed from the committee only on good cause.[484] Congress will stagger the initial termination dates of each member so that no two members vacate positions within the same calendar year.[485]

The NEC will be located in Washington, D.C., in close proximity to the EPA and the CEQ.[486] Congress must encourage a strong working relationship with these and other federal agencies. However, Congress must grant the NEC authority over such federal agencies to facilitate the committee's use of their resources. This will enhance the NEC's ability to accomplish its stated objectives.[487] The committee will also receive support from a Washington, D.C. staff—

The President also will appoint a Chairman and a Vice-Chairman, by and with the advice and consent of the Senate, for a total of 12 members on the NEC. The Chairman and Vice-Chairman will serve for four years each. *See, e.g.*, 12 U.S.C. § 242.

[484] *See id.* (appointing Federal Reserve Board members for 14 years); *id.* § 242 (provision for removing a member of the Federal Reserve Board for cause by the President). Removing a member only on "good cause" will help ensure that the committee is free from political pressures—a factor that is fundamental to its effective operation.

Once a member's term has expired, that member "shall not be eligible for reappointment as such member after he [or she] shall have served a full term of fourteen years." *Id.* The President will appoint new members in the same manner that he appointed original members. The President also will have the authority to fill vacancies during a recess of the Senate, just as President Clinton did recently with the new Chairman of the CEQ. *See Senate Environment Panel Holds Hearing, Delays Vote on McGinty to Chair CEQ*, Nat'l Env't Daily (BNA), Sept. 28, 1995, at 1 (indicating that President Clinton appointed Katie McGinty as the new CEQ Chair during a recess of Congress. She was subsequently confirmed during the next session of Congress). The member's "term" will commence at the beginning of the next session of Congress, pending confirmation by the Senate.

If a member vacates a position prior to the expiration of that member's term, the President shall appoint a successor, by and with the advice and consent of the Senate, to fill the position for the unexpired term of his predecessor. *See* 12 U.S.C. § 244. That new member may be reappointed by the President to a full 14-year position.

[485] The President will stagger appointments so that one member's term expires on January 31 of each calendar year. This measure is designed to lessen the affect of members leaving the NEC, and to limit the power that the President has to effect a change on the committee through the appointment of new members. The NEC has more members than the Federal Reserve Board to provide for both greater representation from the regions (representing states' interests) and to lessen the impact of new appointees.

See, e.g., 12 U.S.C § 242 ("Upon the expiration of the term of any appointive member . . . the President shall fix the term of the successor to such member at not to exceed fourteen years, as designated by the President at the time of nomination, but in such manner as to provide for the expiration of the term of not more than one member in any two-year period.").

[486] *See, e.g., id.* §§ 243, 244 (indicating that the Federal Reserve Board would acquire a location in the District of Columbia "suitable and adequate . . . for the performance of its functions"). I envision regular contact with the EPA, CEQ, and other principal environmental officials within the administration, as well as frequent meetings with the President.

[487] The NEC must have the power to coordinate the activities of other federal agencies concerning the clean-up process at federal facilities.

the chairman will determine the specific number[488]—to assist in meeting these objectives.

As with any other executive agency, Congress will monitor the progress of the NEC. To facilitate this objective, Congress will require the NEC to file an annual report,[489] and the General Accounting Office (GAO) will conduct regular reviews of the committee's activities. The NEC always will be subject to change through the legislative process.[490] Although its goal will be to further the nation's restoration objectives at federal facilities,[491] it must operate with the other branches of government to accomplish this task.[492] However, the requirement to function with the other branches must be balanced against the NEC's need for freedom from economic and political pressures. Such freedom is only one of the many advantages that the NEC affords to the federal facility clean-up process.

B. The Positive Aspects of the NEC

The NEC possesses many positive attributes, some of which are not present with state, EPA, or joint control of cleanups at federal facilities. These attributes include prestige, power, insulation, independence, and experience.[493]

---

[488] The Federal Reserve Board has a staff of 1700. I envision a *much* smaller staff for the NEC, especially in this era of "rego," or reinventing government on a *much* smaller, less-expensive scale. *See supra* note 70. The staff will be comprised of individuals knowledgeable in the various areas over which the committee will exercise control. Examples include such diverse areas as: water, air, and surface pollution; hazardous, toxic, and radioactive wastes; unexploded ordnance; health and safety issues; legislation; law; economics/finance; and science. Thus, the staff will assist the NEC in a manner similar to how the Science Advisory Board (SAB) aids the EPA.

[489] *See, e.g.*, 42 U.S.C. § 247 (reports to Congress). The NEC must forward the report to the Speaker of the House, who will publish it for the entire Congress. Committee members often will be asked to testify before Congress on issues that the committee is, or will be, addressing.

[490] The NEC will owe its mandate and existence to Congress. However, with members appointed by the President for 14-year terms, only to be removed on good cause, Congress will have to abolish the committee or legislate away its powers to effect it. Moreover, Congress must ensure that compelling reasons exist to support any changes that it makes to the committee.

I envision the NEC working like a mutual fund. Congress may experience highs and lows with the committee, but must have faith that in the long term it will receive a substantial return on its investment.

[491] It will accomplish this by achieving its primary goal of establishing an effective *system* by which federal facilities will conduct cleanups of contaminated sites.

[492] The NEC must follow the Federal Reserve Board's lead. The Board has established a working relationship with the executive branch and "works according to the objectives of economic and financial policy established by the executive branch." FEDERAL RESERVE BOARD (FRB), FEDERAL RESERVE SYSTEM, PURPOSES AND FUNCTIONS BOOKLET 3 (8th ed. 1994) [hereinafter PURPOSES AND FUNCTIONS].

[493] *See* BREYER, *supra* note 33, at 59-61 (Justice Breyer states that his small, centralized, administrative group must have five characteristics or features—(1) a specified risk-related mission; (2) interagency jurisdiction; (3) political insulation; (4) prestige; and (5) authority). Some of these features apply to the NEC as well. As such,

1. Prestige[494]—The NEC must have prestige to be effective. The committee will acquire it by two separate methods. First, prestige will arise out of the qualifications possessed by the President's appointees. Individuals accomplished in the diverse areas in which the committee will function, although not necessarily "experts," will lend much credibility to NEC actions. Second, over time, the NEC will acquire prestige through decisions that are effective in solving the problems that presently plague federal facilities. The public will come to accept its decisions as well-reasoned, objective, and authoritative.[495]

2. Power[496]—The committee's power is directly connected to its prestige. Any committee of this nature must have the ability to take actions necessary to attain the desired results. The NEC will derive this power from a number of different sources. For example, Congress could legislatively grant the NEC the authority to implement its decisions.[497] Moreover, the prestige of the committee—based on its members' qualifications and its overall effectiveness—will provide it with additional power to administer its decisions. A reputation for sound decision making will only increase the committee's power.[498]

---

with proper acknowledgment, I adopt some of Justice Breyer's explanations of these features.

[494] *Id.* at 61.

[495] *Id.* (indicating that "prestige must both attract, and arise out of an ability to attract, a highly capable staff"). Justice Breyer also notes that "[i]nsofar as a systemic solution produces technically better results, the decision will become somewhat more legitimate, and thereby earn the regulator a small amount of prestige, which may mean an added small amount of public confidence." *Id.* at 63.

[496] *Id.* at 62-63.

[497] Congress *must* grant the NEC the same powers that it provided to the Federal Reserve Board. "The Federal Reserve is sometimes considered a fourth branch of the U.S. government because it is made up of a powerful group of national policymakers freed from the usual restrictions of governmental checks and balances." PURPOSES AND FUNCTIONS, *supra* note 492, at 3.

[498] The Federal Reserve Board provides an excellent example of this occurrence. The board is considered

> a known quantity as a bank regulator. It has a record of accomplishment, a distinguished tradition, and a reputation for integrity and *thoughtful decision-making. The fact that the Congress has repeatedly* seen fit to assign the Board of Governors the task of developing industry-wide regulations in the increasingly important consumer protection area must mean that the Congress, if not the country at large, has confidence in the Board's objectivity and judgment.

Statements to Congress, 62 FED. RESERVE BULL. 323, 323 (Apr. 1976) (statement by Arthur F. Burns, Chairman, Board of Governors of the Federal Reserve System, before the Subcommittee on Financial Institutions Supervision, Regulation, and Insurance of the Committee on Banking, Currency, and Housing, United States House of Representatives on March 18, 1976); *see* BREYER, *supra* note 33, at 61-63.

3. Insulation and Independence[499]—To be effective, such a committee must remain relatively free from economic and political pressures. It cannot operate any other way.[500] The NEC achieves this freedom from its design. Members appointed for fourteen-year terms, whom Congress and the President can remove only for good cause, possess the necessary "tenured" status.[501] The committee thus maintains a certain level of independence to make decisions that, although they might not be popular, will be successful over time.[502]

Nor is the committee subject to the same pressures that state regulators or the EPA experience. State regulators feel the economic pressure of home-town developers and the political pressure of state legislatures. The EPA is constantly pressured by Congress and the executive branch to conduct faster and more cost-effective cleanups. And, of course, every member of Congress wants these cleanups performed in their jurisdiction first. The NEC's decision making must be devoid of similar influences to be the valuable decision-making body that I envision.

4. Experience[503]—A group such as the NEC joins highly qualified individuals in the pursuit of what is basically one goal—expedient, cost-effective clean ups of federal facility NPL sites. Each member initially brings his or her own experience and expertise to the committee. Thereafter, the committee gains additional experience and expertise through working on one specific set of issues over an extended period of time. Moreover, as the NEC's level of experience and expertise increases, so, too, will its prestige and power to implement its decisions.

---

499 By independence, I mean that "its decisions do not have to be ratified by the President or anyone else in the executive branch," or by Congress or the states. PURPOSES AND FUNCTIONS, *supra* note 492, at 8. The NEC must operate "within the framework of the overall objectives of . . . government." *Id.* As such, it actually will work "independent within the government." *Id.*

500 Federal Reserve Board Chairman Alan Greenspan characterized the Board as "resilient and useful," indicating that "in the past, the Congress has steadfastly supported the independence of the Federal Reserve. I can only encourage the Congress . . . to reaffirm this commitment." *Statements to Congress*, 75 FED. RESERVE BULL. 795, 807 (Dec. 1989) (statement before the subcommittee on Domestic Monetary Policy of the Committee on Banking, Finance, and Urban Affairs, United States House of Representatives, Oct. 25, 1989). Congress must support the independence of the NEC as well.

501 The NEC, like the Federal Reserve Board, will be "formally independent of the executive branch and protected by tenure well beyond that allotted to the President." PURPOSES AND FUNCTIONS, *supra* note 492, at 4. These provisions are intended to ensure that the members are insulated from day-to-day politics.

502 *See* BREYER, *supra* note 33, at 63 ("Bureaucratic solutions, if sound and coherent, resting on well-constructed comparisons . . . offer administrators the promise of a modest increase in independence, through greater insulation from public criticism of individual decisions.").

503 *Id.* at 62.

5. Summary—Listed above are the positive aspects of a committee such as the NEC. These qualities will enable it to bring about many changes in the current clean-up process that the states, the EPA, or both could not. Such changes inevitably will improve the overall cost, speed, and quality of cleanups at federal facility NPL sites. Part VI.C discusses changes that the NEC must implement, the effect of these changes, and any specific grants of power that Congress must make to the NEC to allow it to make such changes.

C. Specific Changes That the NEC Must Make

Creating a group like the NEC provides an opportunity to make improvements in the clean-up process like those detailed in the following sections. Congress has considered some, but not all, of these revisions in recent proposed legislation, but has failed to adopt any of the measures.[504] Accordingly, although I advocate that the NEC modify only the current federal facility NPL site clean-up process, I recognize that some of these changes apply to the clean-up process at the remaining sites as well. Congress must adopt those recommended reforms that will streamline the clean-up process at the remaining sites.

Why, then, do we need the NEC? As the following sections demonstrate, we need an NEC because some of my recommendations for change are either unique to a group such as the NEC or are more easily implemented by such a group.

1. National Risk-Based Prioritization—The NEC, by using a system similar to the Defense Priority Model (DPM),[505] will be able to prioritize federal facility sites on a national level. The committee will assess the relative risk of each site,[506] rank order them according to that risk,[507] and clean the sites on a "worst-first" basis.[508]

---

[504] *See* Superfund Reform Act, H.R. 3800, 103d Cong., 2d Sess. 1 (1994) [hereinafter H.R. 3800]; *see also* David Hosansky, *Superfund Bill's Supporters Look to Next Congress*, 52 CONG. Q. 2865, 2865-66 (1994).

[505] *See supra* notes 420-22 and accompanying text (describing the DPM). The NEC's system will provide greater benefits than the EPA's Hazard Ranking System (HRS) because it will incorporate the results of the remedial investigation (RI) into its assessment of the site's risk.

[506] In assessing the relative risk, the NEC will use a given set of criteria. It will consider, among other things, the threat posed to the community's health and to the environment, taking into account the anticipated future use of the land. *See infra* notes 532-39 (discussing consideration of future land use).

[507] The NEC will develop the equivalent of the Federal Facilities Hazardous Waste Compliance Docket. The NEC's docket will list all federal facility NPL sites. The NEC will then rank them according to the risk that they pose.

[508] The NEC will not prioritize BRAC sites appearing on the NPL on this basis. The "worst first" basis will only apply to active installations, which receive clean-up funding from the DERA. There is growing support for addressing sites at closing facilities on a "best-first" basis. This would allow sites requiring less treatment to be

Consequently, the most heavily contaminated sites will receive increasingly scarce environmental restoration dollars first. Such centralized priority setting avoids the problems associated with each of the fifty states requiring federal facilities to clean its sites first. The NEC also will work closely with federal facilities and community working groups (CWG)[509] to set priorities on a site-by-site basis so that the most pressing work at each site will be accomplished with the resources that are immediately available.[510]

2. National Clean-Up Standards—The NEC must develop national clean-up standards for use at all federal facility NPL sites. Clean-up standards, and the remedy selected to meet those standards, represent the core of the clean-up process at any site. Consequently, the clean-up standards that the NEC establishes, and the remedies it selects—more than any other tasks that it performs—will determine the success of the clean up.[511]

By "success of the cleanup" I mean *protecting human health and the environment in the most timely and cost-effective manner possible*. Yet this definition begs the question of what level of cleanup protects human health and the environment.[512] At what

---

cleaned up and transferred for private use as quickly as possible. One commentator explained as follows:

> [The] DOD, EPA, and the states should be directed to make "best first" their priority in all remedial work at closing bases. More parcels of land would be sold sooner, increasing revenue flow to DOD and facilitating wider redevelopment options. "Best first" priorities are also critically needed to allow effective interim leasing before land sale.

Raymond Takashi Swenson, *A Modest Proposal: Reforming Base Reuse Law*, 6 FED. FACILITIES ENVTL. J. 11, 12 (Summer 1995). This is an excellent illustration of one of the advantages that the NEC provides—*flexibility*. The committee possesses the ability to comprehensively analyze these types of issues to arrive at sound, well-informed decisions, and has the flexibility to redirect resources to these "best" sites if its analysis indicates that such action is warranted.

[509] *See infra* notes 540-44 and accompanying text (discussing Community Working Groups and state and local involvement).

[510] A concern exists that setting national priorities and cleaning on a "worst-first" basis will result in misallocating vital clean-up dollars to remediate *all* contaminated sites at facilities listed on the NPL. Some of the many sites at these facilities have only small amounts of contamination. *See supra* note 364 and accompanying text (discussing "fenceline-to-fenceline" listing on the NPL). Thus, the belief is that scarce funds should not be spent on cleaning up these slightly-contaminated sites. Prioritizing at each facility removes the potential for imprudent spending of limited funds, by identifying the most heavily contaminated sites at each facility, which the NEC will then consider when ranking sites in order of need.

[511] *See* Henley, *supra* note 74, at 24-25.

[512] *See Federalism and Harzardous Waste*, *supra* note 4, at 1518-19 & n.13 & 16 (citing PAUL A. LOCKE, ENVTL. L. INST., RES. BRIEF NO. 4, REORIENTING RISK ASSESSMENT 7-8 (1994); EPA, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS—OVERVIEW REPORT xv, 95, 96 (Feb. 1987)) (indicating that the EPA announced several years ago that it spends a disproportionate amount on hazardous wastes compared to other known risks—pesticides in food, air pollution,

level must federal facilities set clean-up standards to provide such protection? The definition also sidesteps the issue of when a cleanup is no longer timely or cost effective.[513]

The current process—mandated by the CERCLA—of allowing state and local governments to require that federal facilities include ARARs (federal, state, and local standards) in site-specific clean-up standards causes significant problems. Federal facilities must often clean sites to meet unnecessary standards and address speculative risks,[514] which only delays the cleanup and increases its costs. Why must federal facilities do this? Simply because states and localities want their sites completely clean and their requirements are "applicable or relevant and appropriate." As such, they become binding on federal facility cleanups. When federal agencies disagree with these requirements, disputes arise over what standards are appropriate and the process stalls.

To avoid these disputes, I propose that the NEC develop standards that will govern cleanups at all federal facility NPL sites. Remedies will not be allowed to exceed certain minimum levels of contamination.[515] Minimum quantities help "guarantee a minimum level of environmental protection to citizens regardless of their place

---

ozone depletion). The article suggests that, because of the "popular conception that exposure to hazardous waste is one of the worst fates that one might suffer," as a nation we have gone too far in attempting to shield ourselves from all possible exposure. *Id.* at 1518. Clean-up standards become extremely stringent, almost to the point of absurdity. The need for such stringent clean-up standards and remedies must be re-evaluated, especially when the benefits are compared to the costs. The article points out that "[m]ost people are routinely exposed to potentially toxic and carcinogenic substances as they gas up their cars, clean their houses, refinish their furniture, and engage in countless other day-to-day activities." *Id.* at n.13.

513 One commentator explains cost effectiveness as follows: One remedial option may cost $20 million and provide X level of protection. A second option costs $40 million and provides 3X level of protection. A final option costs $400 million and provides only 4X level of protection. Do you need that extra level of protection in light of the added cost? Which remedy do you select? *See* ARBUCKLE, *supra* note 49, at 86; Henley, *supra* note 74, at 25.

The problem lies in the changes that the SARA made to the CERCLA. The SARA indicated a preference for permanent solutions and imposed the ARARs process on federal facility cleanups. *See supra* notes 206-12 and accompanying text. Although the SARA was designed to address the issue of "How clean is clean?"—that is, define clean-up standards—the result was more burdensome standards, more expensive cleanups and, quite possibly, no additional protection at many sites.

514 *See* Henley, *supra* note 74, at 25 & n.230 (citing U.S. OFFICE OF TECHNOLOGY ASSESSMENT, COMING CLEAN: SUPERFUND PROBLEMS CAN BE SOLVED 3 (Oct. 1993)) (indicating that the "U.S. Office of Technology Assessment has estimated that about 50% of cleanups address speculative risks, which preempt spending to identify and reduce current risks at other sites").

515 For example, Congress considered a specific reform in recent legislation concerning the development of "National Applicable Requirements" (NARs) (the alternative to ARARs). The proposal requires the development of "one single numerical cleanup level for each of the 100 contaminants most often found at Superfund sites." Hanash, *supra* note 18, at 116-17; H.R. 3800, *supra* note 504, at 45. The goal of these standards would be to prevent *unreasonable* risks.

of residence"[516] (at least as far as federal facility Superfund sites are concerned). These new standards also will bring much desired consistency and uniformity to the clean-up process, resulting in consistent quality at federal facility NPL sites nationwide.

By implementing uniform standards for all of these sites, the NEC will avoid the ARARs process completely. As such, the NEC will avoid the delays, and related costs associated with "selecting, negotiating, and disputing individual sets of ARARs for each and every cleanup site."[517] Instead of spending countless years and billions of dollars investigating, debating, and then litigating the appropriate standards,[518] uniform clean-up standards will expedite both the assessment/investigative phase and the remedy selection process.[519] This will allow federal facilities to begin timely clean ups of dangerous sites.

3. Remedy Selection—The NEC will incorporate presumptive remedies, *real* risk-assessment, cost-effectiveness, and future land use into remedy selection. Federal facilities, as lead agencies in the clean-up process at their sites, will be charged with developing appropriate remedies and presenting them to the committee. The NEC will grant final approval.

The current remedy selection process, as previously mentioned, is ineffective. The CERCLA's preference for permanent remedies[520] typically results in remedies that are inappropriate for the clean up of a site.[521] Conversely, the NEC will possess the flexibility to adopt creative and innovative techniques that are less expensive and time consuming, but do not pose a threat to human health.[522]

---

516 Percival, *supra* note 24, at 1171-72 (indicating further that "in a nation with high population mobility, federal minimum standards help guarantee that citizens can travel freely without encountering unreasonable risks to their health or welfare from environmental conditions"). The passage cites to a recent article relating that "more than 21 million Americans moved from one state to another between 1985 and 1990," and that "less than 62% of the U.S. population resided in the state in which they were born" as of 1990. *Id.* at n.145 (citing JOHN J. DIULIO, JR. & DONALD F. KETTLE, FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM 6 (1995)).

517 Hanash, *supra* note 18, at 117.

518 This is precisely what federal facilities have done at many sites, to include the TCAAP and the Rocky Mountain Arsenal. *See supra* note 29.

519 Establishing national standards makes remedy selection much less complicated, as long as these national standards are "reasonably clear and objective." *Federalism and Hazardous Waste*, *supra* note 4, at 1537. Federal facilities will no longer have to contend with inconsistent and often unattainable standards at every site.

520 42 U.S.C. § 9621.

521 For example, the EPA may impose stringent clean-up standards and require permanent remedies designed to clean landfills to residential use standards.

522 *See* Henley, *supra* note 74, at 34. The NEC will consider such alternative remedies as interim/long-term containment with interim/long-term monitoring, which are much less expensive than permanent treatment options.

a. Presumptive Remedies—The NEC will adopt presumptive (or generic) remedies for use at federal facility cleanups.[523] Presumptive remedies are nothing other than "cleanup methods or technologies that have proven successful in the past and can be used to remediate the same type of contamination at other . . . locations."[524] Although a tremendous effort goes into determining the proper remedy for a site under the current process, studies show that the same remedies are used for certain types of sites over and over again.[525] Use of presumptive remedies obviously has the potential to streamline remedy selection and expedite the clean-up process. The NEC will facilitate this by becoming a clearinghouse for techniques that facilities have successfully applied at contaminated sites.[526] The NEC will monitor the progress of various techniques to determine what *works best* and identify such remedies for future use.

b. Risk Assessment and Cost-effectiveness—The current process requires that risk assessment be conducted at a site to guarantee that the selected remedy "protects human health and the environment."[527] The NCP requires regulators to assess the risks posed by contaminants at a site. They accomplish this by assessing the toxicity of the contaminants and the amount of human exposure to them. By failing to consider the *actual* future use of the land,[528] however, regulators assess the risks of exposure much higher than they actually are. This results in more stringent standards and more costly, time-consuming remedies. The NEC must consider the real risk posed by contaminants at the site by considering the actual future use of the land. This will allow it to properly assess the risk of exposure. National clean-up standards will then be applied, and a remedy selected based on actual risks.

Moreover, the NEC will clarify the discrepancy between the RCRA and the CERCLA as to consideration of the cost-effectiveness of a remedy. The recent legislation considered by Congress indicated that cost effectiveness must be taken into account in the remedy

---

523 The DOD is attempting to use presumptive remedies now. Wegman & Bailey, *supra* note 2, at 897 & n.185 (citing *Hearings Before the Defense Subcomm. of the House Appropriations Comm.*, 103d Cong., 2d Sess. 4 (1994) (statement of Sherri Wasserman Goodman, DUSD(ES)).

524 Hanash, *supra* note 18, at 117.

525 Henley, *supra* note 74, at 44.

526 A common criticism of the current process is that no centralized database exists from which federal facilities can review the success of various technologies to assist in selecting an appropriate remedy.

527 42 U.S.C. § 9621(b)(1). *See* 40 C.F.R. § 300.430(d)(4).

528 *See infra* notes 532-39 and accompanying text. The current process requires an assumption that the future use of the land will be residential. Estimates as to human exposure to the contaminants will be higher. However, this often fails to accurately assess the actual likelihood of exposure. *See also* Henley, *supra* note 74, at 41.

selection process.[529] This does not mean that the NEC will consider the *cost* of a remedy, but the cost benefit of a remedy. It is worth the extra money to clean up the last ten percent of contamination at a site? What risks does the last ten percent pose compared to the amount of money necessary to clean it up? As one commentator noted, "Measuring benefits . . . would also help calibrate cleanup costs more closely to real health benefits, avoid extravagant cleanups of properties posing little likelihood of human exposure, and conserve resources for the cleanup of sites truly raising health concerns."[530] In short, the NEC would look for the least expensive remedy that provided the required protection to human health and the environment.

c. Future Land Use—The last, but certainly not the least, consideration that the NEC will incorporate into remedy selection is the reasonably anticipated future use of the land.[531] Most commentators see this as the most important consideration, indicating that the future use of a site "must control the decisions for selection of a remedy."[532]

Currently, regulators frequently require that sites be cleaned to unnecessarily high standards. They normally assume that, after cleanup, the site will be used for residential purposes, and must be cleaned to residential use standards. Why? Arguably, because as long as federal facilities are paying for the clean up, states will demand that their sites be returned to pristine conditions. The EPA follows the CERCLA's preference for permanent remedies, and requires such remedies to meet the most stringent standards for protection of human health and the environment.[533] In the revised National Contingency Plan (NCP)[534] the EPA actually included "an assumption that the future use of a hazardous waste site would be residential."[535]

Requiring that all sites be cleaned to residential use standards is illogical. It is simply a lingering result of the context in which Congress enacted the CERCLA.[536] Even Congress must now recog-

---

529 H.R. 3800, *supra* note 504, at 49-51.

530 Henley, *supra* note 74, at 43.

531 The 103d Congress considered the future land use issue in the recent Superfund reform legislation. H.R. 3800, *supra* note 504, at 49.

532 Henley, *supra* note 74, at 37. "It is land use which must drive risk assessment and cleanup standards must be shaped to match intended use. . . . assumptions about future use must dominate risk assessment and cleanup target determinations." *Id.* at 37-38.

533 42 U.S.C. § 9621.

534 40 C.F.R. § 300; *see supra* notes 136 & 260 (discussing the NCP).

535 Wegman & Bailey, *supra* note 2, at 892.

536 *See supra* notes 174-79 and accompanying text.

nize that the additional time and resources allocated to a cleanup under the "residential use assumption," when the anticipated or actual future land use is *not* residential, are unwarranted.[537] Human health and the environment recognize no increased benefit, and the resources wasted on the additional clean-up measures could, and should, be reallocated to other work.[538]

Taking future land use into account in selecting a remedy will make that process less onerous on federal facilities. It will undoubtedly improve the cost effectiveness of the clean-up process significantly. Finally, it will expedite the overall process, allowing the contaminated property to be transferred more quickly to viable economic use.[539]

D. Potential Concerns

One potential objection to creating the NEC is that by granting control to a "national" administrative agency, Congress will limit state and local community involvement in the clean-up process. The initial response to this objection is that the NEC's primary purpose is to avoid the problems associated with involving multiple state and federal agencies in clean-up determinations. Full state and local participation in clean-up decisionmaking will lead to the same confusion, conflict, and delay that the process is now experiencing, for all of the reasons previously set forth.[540]

---

[537] Senator Barbara Boxer (D-CA) recently criticized the application of the "residential use assumption." She questioned the logic, as many before and after her have, of cleaning up facilities that will subsequently be used for industrial purposes to a level that would allow children playing in a sandbox "to eat the sand." Hanash, *supra* note 18, at 116.

[538] The "EPA has told Congress that this conservative [remedy selection] approach may "significantly increase the costs of cleanup without commensurate benefits." Wegman & Bailey, *supra* note 2, at 892 & n.157 (citing *Hearings Before the Subcomm. on Trans. & Hazardous Materials of the House Comm. on Energy & Commerce*, 103d Cong., 1st Sess. 30 (1993) (testimony of Robert Sussman, Deputy Administrator, EPA)).

[539] Caution must be exercised when determining the future land use of a site for this very reason. The community that will receive the property once the cleanup is complete has an incentive to indicate that the future land use will be anything other than residential. As such, they receive the property more quickly. However, circumstances may change over time causing the community to want to use the land for residential purposes.

To avoid this occurrence, the NEC will coordinate with Community Working Groups, who will assist the NEC in determining the actual future land use. These determinations will subsequently be incorporated into deed restrictions, covenants, or zoning ordinances that will restrict the future use of the land. *See* Henley, *supra* note 74, at 33-34; Wegman & Bailey, *supra* note 2, at 893-94.

[540] *See supra* notes 434-49 and accompanying text (analyzing increased state involvement in cleanups at federal facilities).

The alternative is to incorporate state and local concerns into the process through other means. Congress has recently considered establishing CWGs,[541] local panels that would replace entities like the Restoration Advisory Boards (RAB) previously used by the DOD. Such groups will serve as the primary vehicle for providing community input into decisions regarding cleanup. I envision a similar entity at each federal facility site, especially the larger, multibillion dollar cleanups, where local expertise on a wide variety of issues will be necessary. The groups will be comprised of a diverse, but relatively small, number of members, based in large part on the size of the cleanup.[542]

The NEC will establish these groups at the beginning of the clean-up process and allow for their complete involvement in all phases of the cleanup. The assistance that these groups can provide is unlimited and invaluable, especially on the critical issue of future land use recommendations.[543] The groups will provide the NEC with "direct, regular, and meaningful consultation with all interested parties."[544]

A second method of incorporating regional, state, and local concerns into clean-up decisions is through the selection of NEC members based on geographical regions. Such selections must "have a due regard for geographical divisions of the country."[545] Members will, to a certain extent, represent the interests of the geographical region from which they were appointed by the President.

Finally, as the NEC begins to effectively promote the clean up of federal facilities, the public's confidence in the committee will increase. A corresponding decrease will occur in the public's desire for input into, much less control over, the clean-up process. It is logical that the public will not clamor for change in a system that works well. States and local communities want input and control because the current clean-up system at federal facilities is "broken." This

---

[541] H.R. 3800, *supra* note 504, at 5-9.

[542] No more than 25 members should be necessary. The NEC will select these members from lists provided to it by the federal facility that is the subject of the cleanup. Local residents may volunteer for a position or be recommended by state and/or local officials. Senior representatives from the federal facility will attend the meetings and coordinate with the group, but will not take part in any of the group's decisions. The group will forward its nonbinding recommendations to the NEC. *See* Nicholas I. Morgan, *FFERDC Interim Report Sets Landmark Approach for Federal Facility Cleanup*, 4 FED. FACILITIES ENVTL. J. 121, 127-28 (Summer 1993) (discussing the Federal Facilities Environmental Restoration Dialogue Committee's Keystone Report).

[543] H.R. 3800, *supra* note 504, at 5.

[544] *Id.* at 6.

[545] *See supra* note 483.

ineffectiveness is due in large part to the regulatory gridlock that hobbles the clean-up process. Remedy the gridlock and the system becomes more effective. Once it is effective, the public's need for involvement will diminish. Justice Breyer explains this concept well:

> Trust in institutions arises not simply as a result of openness in government, responses to local interest groups, or priorities emphasized in the press—though these attitudes and actions play an important role—but also from those institutions' doing a difficult job well. A Socratic notion of virtue—the teachers teaching well, the students learning well, the judges judging well, and the health regulators more effectively bringing about better health—must be central in any effort to create the politics of trust.[546]

VII. Conclusion

> *It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something.*
>
> —*Franklin Delano Roosevelt*[547]

A. The Challenge and the Response

Federal agencies face what could be their greatest battle as they confront the environmental contamination present at facilities nationwide.[548] Unfortunately, the current system fails to give these agencies the necessary resources, or the authority, to fight this battle. The current statutory scheme is ineffective, as it creates overlapping regulatory authorities at federal facility NPL sites. The result is unnecessary disputes, extra work, increased delays, and added costs and frustration. Considering the recent reductions in funding for federal facility environmental restoration programs, clean-up length and costs are headed in the wrong direction.[549] Instead of

---

[546] BREYER, *supra* note 33, at 81.

[547] Franklin D. Roosevelt, *Address at Oglethorp University*, *in* John Bartlett, *Familiar Quotations* 970 (14th ed. 1968), *quoted in* BREYER, *supra* note 33, at 79.

[548] *See House Armed Services Comm. 1991 Hearings*, *supra* note 2, at 194 (indicating that the Pentagon referred to toxic cleanups at federal facilities as its "largest challenge").

[549] *See supra* notes 19-20 (discussing the slow pace and exorbitant costs of current cleanups); *see also supra* notes 275-303 and accompanying text (discussing funding reductions in federal facility environmental restoration programs).

maintaining a system that produces unwanted results, all parties must seek more timely and cost-efficient methods of completing these cleanups.

Congress must create an administrative body that is free from the gridlock caused by the interface of these two statutes. It must provide this group with the authority to take the necessary measures to bring about the desired results. The NEC represents such an administrative body, possessing the potential to manage the clean-up process at federal facility NPL sites to a successful conclusion.

B. The Future

I recognize that my proposal is not complete and that it likely will remain incomplete for many years. Perhaps Alan Greenspan, Chairman of the Federal Reserve Board, stated it best: "[T]he Federal Reserve as its stands today is the result of many years of informed discussion and refinement; that need not imply that its structure is the best of all possible structures. But it is one that works. It is a system in which the various parts mesh, and the job gets done."[550]

Admittedly, this is what I sought in this article—to shed light on, or at the very least, stimulate discussion about, what "system" or "structure" *works well* in facilitating timely and cost-effective cleanups at federal facility NPL sites.[551] I was driven only by a desire to discover a solution that ensured that "the job gets done"—not by a prejudice against state control of, or expanded involvement in, the clean-up process nor a bias in favor of federal facility control.[552] I concluded that the problem lies in overlapping regulato-

---

[550] *Statements to Congress*, 78 FED. RESERVE BULL. 795, 798 (Dec. 1989) (no. 12) (statement by Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System, before the Subcommittee on Domestic Monetary Policy of the Committee on Banking, Finance and Urban Affairs, United States House of Representatives, Oct. 25, 1989).

[551] Success in facilitating such cleanups will allow for the transfer of more resources to nonfederal facility NPL sites and all non-NPL sites. Moreover, if the NEC is successful with its initial task, no reason exists to limit its application to just federal facility NPL sites. Congress could expand the committee's control to a larger section of the contaminated sites.

[552] Hopefully, my solution will not be cast aside as one that emanated from a bias in favor of federal facilities. I recognize the contributions that state and local governments have made, and the opportunities that their involvement represents. However, I also recognize that over 15 years of Superfund operations have demonstrated that having more than one entity in control of the cleanups leads to inconsistent and ineffective results. I truly believe that all parties will benefit from creating such a committee, through the prompt and efficient remediation of these dangerous sites.

ry authorities. Thus, any proposed solution that removes this overlap (*e.g.*, placing authority in one entity) will provide better results than the present system. The NEC provides benefits above and beyond its exercise of sole authority over the cleanups due to its prestige, insulation, and ability to effectively implement a rational series of changes to the current system.

Over the years, those involved in the clean-up process have gained a wealth of experience in protecting human health and the environment.[553] The NEC must apply this experience by implementing valuable changes, all aimed at spending limited clean-up dollars prudently. I certainly am not advocating greater spending, just "smarter" spending. The NEC must prioritize sites properly to ensure that the money goes where it is needed most. It must develop national clean-up standards for federal facility NPL sites. Such standards will replace the current ARARs process, which is overly burdensome and leads to inconsistent clean-up standards and results. These new standards will streamline the entire clean-up process, from site assessment through remediation.[554] They will simplify the assessment phase by providing specific guidance on when a cleanup is necessary.[555] Remedy selection becomes less complicated because the level of cleanup required is more easily identified.[556]

The NEC also must incorporate real risk assessment into the remedy selection process. Assessing the risk posed by a site based on the actual future land use, instead of faulty assumptions that end up requiring more stringent standards and excessive remedies, will result in the selection of more appropriate remedies. The NEC also must consider the cost-effectiveness of a proposed remedy—seeking the least expensive remedy that affords the necessary protection to human health. Finally, the NEC must incorporate less costly alternatives into the remedy selection process through the use of presumptive remedies.

Federal agencies face a stern challenge in attempting to clean up the contamination at federal facilities caused by years of neglect. Current methods designed to meet this challenge are incapable of doing so. The NEC provides an opportunity to avoid the problems that the current clean-up system presents and to make real progress in remediating sites. The committee's experience, credibility, pres-

---

553 *See* Henley, *supra* note 74, at 45.

554 *Id.*

555 *Id.*

556 *Id.*

tige, and power will only increase over time as the public begins to recognize the advantages it provides. Any concerns that the NEC initially causes will slowly dissipate as public recognition of its effectiveness grows. I anticipate that the NEC will evolve over time, as did the Federal Reserve Board. Refinements are acceptable, even expected. Ultimately, the NEC may not be perfect, but at least FDR would be pleased that we are determined to "try something." Let the clean ups begin!

APPENDIX A

A BILL

To Amend Section 9620 of Title 42, United States Code
(the Comprehensive Environmental Response, Compensation
and Liability Act of 1980 (CERCLA)),
to create a National Environmental Committee.

SUBCHAPTER I—HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "National Environmental Act of 1996."

SECTION 2. NATIONAL ENVIRONMENTAL COMMITTEE

(a) In General—Section 9620 of Title 42 of the United States Code is amended by adding the following new paragraph:

§ 9620(k). NATIONAL ENVIRONMENTAL COMMITTEE

(1) To establish a more effective supervision of the restoration process at facilities owned or operated by a department, agency, or instrumentality of the United States (federal facility sites) included on the National Priorities List, upon the effective date of this Act, the President shall appoint a National Environmental Committee.

(2) The National Environmental Committee shall exercise complete authority over all federal facility sites included on the National Priorities List.

(3) The National Environmental Committee shall be composed of twelve members, to be appointed by the President, by and with the advice and consent of the Senate, after _____, 1996, for terms of fourteen years.

(4) Each appointive member shall continue to serve until January 31, 1997, at which time one member's term will expire. Thereafter, the term of one member per year will expire, so that no more than one member's term expires within the same one-year period. The President may reappoint, for a full fourteen-year term, any member who does not complete a full term. The President shall also appoint a successor to any member whose term expires, and shall appoint this new member for a period not to exceed fourteen years.

(5) In appointing members to the committee, the President shall have due regard to a fair representation of the financial, environmental, agricultural, industrial, and commercial interests, and geographical divisions of the country. The President shall select no more than one member from any one Environmental Protection Agency region, of which there are currently ten.

(6) The President shall also appoint a Chairman and a Vice-Chairman, by and with the advice and consent of the Senate. The Chairman and Vice-Chairman will serve four-year terms each. The President may reappoint any Chairman or Vice-Chairman for one four-year term each.

(7) Members of the committee may only be removed from the committee for good cause by the President.

(8) Section 9620(i) shall not apply to federal facility sites included on the National Priorities List. Section 9620(a)(4) shall apply only to those federal facility sites not included on the National Priorities List.

SECTION 3. EFFECTIVE DATE

The amendments made by this section (9620(k)) shall take effect on _____, 1996.

APPENDIX B

FREQUENTLY USED ENVIRONMENTAL LAW ACRONYMS

AP — Accumulation Points

ARAR — Applicable or Relevant and Appropriate Requirements

ATSDR — Agency for Toxic Substances and Disease Registry

BCA — Base Closure Account

BNA — Bureau of National Affairs

BRAC — Base Realignment and Closure (Commission/Act)

CAA — Clean Air Act (1955)

CBO — Congressional Budget Office

CEQ — Council on Environmental Quality

CERCLA — Comprehensive Environmental Response, Compensation & Liability Act (1980)

CERCLIS — Comprehensive Environmental Response, Compensation & Liability Information System

CESQG — Conditionally Exempt Small Quantity Generator

CFR — Code of Federal Regulations

COE — U.S. Army Corps of Engineers

CWA — Clean Water Act (1972)

CWG — Community Working Groups

DERA — Defense Environmental Restoration Account

DERP — Defense Environmental Restoration Program

DESR — Defense Environmental Status Report

DHS — Department of Health and Human Services

DOE — Department of Energy

DOD — Department of Defense

DOI — Department of Interior

DPM — Defense Priority Model

DRMO — Defense Reutilization and Marketing Office

DSMOA — Defense & State Memorandum of Agreement

DUSD — Deputy Under Secretary of Defense (Environmental Security) (ES)

EIRP — Environmental Impact Review Program

EIS — Environmental Impact Statement

EMF — Environmental Management Fund (DOE)

EPA — Environmental Protection Agency

EPCRA — Emergency Planning and Community Right-to-Know Act (1986)

ERRIS — Emergency & Remedial Response Information System

ESA — Endangered Species Act (1973)

ESC — Endangered Species Committee

FDA — Food & Drug Administration

FFCA — Federal Facilities Compliance Act (1992)

FFERDC — Federal Facilities Environmental Restoration Dialogue Committee

FFHWCD — Federal Facilities Hazardous Waste Compliance Docket

FEPCA — Federal Environmental Pesticide Control Act

FIFRA — Federal Insecticide, Fungicide, and Rodenticide Act (1947)

FONSI — Finding of No Significant Impact

FUDS — Formerly Used Defense Sites

FWPCA — Federal Water Pollution Control Act/Agency (1952)

FY — Fiscal Year

GAO — General Accounting Office

HEW — Department of Health, Education, and Welfare

HRS — Hazardous Ranking System

HSWA — Hazardous and Solid Waste Amendments (1984)

HWCD — Hazardous Waste Compliance Docket

IAG — Inter-Agency Agreement

IG — Inspector General

IRP — Installation Restoration Program

NAR — National Applicable Requirements

NASA — National Aeronautics & Space Administration

NAPCA — National Air Pollution Control Administration

NCP — National Contingency Plan

NCSC — National Conference of State Legislatures

NEPA — National Environmental Policy Act (1969)

NMFS — National Marine Fisheries Service

NOAA — National Oceanic and Atmospheric Administration

NOHSPCP — National Oil and Hazardous Substances Pollution Contingency Plan (otherwise known as the NCP)

NOV — Notice of Violation

NPDES — National Pollutant Discharge Elimination System

NPL — National Priorities List

OEP — Office of Environmental Policy

OHW — Other Hazardous Waste (Program)

O&M — Operations & Maintenance (Funds)

OMB — Office of Management & Budget

OTA — Office of Technology Assessment

OSHA — Occupational Safety and Health Act/Administration

PA/SI — Preliminary Assessment/Site Investigation

PCB — Polychlorinated Biphenyls

POTW — Publicly Owned Treatment Works

PRP — Potentially Responsible Party

QOL — Quality of Life (Funds)

RAP — Remedial Action Plan

RCRA — Resource Conservation and Recovery Act (1976)

RD/RA — Remedial Design/Remedial Action

RDT&E — Research, Development, Testing, & Evaluation

RFA — RCRA Facility Assessment (like a PA/SI)

RI/FS — Remedial Investigation/Feasibility Study

ROD	— Record of Decision
RPM	— Remedial Project Manager
RT&E	— Research, Testing & Development (Funds)
SAPs	— Satellite Accumulation Point
SARA	— Superfund Amendments and Reauthorization Act (1986)
SDWA	— Safe Drinking Water Act (1974)
SQG	— Small Quantity Generator
SRA	— Superfund Reform Act (Bill)
Super-fund	— Comprehensive Environmental Response, Compensation & Liability Act (1980)
SWMU	— Solid Waste Management Unit
SWDA	— Solid Waste Disposal Act (1965)
TCAAP	— Twin Cities Army Ammunition Plant
TRC	— Technical Review Committee
TSCA	— Toxic Substances Control Act (1976)
TSD	— Treatment, Storage and Disposal
TSDF	— Treatment, Storage and Disposal Facility
USAEC	— United States Army Environmental Center
USDA	— United States Department of Agriculture
USELD	— United States Army Environmental Law Division
USFWS	— United States Fish and Wildlife Service
UST	— Underground Storage Tanks

APPENDIX C

THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976

APPENDIX D

FEDERAL FACILITIES SPENDING ON ENVIRONMENTAL RESTORATION*

(DOLLARS IN BILLIONS)

	DOE	DOD	DOI	USDA	NASA
Number of sites:	10,000	21,425	26,000	3000	730
Estimated Cost:	$250-$350	$26.2	$3.9-$8.2	$2.5	$1.5-$2.0
Estimated Years to Complete:	30-75	20	NA	50	25
Fiscal Year 1995 Enacted Budget:	$5.9	$2.0	$0.065	$0.016	$0.02
Fiscal Year 1996 Budget Request:	$6.6	$2.1	$0.066	$0.045	$.037

**Top Officials Call For Cleanup Reforms*, 6 DEF. CLEANUP 41 (Oct. 20, 1995) (citing a report released by the Federal Facilities Policy Group, an interagency panel appointed by President Clinton in 1993 and chaired by Alice Rivlin, Director of the Office of Management & Budget, and Katie McGinty, Director of the Council on Environmental Quality).

AFFIRMATIVE ACTION: SHOULD THE ARMY MEND IT OR END IT?

CAPTAIN HOLLY O'GRADY COOK*

I. Introduction

> *[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.*[1]

On June 12, 1995, these twenty-two words sent shock waves throughout the federal government. In *Adarand Constructors, Inc. v. Pena,* the United States Supreme Court held for the first time that the federal government must adhere to the same rules as state and local governments when establishing programs that grant minorities employment preferences.[2] This was a devastating blow to federal programs. Before *Adarand,* the federal government had nearly free reign to establish and operate programs involving such preferences. The Supreme Court had recognized Congress's unparalleled authority to define situations that "threaten principles of equality and to adopt prophylactic rules to deal with those situations."[3] While the Court still recognizes Congress's authority, *Adarand* decisively ended Congress's reign of operating virtually unchecked in the affirmative action arena.

Adarand involved a racial classification created by a federal contracting statute. While the Court held that the strict scrutiny standard applies to "all racial classifications," the Court did not

---

* Judge Advocate General's Corps, United States Army. Presently assigned as Chief, Administrative and Civil Law Division, 21st Theater Army Area Command, Kaiserslautern, Germany. B.A., *magna cum laude*, 1984, Saint Joseph's College; J.D., 1987, Union University, Albany Law School. Formerly assigned as Legal Adviser, International Claims and Investment Disputes, United States Department of State, Washington, D.C., 1993-95; Chief of Criminal Law, Yongsan Law Center, Yongsan, Republic of Korea, 1992-93; Administrative Law Attorney, Eighth United States Army, Yongsan, Republic of Korea, 1990-92; Command Judge Advocate, Headquarters, Eighth Army Special Troops, Yongsan, Republic of Korea, 1990; Trial Counsel, Fort Huachuca, Arizona, 1989-90. Previous publications: Holly O'Grady Cook & David F. Shutler, *Tracking Criminals on the Information Highway: DIBRS Makes It Closer Than You Think,* ARMY LAW., May 1995, at 76; Holly O'Grady Cook & Stephen E. Castlen, *An Overview and Practitioner's Guide to Gifts,* ARMY LAW., May 1996, at 20. The author submitted this thesis to satisfy, in part, the Master of Laws degree for the 44th Judge Advocate Officer's Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] Adarand Constructors, Inc v. Pena, 115 S. Ct. 2097, 2113 (1995).

[2] *Id.*

[3] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

actually apply the standard in *Adarand*. Instead, the Court remanded the case so that the lower court could apply the strict scrutiny standard thereby delaying *Adarand's* precise impact on federal programs. The Court's broad application of strict scrutiny to "all racial classifications" further complicates the uncertainty of the situation. Not only will *Adarand* impact federal contracting programs, but it also will impact any other federal program that creates a racial classification, including affirmative action programs[4] used in federal employment. This potential impact adds fuel to an already volatile political debate.

A. Political Reaction

One month after the Supreme Court announced the *Adarand* decision, President William Clinton directed all federal agencies to evaluate programs they administer "that use race or ethnicity in decision making."[5] President Clinton also directed federal agencies to apply the following four standards of fairness to all federal affirmative action programs:

> No quotas in theory or practice; no illegal discrimination of any kind, including reverse discrimination; no preference for people who are not qualified for any job or other opportunity; and as soon as a program has succeeded, it must be retired. Any program that does not meet these four principles must be eliminated or reformed to meet them.[6]

---

[4] There is no universally recognized definition for "affirmative action." However, most definitions recognize that affirmative action includes "any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration." GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT, § 1.1, n.1 (July 19, 1995) [hereinafter REPORT TO THE PRESIDENT]. *See United States Commission of Civil Rights Briefing Paper on Affirmative Action,* Daily Lab. Rep. (BNA) No. 64, at D-33 (Apr. 4, 1995) (stating that affirmative action "encompasses any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, [or] sex . . . , along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities . . . ."); BLACK'S LAW DICTIONARY 59 (6th ed. 1990) (describing affirmative action programs, in part, as "positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination"); Lara Hudgins, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease,* 47 BAYLOR L. REV. 815, 820-24 (1995) (discussing the various definitions of "affirmative action"). *See also infra* notes 145, 323, 341.

[5] Memorandum, President William J. Clinton, to Heads of Executive Departments and Agencies, subject: Evaluation of Affirmative Action Programs (19 July 1995).

[6] President William J. Clinton, Remarks by the President at the Rotunda on Affirmative Action (July 19, 1995) [hereinafter Remarks by the President].

The President acknowledged that "affirmative action has not always been perfect," and it "should not go on forever."[7] However, a review of all federal affirmative action programs proved that the need for affirmative action still exists.[8] The President, therefore, "reaffirmed the principle of affirmative action" and developed the slogan "[m]end it, but don't end it."[9]

While President Clinton is striving to "mend" federal affirmative action programs, competing political forces are striving to "end" them. Before President Clinton ordered a review of federal affirmative action programs, Senator Robert Dole obtained "a comprehensive list of every federal statute, regulation, program, and executive order that grants a preference to individuals on the basis of race, sex, national origin, or ethnic background."[10] After receiving this list and reviewing the *Adarand* decision, Senator Bob Dole introduced in the Senate the Equal Opportunity Act of 1995.[11] This Act would prohibit "the Federal government from discriminating against, or granting any preference to, any person based in whole or in part on race or sex in connection with federal employment, federal contracting and subcontracting, and other federally-conducted programs and activities."[12] The only federal affirmative action programs this Act would endorse are those designed "(1) to recruit qualified members of minority groups or women, so long as there is no preference granted in the actual award of a job, promotion, contract or other opportunity, or (2) to require the same recruitment of its contractors or subcontractors, so long as the Federal government does not require preferences in the actual award of the benefit."[13]

---

[7] *Id.*

[8] President Clinton ordered the review of all federal affirmative action programs on March 7, 1995. *See* REPORT TO THE PRESIDENT, *supra* note 4, § 1.1. The review identified federal affirmative action programs and initiatives, and analyzed the fairness of them. *Id.* The review did not determine "whether any particular program satisfies the constitutional standard advanced in *Adarand*." *Id.*

[9] Remarks by the President, *supra* note 6.

[10] *See* AMERICAN LAW DIVISION, LIBRARY OF CONGRESS, COMPILATION AND OVERVIEW OF FEDERAL LAWS AND REGULATIONS ESTABLISHING AFFIRMATIVE ACTION GOALS OR OTHER PREFERENCES BASED ON RACE, GENDER, OR ETHNICITY (1995) (listing approximately 160 federal measures that grant race or gender preferences in various fields, including more than 20 laws and regulations related to federal employment policy).

[11] S. 1085, 104th Cong., 1st Sess. (1995). Representative Charles Canady cosponsored the bill in the House. *Id.*

[12] Equal Opportunity Act of 1996 (HR 2128) as Amended by House Judiciary Subcommittee, March 7, 1996; Section-by-Section Analysis, Daily Lab Rep. (BNA) No. 46, at D-31 (Mar. 8, 1996) (citing the section-by-section analysis of the Equal Opportunity Act of 1996, which is the amended version of the 1995 Act, "approved on a party-line vote by a House Judiciary subcommittee" on March 7, 1996).

[13] *Id.* (referencing § 3 of the Equal Opportunity Act of 1996, as amended). In addition to Senator Dole's efforts, some state governors have spearheaded their own efforts to end affirmative action. In California, Governor Pete Wilson unsuccessfully

B. How Must the Department of the Army Respond?

Amidst the legal and political controversy surrounding affirmative action, the Department of the Army stands as a major federal government contractor and employer. Both *Adarand* and President Clinton's directions dictate that the Army review all of its affirmative action programs to ensure that they comply with the new standards. If any program does not comply, the Army must mend it or end it.

This article reviews employment practices used by the Army to make promotion decisions, both military and civilian.[14] It begins with a brief history of affirmative action in federal employment and an overview of applicable case law. This article then identifies the affirmative action programs that apply to all Army military personnel and the promotion[15] procedures that are germane to military

petitioned the state supreme court to overturn statutory affirmative action plans. Arlene Jacobius, *Affirmative Action Suit Dismissed*, A.B.A. J., Mar. 1996, at 40. With Governor Wilson's support, the University of California Board of Regents had previously voted to eliminate affirmative action in admission effective the spring of 1998. *See Affirmative Action Repeal Challenged*, WASH. POST, Feb. 17, 1996, at A12; Rene Sanchez, *Struggling to Maintain Diversity: UC Berkeley Takes Steps to Offset Ban on Affirmative Action*, WASH. POST, Mar. 11, 1996, at A-1. In Louisiana, Governor Mike Foster issued an executive order eliminating affirmative action and minority set-asides for state contracts only three days after taking office. *See* Robert Buckman, *Louisiana Split over Affirmative Action: Foster Stands by Campaign Vow, Angers Critics*, DALLAS MORNING NEWS, Mar. 15, 1996, at 33A. *See also Affirmative Action After Adarand: A Legal, Regulatory, Legislative Outlook*, Daily Lab. Rep. (BNA) No. 147, at D-21 (Aug. 1, 1995) (reporting that "some 20 states have introduced bills or resolutions that seek to substantially limit, ban, or weaken preferential policies").

[14] The Army's affirmative action programs in the contracting arena are outside the scope of this article. However, practitioners should know that the *Adarand* decision has already caused major changes in federal contracting. In October 1995, the Department of Defense suspended the "rule of two" contracting program. Ann Devroy, *Rule Aiding Minority Firms to End: Defense Dept. Move Follows Review of Affirmative Action*, WASH. POST, Oct. 22, 1995, at A1 (explaining that "[u]nder the rule, if at least two qualified small, disadvantaged businesses express interest in bidding for a contract, only disadvantaged businesses can compete for it [— v]irtually all firms certified as small, disadvantaged businesses are minority owned"). A three-year moratorium on the "rule of two" program is imminent. John A. Farrell & Maria Shao, *Moratorium on Set-Asides Seen: White House Prepares 3-Year Halt in Some Affirmative Action Programs*, BOSTON GLOBE, Mar. 9, 1996, at 3. The Clinton Administration also is preparing rules to impose "limits on race-based [federal] government contracting and require proof of discrimination before such contracts can be awarded." Ann Devroy, *Administration Memo Outlines Limited Affirmative Action Contracting*, WASH. POST, Mar. 7, 1996, at A8-A9.

[15] The Army makes numerous types of employment decisions for each of its employees. These decisions include hiring, training, promoting, and firing. Each of these decisions follows different procedures. When any of these procedures use a racial classification, it is subject to *Adarand's* strict scrutiny standard. It is impossible to review all of the procedures and issues raised by the Army's employment decisions in this article. Therefore, this article focuses on one of the employment decisions that becomes more controversial when race, ethnicity, or sex play a factor in the final decision: promotions. The rules applicable to promotions differ from those applicable to other employment decisions, but all employment-based decisions are subject to the same strict scrutiny standard.

officers. A critical examination of the Army's officer promotion procedure reveals that, as written, it does not comply with *Adarand's* strict scrutiny standard. The Army's legal interest in using the current procedure is ambiguous and the procedure lacks the narrow tailoring necessary to achieve an appropriate interest. The Army should mend its promotion procedure to pass *Adarand's* requirements and the President's standards. This article addresses how the Army can do so by redefining its compelling interest and employing new promotion instructions narrowly tailored to further its interest.

After examining promotion practices for Army officers, this article identifies affirmative action programs applicable to all Army civilian personnel and merit promotion practices used for competitive service employees. It then critically examines these programs under *Adarand's* strict scrutiny standard. At the Department of the Army level, the Army does not create racial classifications in either its affirmative action plan for civilian personnel or in its promotion procedures. The Army-level plan and procedures are not, therefore, subject to *Adarand's* strict scrutiny standard. However, at the installation level some plans and practices create racial classifications and are subject to review under *Adarand*. This article identifies those installation promotion practices with problem areas, and recommends ways installations should mend these practices or end them to ensure compliance with *Adarand*.

II. Historical Background

Employment preferences are not new to the federal government. Congress draws distinctions between groups of people and awards employment benefits to some while it denies others. For example, the Veterans' Preference Act grants military veterans special rights or preferences in hiring for federal civilian employment positions.[16] The Indian Reorganization Act accords a hiring and pro-

[16] 5 U.S.C. § 2108 (1994). Congress codified the Veterans' Preference Act in several sections of Title 5 of the United States Code. The purpose of the Veterans' Preference Act is to aid in the readjustment and rehabilitation of veterans. *See* Mitchell v. Cohen, 332 U.S. 411 (1948). The Veterans' Preference Act grants veterans who meet specific eligibility requirements a preference in securing and retaining federal employment that nonveterans do not get. Some of the benefits preference eligible veterans receive include bonus points on competitive examinations (5 U.S.C. § 3309 (1994)); greater tenure during a reduction in force (5 U.S.C. § 3502 (1994)); additional procedural safeguards when undergoing disciplinary or removal actions (5 U.S.C. §§ 7511-7513 (1994)); and waivers of physical qualifications required for appointment (5 U.S.C. § 3312 (1994)). Veterans do not receive any preference or special consideration in promotions in the federal government. *See also* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. § 2000e-11 (1988) (stating that nothing in Title VII "shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans") (hereinafter all references to Title VII will be to the United States Code citation).

motion preference for qualified Native Americans living on or near an Indian reservation; other people interested in positions on or near the reservation are ineligible.[17] Individuals not eligible for these preferences have challenged them on constitutional grounds. However, both preferences survived judicial scrutiny.[18]

Affirmative action programs in the federal government also draw distinctions between groups of people and award employment preferences to some that they do not award to others. Many of these programs base their distinctions on an individual's race, ethnicity, or sex. Unlike other federal employment preferences, however, Congress has never expressly authorized employment preferences based on race, ethnicity, or sex.[19] The Supreme Court inferred congressional authorization for such preferences from the legislative history of the Civil Rights Act of 1964. Federal agencies relied on the Court's interpretation when they developed and implemented these programs and preferences. Individuals who have suffered discrimination because of these preferences have repeatedly challenged them in court.

In reviewing affirmative action cases, the Supreme Court generally applies a Title VII analysis or an equal protection analysis,

[17] 25 U.S.C. §§ 472, 472a (1994). The Indian Reorganization Act gives Native Americans a preference in hiring for various positions maintained by the Indian office. *Id.* § 472. The purpose of the statutory hiring preference was to afford Native Americans greater participation in their own self-government, both politically and economically, and to reduce the negative effect of having non-Native Americans administer matters that may affect tribal life. *See* Johnson v. Shalala, 35 F.3d 402 (9th Cir. 1994). The Indian Reorganization Act also gives Native Americans a preference for the purpose of applying reduction in force procedures. 25 U.S.C. § 472a (1994). *See also* 42 U.S.C. § 2000e-2(i) (1988) (stating that nothing in Title VII shall apply to any business on or near a reservation which has a publicly announced employment practice under which it gives a preference to any individual because they are a Native American living on or near a reservation).

[18] *See, e.g.*, Massachusetts v. Feeney, 442 U.S. 256 (1979) (holding that a statute that gave an absolute preference to veterans did not violate the Equal Protection Clause even though the preference operated to exclude women); Morton v. Mancari, 417 U.S. 535, 554 (1974) (holding that an employment preference for Native Americans in the Indian service was reasonably and directly related to a legitimate, nonracially based goal of furthering Native American self-government; therefore, it did not violate the Due Process Clause of the Fifth Amendment); Fredrick v. United States, 507 F.2d 1264 (Ct. Cl. 1974) (holding that veterans preference does not violate Fifth Amendment Equal Protection and Due Process Clauses because the government had a rational basis for differentiating between veterans and nonveterans).

[19] The employment preference for Native Americans under the Indian Reorganization Act is not a "racial" preference. *Morton*, 417 U.S. at 553. "Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government . . . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities. . . ." *Id.* at 554.

depending on the allegations[20] and the employer.[21] The Court's decisions in these cases have been divisive and constantly evolving, leaving employers with little guidance on what, if anything, constitutes a legally acceptable affirmative action plan. While the law is far from settled, employers must prepare for challenges to race-based employment preferences under *Adarand*. This preparation begins with an historical assessment of affirmative action cases to determine the current legally permissible parameters of affirmative action plans.

A. Title VII Analysis

Congress passed Title VII as part of the Civil Rights Act of 1964.[22] The purpose of this title was to eliminate discrimination in employment based on race, color, religion, sex,[23] or national origin.[24] Title VII initially prohibited only employment discrimination by pri-

[20] An individual can bring two main types of actions against a federal agency that discriminates against him in employment. First, an individual can file a Title VII action if the agency discriminates based on race, national origin, or sex. *See* 42 U.S.C. § 2000e-2(a) (1988). Second, an individual can bring a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment if the agency treats the individual differently than other similarly situated individuals. *See* U.S. CONST. amends. XIV, § 1, V.

[21] If a *private employer* discriminates against an individual, the individual may only bring a Title VII action against the employer.

If a *state or local government* discriminates against an individual, the individual can sue under Title VII or the Fourteenth Amendment or both. The Fourteenth Amendment prohibits "states" from "denying any person within [their] jurisdiction the equal protection of the laws." MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 3.04(a) (1988). The Fourteenth Amendment does not apply to discriminatory actions by private employers or by the federal government.

If the *federal government* discriminates against an individual, the individual may bring a Title VII action or a Fifth Amendment due process challenge against the government. "The 'due process' requirement in the Fifth Amendment has an 'equal protection' component which subjects classifications made by the federal government to an analysis similar to that applied to classifications adopted by state governments." *Id.* § 3.01. The Fifth Amendment does not apply to actions by private employers or by state and local governments.

[22] 42 U.S.C. §§ 2000e to 2000e-17 (1988).

[23] Initially, the House proposal did not include reference to discrimination based on sex. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 10 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2402 (prohibiting discrimination in employment because of "race, color, religion, or national origin"). However, Representative Smith proposed an amendment to the proposal adding "sex" as a prohibited basis for discrimination. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 439 (1966) (extensively discussing the legislative history of Title VII). The House adopted the amendment before forwarding the bill to the Senate. *Id.* at 433. *See also* Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 2 n.5 (1993) (referencing several sources that discuss the addition of "sex" as a basis for discrimination under Title VII).

[24] H.R. REP. NO. 914, 88th Cong., 1st Sess. 10 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2402. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (stating that Congress's objective was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

vate employers.[25] In 1972, however, Congress amended Title VII to include a prohibition against employment discrimination by public employers.[26]

On its face, Title VII appears color blind; it does not draw race, ethnic, or gender distinctions between groups.[27] Title VII simply prohibits all discrimination based on race, ethnicity, or sex. It also explicitly states that it should not be interpreted as requiring employers to grant preferential treatment to any individual or group to correct imbalances in the work force.[28] Notwithstanding the clear

---

[25] CHARLES A SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 13.1, at 584-85 (2d ed. 1988).

[26] 42 U.S.C. § 2000e-16 (1988). Congress saw the amendment as necessary "to correct this entrenched discrimination in the Federal service." H.R. REP. NO. 238, 92d Cong., 1st Sess. 24 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2159. *See also* Charles R. McManis, *Racial Discrimination in Government Employment: A Problem of Remedies for Unclean Hands*, 63 GEO. L. J. 1203 (1975) (describing the federal government's equal employment record and the hurdles that federal employees must overcome before bringing a discrimination suit against the government).

[27] Title VII states:

> It shall be an unlawful employment practice for an employer . . to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

42 U.S.C. § 2000e-2(a)(1) (1988). Title VII contains a similar prohibition against discrimination in training programs. *See id.* § 2000e-2(d).

Congress intentionally drafted Title VII so that it was race neutral. "[T]he very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." *Griggs*, 401 U.S. at 434.

[28] 42 U.S.C. § 2000e-2(j) (1988). Specifically, Title VII states:

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

Id. See also United Steelworkers of America v. Weber, 443 U.S. 193, 227 (1979) (Rehnquist, J., dissenting) (basing his dissent on Title VII's two express prohibitions against discrimination in hiring and training plus its pronouncement that the Act must not be interpreted as requiring any employer to grant any preferential treatment to any individual or group because of their race, color, sex, or national origin); Bernard D. Meltzer, *The Weber Case: The Judicial Aboration of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 465 (1980) (discussing the color-blind intent of Title VII and the opinion in *Weber* where the Supreme Court "legitimated a new form of racism"); Henry J. Abraham, *Some Post-Bakke-and-Weber Reflections on "Reverse Discrimination,"* 14 U. RICH. L. REV. 373 (1980) (defining "racial discrimination" and concluding that the Supreme Court has legislated a definition that is contrary to Title VII); Richard K. Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of United Steelworkers of America v. Weber and the Misguided Policy of Numerical Employment*, 21 B.C. L. REV. 1 (1979) (criticizing the use of numerical employment and race-conscious affirmative action as a remedy for discrimination).

language of Title VII, the Supreme Court has refused to ascribe a color-blind interpretation to Title VII.[29] Instead, the Court has carved out an exception to Title VII's prohibition against considering race, ethnicity, and sex in employment decisions for affirmative action plans.[30]

In *United Steelworkers of America v. Weber*,[31] the Supreme Court first announced that "Title VII does not prohibit . . . race-conscious affirmative action plans." In *Weber*, the Court upheld a private employer's[32] voluntary affirmative action plan[33] and rejected a

---

[29] Prior to 1978, the Supreme Court construed Title VII as "an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences for any group, minority or majority." Johnson v. Santa Clara Transportation Agency, 480 U.S. 616, 642 (1987) (Stevens, J., concurring). The first time the Court addressed Title VII it stated:

> [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed.

Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). "Good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

Griggs involved an employer's test that operated *against* minorities. The Court had no problem applying Title VII's explicit prohibition against discrimination to such a discriminatory tool. However, in 1979, an affirmative action plan that operated *in favor of* minorities, rather than against them, confronted the Court. *See Weber*, 443 U.S. at 197. The Court then abandoned its color-blind interpretation of Title VII and began upholding the favorable consideration of race or sex in the employment arena under certain circumstances.

[30] The Court assumes its interpretation of Title VII is correct because "Congress has not amended the statute to reject [our] construction, nor have any such amendments even been proposed." *Johnson*, 480 U.S. at 629 n.7.

[31] 443 U.S. 193, 197 (1979).

[32] The term "private employer" refers to nongovernment employers. In *Weber*, for example, the private employer was Kaiser Aluminum & Chemical Corporation. To review employment decisions involving private employers, the Supreme Court applies a Title VII analysis.

Had the employer been an agency of a federal, state or local government, it would have been considered a "public employer." For cases involving affirmative action programs by public employers, the Supreme Court conducts a Title VII analysis and/or an equal protection analysis under the Fourteenth or Fifth Amendments, depending on the issues raised. *See Johnson*, 480 U.S. at 620 n.2 (analyzing a public employer's affirmative action plan only under Title VII because petitioner did not raise the constitutional issue). *See also infra* discussion part II.B.1-2.

[33] A "voluntary" affirmative action plan is one that a private employer voluntarily adopts to eliminate traditional patterns of discrimination. An example of a voluntary affirmative action plan is the negotiated plan between Kaiser Aluminum & Chemical Corporation and United Steelworkers of America in *Weber*. *See Weber*, 443 U.S. at 197. The parties designed their plan to eliminate conspicuous imbalances in Kaiser's almost exclusively white craft-work forces. *Id.* *See also* Firefighters v. Cleveland, 478 U.S. 501 (1986) (upholding a consent decree requiring an employer to promote a specific number of minority employees).

"Involuntary" affirmative action plans include those imposed on employers as judicial remedies for Title VII violations or those required by statute. *See, e.g.*, United

literal reading of Title VII's prohibition against race discrimination.[34] The Court read Title VII contrary to its legislative history and the context from which the Act arose.[35] From these sources, the Court implied that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."[36]

In reviewing the affirmative action plan in *Weber*, the Court found the following characteristics of the plan important to its decision:

> (1) The purpose of the plan was to break down old patterns of racial segregation and hierarchy, which mirrored the purpose of Title VII.[37]
>
> (2) The plan did not "unnecessarily trammel the interests of white employees" because it did not require "the discharge of white workers and their replacement with new black hirees."[38] The plan also did not create "an absolute bar to the advancement of white employees" because half of those trained in the program would be white.[39]
>
> (3) The plan was only a temporary measure. "It [was] not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."[40]

The Court relied on these characteristics to uphold the plan, but intentionally declined to define the line between permissible and impermissible affirmative action plans.[41] The Court found it sufficient

---

States v. Paradise, 480 U.S. 149 (1987) (involving a court-ordered promotion scheme imposed after voluntary efforts at correcting racial imbalances were unsuccessful).

[34] The *Weber* Court disagreed with arguments that Title VII prohibited preferential treatment. The Court drew the following distinction between what Congress said in Title VII, and what it could have said:

> The section provides that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of . . . such group on account of" a de facto racial imbalance in the employers workforce. The section does not state "nothing in Title VII shall be interpreted to permit" voluntary affirmative action efforts to correct racial imbalances.

Weber, 443 U.S. at 205 (referencing 42 U.S.C. § 2000e-2(j)). The Court then stated that the "natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action." *Id.*

[35] *Id.* at 201.

[36] *Id.* at 207.

[37] *Id.* at 208.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* The Court still has not issued any opinion defining the outer limits of what constitutes a permissible affirmative action program. *See* Johnson v. Santa Clara Transportation Agency, 480 U.S. 616, 642 (1987) (Stevens, J., concurring).

"to hold that the challenged . . . affirmative action plan falls on the permissible side of the line."[42]

The Supreme Court applied the characteristics of a permissible racially based affirmative action plan from *Weber* to a gender-based plan in *Johnson v. Santa Clara Transportation Agency*.[43] In *Johnson*, a public employer voluntarily adopted an affirmative action plan because the "mere prohibition of discriminatory practices" was not enough "to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons."[44] Relying on its plan, the employer hired a woman as a road dispatcher; no woman had previously held this position.[45] During the interview process, the woman scored slightly lower on an employment interview than a male applicant for the position.[46] While the *Johnson* Court considered all of the *Weber* plan's characteristics, it focused primarily on two of them in deciding the legality of the employer's plan.

First, the Court examined whether the existence of a "manifest imbalance" of women in "traditionally segregated job categories" justified the public employer's consideration of the sex of the job applicants.[47]

> In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise . . . . Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.[48]

The Court did not further define manifest imbalance.[49] It stated only that "as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking."[50] The imbalance "need not be such that it would support a prima facie case

---

[42] *Weber*, 443 U.S. at 208.

[43] 480 U.S. 616 (1987).

[44] *Id.* at 620.

[45] *Id.* at 621. The employer's affirmative action plan noted that women had not previously sought road dispatcher or other skilled craft worker positions "because of the limited opportunities that [had] existed in the past for them to work in such classifications." *Id.*

[46] *Id.* at 624. The petitioner received a score of 75 on his hiring interview, while the woman whom the employer hired received a score of 73. *Id.*

[47] *Id.* at 631.

[48] *Id.* at 632.

[49] BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW—FIVE YEAR SUPPLEMENT 332 (2d ed. 1989).

[50] *Johnson*, 480 U.S. at 633 n.11. *See also* Hudgins, *supra* note 4, at 826 (explaining that as long as there is a manifest imbalance, evidence of employer discrimination is not necessary for an affirmative action plan to be valid under Title VII).

against the employer."[51] "Of course, where there is sufficient evidence to meet the more stringent 'prima facie' standard, . . . the employer is free to adopt an affirmative action plan."[52]

To demonstrate a manifest imbalance in traditionally segregated job categories in *Johnson*, the employer produced statistical evidence disclosing the specific number of women hired in various agency positions.[53] These statistics showed that "women were concentrated in traditionally female jobs" and would have had a higher representation in other jobs in the agency "if such traditional segregation had not occurred."[54] The employer also emphasized that eliminating underrepresentation in the work force was only one of several factors that supervisors considered when making hiring decisions.[55] The Court found that the employer's statistics and use

---

[51] *Johnson*, 480 U.S. at 632. To establish a prima facie case under Title VII, the plaintiff has the initial burden of proving a pattern or practice of a discriminatory employment practice. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 334-35 (1977) (describing the prima facie case required for a disparate impact case). Plaintiffs generally present statistical evidence of a racial imbalance to meet this burden. "Statistics showing a racial or ethnic imbalance are probative . . . only because such imbalance is often a telltale sign of purposeful discrimination." *Id.* at 340 n.20. *See also* Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 995 n.3 (1988) (explaining there is no consensus on the mathematical standard by which to judge the "substantiality" of numerical disparities and acknowledging that a "case-by-case approach" recognizes that the usefulness of statistics depends on the surrounding facts and circumstances); Equal Employment Opportunity Commission v. Chicago Miniature Lamp Works, 946 F.2d 292, 297 (7th Cir. 1991) (explaining in detail how "statistics can be used to prove both disparate treatment and disparate impact" cases).

[52] *Johnson*, 480 U.S. at 633 n.11. The Court described the use of standard deviations as a precise method of measuring the significance of statistical disparities in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977). There the Court said that, as a "general rule," the disparity must be "greater than two or three standard deviations" before it will infer discrimination from an employment practice. *Id. See also* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 98 (2d ed. 1983) (describing the mathematical showing of variance required for a manifest imbalance); David D. Meyer, Note, *Finding a "Manifest Imbalance": The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII*, 87 MICH. L. REV. 1986, 2016-17 (1989) (discussing the degree of imbalance necessary for a manifest imbalance).

[53] The employer showed that 9 of its 10 paraprofessionals and 110 of its 145 office and clerical workers were women. *Johnson*, 480 U.S. at 634. By contrast, the employer showed that only 2 of the 28 officials and administrators, 5 of the 58 professionals, 12 of the 124 technicians, none of the skilled craft workers, and 1 of the 110 road maintenance workers were women. The one road maintenance worker was the woman whose hiring was at issue in *Johnson*. *Id.*

[54] *Id.*

[55] *Id.* at 636. Supervisors also considered the applicant's qualifications. *Id.* at 636. The Court said that had qualifications not been considered, the plan "would dictate mere blind hiring by the numbers, for it would hold supervisors 'to achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as . . . the number of qualified minority applicants.'" *Id.* (citing Sheet Metal Workers v. Equal Employment Opportunity Commission, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)).

of numerous factors to make hiring decisions satisfied "the first requirement enunciated in *Weber*."[56]

The second characteristic that the Court addressed was "whether the Agency Plan unnecessarily trammeled the rights of the male employees or created an absolute bar to their advancement."[57] The employer's long-term goal was to increase female representation in traditionally segregated positions. The employer's plan did not set aside positions for women; it merely authorized "that consideration be given to affirmative action concerns."[58] This did not mean that supervisors hired women just to achieve numbers. Supervisors still weighed the qualifications of female applicants against those of other applicants.[59] This flexible approach to attain a balanced work force satisfied the second *Weber* requirement.[60]

Weber and *Johnson* embody the Supreme Court's current prerequisites for permissible affirmative action plans under Title VII.[61] They do not establish precise parameters of permissible plans, but they do provide the minimally acceptable framework for such plans. An employer may adopt an affirmative action plan if it does not unnecessarily trammel the interests of white employees and is for a proper purpose, temporary, and flexible. *Weber* and *Johnson* demonstrate that an employer need not admit that it engaged in discrimination before adopting a voluntary affirmative action plan.[62] An employer can adopt such a plan if a manifest imbalance exists which is sufficient to justify taking race or sex into account when making employment decisions. Employees challenging the plan will have the burden of proving that the plan violates Title VII.[63]

---

[56] *Id.* at 637.

[57] *Id.* at 637.

[58] *Id.* at 638.

[59] *Id.*

[60] *Id.* at 641.

[61] Although *Johnson* reaffirms *Weber*, four of the current Justices have raised questions about the *Weber* decision. *See* Michael K. Braswell et al., *Affirmative Action: An Assessment of its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 378-79 (1993) (discussing specific objections raised by Chief Justice Rehnquist and Justices Scalia, Stevens, and O'Connor). Three of these Justices believe that the Court wrongly decided *Weber*. *Id.* *See* Hernicz, *supra* note 23, at 48 (noting that "at least three Justices would have overruled *Weber* because it encourages 'reverse discrimination' where there is no evidence of manifest imbalance").

[62] *Johnson*, 480 U.S. at 652-53 (O'Connor, J., concurring).

[63] *Id.* at 626. In *Johnson*, the Supreme Court allocated the burden of proof for a Title VII case as follows:

> Once a plaintiff establishes a prima facie case that race or sex has been

B. Equal Protection Analysis

The Fourteenth Amendment Equal Protection Clause prohibits state and local governments from denying "any person within [their] jurisdiction the equal protection of the laws."[64] The Fifth Amendment Due Process Clause prohibits the federal government from depriving any person "of life, liberty, or property without due process of law."[65] These constitutional prohibitions provide special protections for public employees who suffer employment discrimination by state, local, and federal agencies. Although this article focuses on affirmative action programs employed by the federal government—in particular, the Department of the Army—the Supreme Court's pronouncements in cases involving state and local programs are relevant to cases involving federal programs. Consequently, this subpart will review cases involving state and federal programs and the distinctions that the Court has drawn between them.

1. State and Local Programs—Affirmative action programs used by state and local governments when making employment decisions generally have not fared well at the Supreme Court.[66] In

---

taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.

Id. See also 29 U.S.C. § 2000e-12 (1994) (providing that "no person shall be subject to any liability" for an unlawful employment practice "if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission"); 29 C.F.R. § 1608.1(e) (1995) (limiting liability protection to "affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines"); *id.* § 1608.10 (granting liability protection to an employer who the Commission finds took action "pursuant to and in accordance with a plan or program which was implemented in good faith" reliance on the guidelines).

After *Adarand*, a public employer cannot rely solely on the existence of an affirmative action plan to defend itself in a discrimination case. The plan may provide some protection in a Title VII case; however, it will not protect the employer from a constitutional challenge. The employer must have a compelling government interest to support any race-based employment actions it takes and it must narrowly tailor those actions to achieve its interest. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995). If it does not, then even if the employer has an affirmative action plan, it will still fail *Adarand's* strict scrutiny standard. *See infra* discussion parts II.B.2, IV.C.

[64] U.S. CONST. amend. XIV, § 1.

[65] *Id.* amend. V.

[66] Affirmative action programs used by state and local governments when making decisions related to education also have not fared well. In *Regents of the University of California v. Bakke*, the Court faced a Fourteenth Amendment equal protection challenge to a state-run medical school's admission policy that reserved 16 out of 100 places for minority students. 438 U.S. 265 (1978). A plurality of the Court found that a race-based admission program that foreclosed consideration to nonminorities was unnecessary to the achievement of the state's compelling interest in attaining a diverse student body. *Id.* at 315. If the program had taken race or ethnic background

Wygant v. Jackson Board of Education,[67] the Court struck down a collectively bargained affirmative action plan that extended preferential protection against layoffs to some employees because of their race.[68] In *City of Richmond v. J.A. Croson*,[69] the Court struck down a city ordinance that required construction contractors to subcontract at least thirty percent of the dollar value of city contracts to minority-owned businesses.[70] The Court applied a strict scrutiny standard to review both of these cases.[71]

To survive strict scrutiny, a racial classification must be justified by a compelling governmental interest, and the means chosen to effectuate its purpose must be narrowly tailored to the achievement of that goal.[72] The compelling government interest prong helps " 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool."[73] To satisfy this prong, the Equal Protection Clause requires "some showing of prior discrimination by the governmental unit involved" before an employer can use race to remedy such discrimination.[74] Societal discrimination alone is insufficient to justify a racial classification.[75]

---

into account simply as one element "to be weighed fairly against other elements in the selection process," then the program probably would have survived judicial scrutiny. *Id.* at 318. While there was no majority opinion in *Bakke*, a majority of the Justices believed that race can be taken into account as a factor in an admissions program. *Id.* at 297 n.36 (Justice Powell agreeing with Justices Brennan, White, Marshall, and Blackmun that "the portion of the judgment that would proscribe all consideration of race must be reversed").

[67] 476 U.S. 267 (1986).

[68] *Id.* at 269, 284. In *Wygant*, the Court held that using a layoff plan based on race to remedy the effects of prior discrimination is not narrowly tailored. *Id.* at 283. The adoption of hiring goals would be less intrusive. *Id.* at 284. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Id.* at 283.

[69] 488 U.S. 469 (1989).

[70] *Id.*

[71] In *Wygant*, only a plurality of the Court determined that strict scrutiny was the appropriate standard for reviewing remedial employment plans under the Fourteenth Amendment. *Wygant*, 476 U.S. at 274, 285. However, in *Croson*, a majority affirmed the *Wygant* strict scrutiny standard. *Croson*, 488 U.S. at 494 (stating that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

[72] *Wygant*, 476 U.S. at 274.

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

[74] *Id.* at 492 (citing Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986)). "[A] contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring with the plurality).

[75] *See Wygant*, 476 U.S. at 274. *See also Croson*, 488 U.S. at 492 (requiring proof of discrimination by the governmental unit involved). A generalized assertion that there has been discrimination in an entire industry cannot justify a racial classification because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498.

In *Croson*, the City of Richmond failed to present any evidence of past discrimination to justify a thirty-percent set-aside program for minority businesses.[76] The city based its program on a conclusory statement by a government official that such discrimination existed.[77] This declaration was insufficient to satisfy the compelling government interest prong[78] of the strict scrutiny standard.[79] However, the Court said that the city could have satisfied equal protection requirements if it had shown "that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry."[80]

Besides satisfying the compelling interest prong, a valid affirmative action plan must be narrowly tailored to serve its intended purpose to survive the strict scrutiny standard. This prong "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."[81] In *Croson,* there was no evidence that the City of Richmond ever considered alternatives to a race-based quota.[82] The city's plan was "grossly overinclusive,"[83] was not tailored to a specific goal, and awarded an absolute preference based solely on minority status.[84] These characteristics convinced the Court that the only interest furthered by the quota system was "administrative convenience."[85] The city "obviously" did not narrowly tailor its program "to remedy the effects of prior discrimination."[86] Therefore, it failed the Court's strict scrutiny standard.

---

[76] *Croson*, 488 U.S. at 505.

[77] *Id.* at 480, 505.

[78] "To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims 'for remedial' relief for every disadvantaged group." *Id.* at 505.

[79] In *Wygant*, the Court held that no compelling interest could justify using race to make layoff decisions. Layoff provisions are "not a legally appropriate means of achieving even a compelling interest" because of the harsh burden imposed on particular individuals. *Wygant*, 476 U.S. at 278.

[80] *Croson*, 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment).

[81] *Id.* at 493.

[82] *Id.* at 507.

[83] The justification stated for the set-aside program was to compensate Black contractors for past discrimination. *Id.* at 506. The preference also applied to racial groups that may never have suffered from discrimination (*e.g.*, Aleuts and Eskimos). *Id.*

[84] *Id.* at 506-09. *But see* United States v. Paradise, 480 U.S. 149 (1987) (holding that a court-ordered 50% promotion requirement did not violate the Equal Protection Clause; there was a compelling governmental interest in eradicating past discrimination by the employer and the plan was narrowly tailored in that it was flexible at all ranks, was temporary in nature, and it applied only when promotions were needed).

[85] *Croson*, 488 U.S. at 508. "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 racially based quota system. *Id.*

[86] *Id.*

Before striking down the city ordinance in *Croson*, the Supreme Court acknowledged that the legislative actions of state and local governments are entitled to deferential review by the judiciary.[87] Nonetheless, there are constitutional limits on state and local actions when they employ race as a criterion.[88] State and local legislative bodies do not have the same freedom that Congress does in remedying past discrimination.[89] The Court has yet to decide, however, how much freedom Congress has to remedy past discrimination.

2. *Federal Programs*—Until June of 1995, more affirmative action programs employed by the federal government consistently survived Supreme Court review than similar state and local programs. The primary reason for this difference may have been the deference that the Court afforded federal programs.

In *Fullilove v. Klutznick*,[90] the Court approved a congressional spending program that provided a preference to minority-owned businesses for public works projects.[91] The program required state and local recipients of federal funds for these projects to use ten percent of the funds to procure services or supplies from businesses owned and controlled by members of statutorily defined minority groups.[92] Because the case involved an act of Congress, a plurality of the Court said that it was "bound to approach its task with appropriate deference to 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."[93] The Court then refused to adopt a specific standard of review for congressionally required programs.[94] Instead, the Court upheld the set-aside program after conducting a "most searching examination."[95]

---

[87] *Id.* at 500. Nothing "precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." *Id.* at 509.

[88] *Id.* at 491.

[89] "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490.

[90] 448 U.S. 448 (1980).

[91] *Id.* at 457.

[92] Congress included the ten percent set-aside requirement for minority-owned businesses in the Public Works Act of 1977. *Id.* at 458-59.

[93] *Id.* at 472 (plurality opinion) (citing U.S. CONST. art. I, § 8, cl. 1; amend. XIV, § 5).

[94] *Id.* at 492. The set-aside program in *Croson*, which the Supreme Court analyzed using a strict scrutiny standard, was similar to the one in *Fullilove*. However, the Court expressly refused to apply the lower standard of review from *Fullilove* to the *Croson* program. *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 491 (1989) (stating that *Fullilove* involved the treatment of an exercise of congressional power and could not be dispositive in *Croson*).

[95] The *Fullilove* Court said that "preferences based on race or ethnic criteria must

Ten years later, the Court imposed a more stringent standard of review on federal affirmative action programs. In *Metro Broadcasting, Inc. v. Federal Communications Commission*,[96] the Court applied an intermediate scrutiny standard rather than the "most searching examination" of *Fullilove*. A race-conscious measure can pass an intermediate scrutiny standard if it serves an "important government interest" and is "substantially related to the achievement of those objectives."[97] The Court expressly refused to subject federal affirmative action programs to the same strict scrutiny standard it applied one year earlier to a local program[98] because of its deference to Congress.[99]

In Metro Broadcasting, the Federal Communications Commission considered minority status when deciding whether to issue new broadcast licenses.[100] The Commission's intent was to increase minority ownership of broadcast properties and ensure "diversified programming."[101] The Court applied the intermediate scrutiny standard and found the congressionally mandated preference to be legally justified. The government's "interest in enhancing broadcast diversity" was "at the very least" an important government objective and the minority ownership policy used in the case was substantially related to that goal.[102]

---

necessarily receive a most searching examination to make sure it [sic] does not conflict with constitutional guarantees." *Fullilove*, 448 U.S. at 491 (Burger, C.J., White & Powell, JJ., plurality opinion). The Court never defined a "most searching examination." It instead employed a two-step analysis in *Fullilove*. First, it asked "whether the objectives of this legislation [were] within the powers of Congress," and second, it asked "whether the limited use of racial and ethnic criteria, in the context presented, [was] a constitutionally permissible means for achieving the congressional objectives." *Id.* at 473. Satisfied that the set-aside program met both of these requirements, the Court upheld it. *Id.* at 492.

[96] 497 U.S. 547 (1990), *overruled in part by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

[97] *Id.* at 564-65.

[98] *See Croson*, 488 U.S. at 493-94. While a majority of the Court in *Metro Broadcasting* voted for the intermediate scrutiny standard, four of the current Justices adamantly dissented, arguing that strict scrutiny was the appropriate standard of review. *Metro Broadcasting*, 497 U.S. at 602-31 (Rehnquist, C.J., O'Connor, Scalia, & Kennedy, JJ., dissenting); *id.* at 632-38 (Kennedy & Scalia, JJ., dissenting). These four Justices also refused to recognize "the interest in increasing the diversity of broadcast viewpoints" as a compelling government interest. *Id.* at 612, 633.

[99] *Metro Broadcasting*, 497 U.S. at 565 (noting that the question of congressional action was not before the Court in *Croson*). The Court observed that Congress endorsed the minority ownership preferences only after long study and painstaking consideration of all available alternatives. *Id.* at 589.

[100] *Id.* at 556.

[101] *Id.*

[102] *Id.* at 567-69.

In June of 1995, the Supreme Court imposed its most stringent standard of review on federal affirmative action programs. In *Adarand Constructors, Inc. v. Pena,*[103] a majority of the Court agreed that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[104] The Court then expressly prohibited applying the intermediate scrutiny standard used in *Metro Broadcasting.*[105]

Adarand involved a Department of Transportation program that offered financial incentives to prime contractors for hiring subcontractors certified as small businesses controlled by "socially and economically disadvantaged" individuals.[106] To take advantage of the financial incentive offered by the program, a prime contractor awarded a highway construction project to a properly certified small business[107] even though Adarand Constructors was the low bidder on the project.[108] Adarand Constructors sued the Department of Transportation, arguing that the subcontracting clause violated its right to equal protection.[109] Adarand Constructors initially lost in the lower courts, which applied the intermediate scrutiny standard of *Metro Broadcasting.*[110] However, the Supreme Court remanded

---

[103] 115 S. Ct. 2097 (1995).

[104] *Id.* at 2113.

[105] *Id.* (stating that "to the extent that *Metro Broadcasting* is inconsistent with this holding, it is overruled"). The Court also said that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." *Id.* at 2117.

A turnover in Justices may account for the shift in the Court's position. After *Metro Broadcasting,* four of the Justices from the majority opinion retired. Justice Stevens, who concurred in the *Metro Broadcasting* opinion, is the only Justice from the majority remaining, along with all four of the dissenters. *See Metro Broadcasting,* 497 U.S. at 602-38 (Rehnquist, C.J., O'Connor, Scalia, & Kennedy, JJ., dissenting). President Bush appointed Justices Souter and Thomas to the Court in 1990 and 1991, respectively. President Clinton appointed Justices Ginsburg and Breyer in 1993 and 1994, respectively.

[106] *Adarand,* 115 S. Ct. at 2102-03. Congress codified the United States policy of ensuring that small businesses owned and controlled by socially and economically disadvantaged individuals be given the maximum practicable opportunity to participate in the performance of government contracts in the Small Business Act. *Id.* at 2102 (citing 15 U.S.C. § 631 (1994)). In furtherance of this policy, the Small Business Act established a government-wide goal for participation of small businesses of "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Id.* (citing 15 U.S.C. § 644(g)(1) (1994)). The Small Business Act requires that contractors presume that socially and economically disadvantaged individuals include specifically enunciated minority groups. *Id.* (citing 15 U.S.C. §§ 637(d)(2), 637(d)(3) (1994)).

[107] *Id.* at 2101.

[108] *Id.*

[109] *Id.*at 2103.

[110] *Id.*

the case for further review because the lower courts should have applied strict scrutiny to review the racially based program.[111]

The Supreme Court did not discuss the application of either prong of the strict scrutiny standard to the racially based program used in *Adarand* nor did it address the merits of the case. However, the Court emphasized that strict scrutiny does not mean "strict in theory, fatal in fact."[112] The Constitution gives Congress the power to deal with the problem of racial discrimination and the Court will defer to the exercise of that authority.[113] The Court refused to discuss the extent of that deference.[114]

C. Current Status

After *Adarand*, state and federal governments still may employ affirmative action programs. These programs must pass standards imposed by both Title VII and the United States Constitution. Because constitutional standards are more restrictive than Title VII, some plans will survive Title VII analysis, but fail constitutional review.[115] Public employers should, therefore, devise their plans to pass the higher constitutional requirements.

Under a constitutional analysis, affirmative action programs employed by state and local governments, and those employed by the federal government, are now subject to strict scrutiny on judicial review.[116] To pass strict scrutiny, public employers must have a compelling government interest to justify a racial classification and must use measures narrowly tailored to further that interest. To date, the Supreme Court has only recognized one interest compelling enough to justify a racial classification—remedying unlawful

[111] *Id.* at 2118. The Court issued a five-to-four opinion in *Adarand*. All four of the dissenters from *Metro Broadcasting* voted in the *Adarand* majority, along with Justice Thomas. *See supra* note 98. Three of the new Justices voted in the dissent with Justice Stevens. The four dissenters in *Adarand* do not think that a strict scrutiny standard is necessary for congressionally authorized affirmative action measures; intermediate scrutiny is sufficient. *Id.* at 2120-36 (Stevens, Ginsburg, Souter, & Breyer, JJ., dissenting).

[112] *Id.* at 2117.

[113] *Id.* at 2114.

[114] *Id.* at 2097.

[115] At least one Supreme Court Justice thinks the "initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is not different from that required by the Equal Protection Clause." Johnson v. Santa Clara Transportation Agency, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring in the judgment).

[116] While *Adarand* involved a challenge to a federal contracting program, the Supreme Court did not limit its opinion to that arena. After reviewing its previous affirmative action decisions involving contracting, employment, and education, the Court used broad, sweeping language to make clear that *Adarand* will impact on *any* federal, state and local programs allowing race or ethnicity to be used as a basis for decisionmaking. *See* Memorandum, Assistant Attorney General, United States

past discrimination.[117] Public employers may remedy their own past discrimination, or past discrimination caused by private actors if the government became a "passive participant" in the private actors' discriminatory activities.[118] While a public employer may have other interests to justify a racial classification, a majority of the Court may not recognize those interests as compelling.[119]

To justify a compelling interest in remedying past discrimination, a public employer need not admit or prove that it discriminated against a minority or gender group.[120] A judicial or administrative finding of discrimination also is unnecessary.[121] An employer must, however, have "a strong basis in evidence for its conclusion that remedial action was necessary."[122] "[S]tatistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination."[123] Comparisons that result in a statistical difference of

Department of Justice, to General Counsels, subject: *Adarand*, sec. I.C. (28 June 1995).

[117] *See, e.g.*, Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547, 612 (1990), *overruled in part by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (recognizing that "modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of discrimination"); City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989) (noting that unless classifications based on race "are strictly reserved for remedial settings, they may in fact promote notions of inferiority and lead to a politics of racial hostility"); United States v. Paradise, 480 U.S. 149, 166 (1987) (stating that "[i]t is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination").

[118] *See Croson*, 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment). Public employers will need a "strong basis in evidence" to support their conclusion that remedial action is necessary. *Id.* at 500. This evidence may need to approach a prima facie case of a constitutional or statutory violation by the public employer or anyone in the relevant private sector. *Id.*

[119] *See, e.g.*, Regents of the University of California v. Bakke, 438 U.S. 265, 311-12 (1978) (recognizing the "attainment of a diverse student body" as a "constitutionally permissible goal for an institution of higher education"); *Johnson*, 480 U.S. at 647 (Stevens, J., concurring) (noting that legitimate reasons for preferences may include dispelling the notion that white supremacy governs our social institutions, improving services to Black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of the work force); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) (stating that at least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life or limb can justify a racial classification).

[120] *See Johnson*, 480 U.S. at 652-53 (O'Connor, J., concurring) (explaining that to require an employer to "actually prove that it had discriminated in the past would . . . unduly discourage voluntary efforts to remedy apparent discrimination").

[121] *Id.*

[122] *Croson*, 488 U.S. at 500. *See also* Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1555 (11th Cir. 1994) (stating that "[e]vidence that the statistical imbalance between minorities and nonminorities in the relevant work force and available labor pool constitutes a gross disparity, and thus a prima facie case of constitution or statutory violation, may justify a public employer's adoption of racial or gender preferences").

[123] *Croson*, 488 U.S. at 501.

more than two or three standard deviations[124] undercut the presumption that decisions were made without regard to race and justify the use of race-conscious affirmative action.[125] Statistical results that are less than two standard deviations also may be sufficient to justify race-conscious action, but there is limited precedent supporting lower deviations.[126]

To satisfy the narrowly tailored prong of the strict scrutiny standard, public employers must link their affirmative actions directly to their compelling interest.[127] For example, if a public employer has discriminated against Blacks and Hispanics, the employer must tailor its program to remedy only that discrimination. Providing a preference to other groups against which the employer has no history of discrimination will not pass the strict scrutiny standard.[128] Once the employer has remedied the discrimination against a group, the preference accorded that group must end. Where an employer has adequate evidence to justify a racial preference, the employer cannot rely solely on race to make an employment decision; the employer also must consider qualifications and other critical components.[129] An employer cannot use inflexible goals or quotas to administer a program. Any program unable to meet these criteria, or any employer unable to demonstrate that it considered race-neutral alternatives,[130] will not survive the "narrowly tailored" requirement of *Adarand*.

Courts will yield congressionally authorized affirmative action programs greater deference than state and local programs because of Congress's authority to identify and remedy the effects of past discrimination.[131] The Court has not yet decided the extent of that def-

---

[124] *See* Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977) (using the selection of jurors drawn randomly from the general population to illustrate standard statistical deviations and how to calculate them); *Peightal*, 26 F.3d at 1556 (upholding the lower court's determination that a statistical disparity of 17.6 standard deviations constitutes a "strong basis in evidence").

[125] *See id. See also* Hazelwood v. United States, 433 U.S. 299, 311-12 n.17 (1977) (demonstrating how choosing the relevant labor market area can impact on statistical deviation results); SCHLEI & GROSSMAN, *supra* note 52, at 98-99 n.75 (listing cases where the statistical deviation was greater than two standard deviations).

[126] *See, e.g.*, Chance v. Board of Examiners, 458 F.2d 1167, 1171 (2d Cir. 1972) (finding a substantial adverse impact where the statistical deviation between the pass rates for white and minorities was 1.5). *But see* Boggs v. Bancroft-Whitney Co., 25 Fair Empl. Prac. Cas. (BNA) 13, 15 (C.D. Cal. Feb. 5, 1981) (finding no adverse impact where statistical deviation between selection rates was 1.73).

[127] Adarand Constructors, Inc v. Pena, 115 S. Ct. 2097, 2117 (1995) (requiring that the reasons for racial classifications be clearly identified and that there be the most "exact connection between justification and classification").

[128] *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 507 (1989).

[129] *See* Johnson v. Santa Clara Transportation Agency, 480 U.S. 616, 636 (1987).

[130] *See Croson*, 488 U.S. at 507.

[131] *Adarand*, 115 S. Ct. at 2114.

erence.[132] However, the Court has decided that Congress is not immune from judicial scrutiny. The Supreme Court "would not hesitate to invoke the Constitution should [it] determine that Congress has overstepped the bounds of its constitutional power."[133] Consequently, federal employers should proceed cautiously if they adopt programs that would not meet the Court's minimum requirements for state programs, especially if Congress has not specifically authorized the federal program.

Thus far, the Supreme Court has only issued opinions in cases involving constitutional challenges to affirmative action programs based on racial classifications. The Court has not yet decided the proper standard of review for affirmative action programs involving gender classifications.[134] Some courts continue to apply an intermediate level of scrutiny to these cases.[135] Other courts may apply a strict scrutiny standard based on *Adarand*. In the recent Supreme Court argument on the case involving gender-based discrimination at the Virginia Military Institute, even the Solicitor General argued that strict scrutiny is the proper standard for reviewing gender-based classifications.[136] Perhaps when the Court issues its opinion in that case, it will finally resolve this issue. In the interim, the Army and other public employers should analyze gender-based programs under the strict scrutiny standard to ensure compliance with whichever standard the Court imposes.

III. Military Personnel

The Army currently has approximately 500,000 soldiers on

---

[132] The *Adarand* majority specifically said "[w]e need not, and do not, address these differences today," referring to various Court opinions discussing judicial deference to Congress. *Id.* at 2114.

[133] Fullilove v. Klutznick, 448 U.S. 448, 473 (1980).

[134] However, in *Bakke*, the Court inferred that it would apply a lower standard of review for gender classifications. Regents of the University of California v. Bakke, 438 U.S. 265, 302-03 (1978).

> Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. . . . In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

[135] *See, e.g.*, Associated General Contractors of California, Inc. v. San Francisco, 813 F.2d 922 (9th Cir. 1987) (applying an intermediate scrutiny standard to a gender preference, but a strict scrutiny standard to a racial preference).

[136] *See* United States v. Virginia, Nos. 94-1941, 94-2107, 1996 WL 16020, at *5

active duty.[137] The Army regularly makes employment decisions affecting these soldiers.[138] The procedures applicable to each decision vary. Some procedures allow Army officials to consider race, ethnicity, or sex to ensure that all soldiers receive an equal opportunity to succeed.[139] Whenever the Army considers race, ethnicity, or sex to make an employment decision affecting an active duty service member, it must justify such considerations under the Due Process Clause of the Fifth Amendment.[140] The Army does not have to justify these decisions under Title VII because Title VII does not apply to service members.[141]

One of the most important employment decisions that the Army makes is promotions. The Army officer promotion process exemplifies the Army's commitment to ensuring equal opportunity for its personnel. The Army's affirmative action plan and instructions governing officer promotions contain goals and special procedures for examining the selection of minorities and women. Use of these procedures has contributed to the Army becoming "the most racially diverse and best-qualified military in our history."[142]

(U.S. Jan. 17, 1996) (oral argument urging the Supreme Court to adopt the highest standard of strict scrutiny).

137 At the end of fiscal year 1995, the Army had 82,000 officers and 420,000 enlisted personnel. Telephone Interview with Randall Rakers, Military History Institute, Army War College (Feb. 23, 1996) [hereinafter Randall Rakers Interview] (quoting Gary Bounds, Headquarters, Department of the Army, Deputy Chief of Staff for Operations, Force Design).

138 The Army regularly decides which soldiers to train, which soldiers to retain on active duty (especially in this time of downsizing), which soldiers to promote, which soldiers to assign to available positions, and which soldiers to place in leadership positions.

139 Military leaders prefer to use the term "equal opportunity" rather than "affirmative action" or "diversity" when describing the ongoing integration of minorities and women into the work force. *See* REPORT TO THE PRESIDENT, *supra* note 4, § 7.1 n.54. However, "[i]nsofar as bias and prejudice persist, effective equal opportunity strategies will often entail affirmative action." *Id.*

140 *See supra* discussion part II.B.2.

141 *See* Roper v. Department of the Army, 832 F.2d 247, 248 (2d Cir. 1987) (holding that "[i]n the absence of some express indication in the legislative history that Congress intended Title VII to apply to uniformed members of the armed forces," the court refused "to extend a judicial remedy for alleged discrimination in civilian employment to the dissimilar employment context of the military"); Gonzalez v. Department of the Army, 718 F.2d 926, 928 (9th Cir. 1982) (concluding that the term "military departments" in Title VII includes only civilian employees of the military services and not military personnel); Johnson v. Alexander, 572 F.2d 1219, 1223 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978) (finding that the term "employee" in Title VII does not encompass service members because military service differs from civilian employment in critical respects). *See also* Mier v. Owens, 57 F.3d 747, 748 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 36 (U.S. Mar. 25, 1996) (No. 95-816) (holding that Title VII applies to National Guard technicians whose jobs are hybrid military-civilian positions, except when they challenge personnel actions integrally related to the military's unique structure).

142 Remarks by the President, *supra* note 6 (praising the Army for setting "such a fine example" with its affirmative action program and for "ensuring that it has a wide pool of qualified candidates for every level of promotion").

Continued use of these procedures after *Adarand*, however, may result in a violation of the Fifth Amendment.

A. Affirmative Action Programs

The Department of Defense requires each military service to establish equal opportunity and affirmative action programs.[143] Equal opportunity programs ensure that individuals are "evaluated only on individual merit, fitness, and capability, regardless of race, color, sex, [or] national origin . . . ."[144] Affirmative action programs are a management tool "intended to assist in overcoming the effects of discriminatory treatment as it affects equal opportunity, upward mobility, and the quality of life for military personnel."[145] The Army maintains that both of these programs are essential because illegal discrimination based on race, color, or gender is "contrary to good order and discipline" and "counterproductive to combat readiness and mission accomplishment."[146]

The design of the Army Equal Opportunity Program is to provide equal opportunity for military personnel and to "contribute to mission accomplishment, cohesion, and readiness."[147] The Army's equal opportunity policy generally prohibits soldiers from being promoted or otherwise managed on the basis of race, color, or gender (sex).[148] There are two exceptions to this "totally nonbiased personnel management process."[149] First, the Army can assign and use female soldiers pursuant to its coding system.[150] Second, the Army

---

143 DEP'T OF DEFENSE DIR. 1350.2, THE DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM, para. D.4 (18 Aug. 1995) [hereinafter DOD DIR. 1350.2].

144 *Id.* encl. 2, para. 6. Equal opportunity is "[t]he right of all persons to participate in, and benefit from, programs and activities for which they are qualified. . . ." *Id.*

145 DEP'T OF DEFENSE INSTRUCTION 1350.3, AFFIRMATIVE ACTION PLANNING AND ASSESSMENT PROCESS, encl. 1, para. 1 (29 Feb. 1988) [hereinafter DODI 1350.3]. The Department of Defense defines affirmative action as "methods used to achieve the objectives of the [Military Equal Opportunity] program." DOD DIR. 1350.2, *supra* note 143, encl. 2, para. 1.

The Equal Opportunity Policy Office for the Department of Defense is circulating a revised draft of DODI 1350.3.

146 DOD DIR. 1350.2, *supra* note 143, para. D.2.

147 DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 6-1 (30 Mar. 1988) (IO4, 17 Sept. 1993) [hereinafter AR 600-20]. The Army sent Interim Change 5 to Army Regulation 600-20 to the publisher and expects to release it in May 1996. In its entirety, Interim Change 5 will say "See Interim Change 4 to AR 600-20." Telephone Interview with Chaplain (Lieutenant Colonel) Willard D. Goldman, Army Command Policy (Feb. 28, 1996).

148 AR 600-20, *supra* note 147, para 6-3b (IO4, 17 Sept. 1993).

149 *Id.*

150 *Id.* para. 6-3b(1). *See also* DEP'T OF ARMY, REG. 600-13, ARMY POLICY FOR THE

can support "established equal opportunity goals . . . to increase representation of a particular group in one or more monitored area(s) of affirmative action plans."[151]

The Army requires each major command, installation, unit, agency, and activity down to the brigade level to develop and implement affirmative action plans.[152] Each plan must include "conditions requiring affirmative action(s), remedial action steps (with goals and milestones as necessary), and a description of the end-condition sought for each subject area included."[153] Activities that have affirmative action plans must review them at least annually "to assess the effectiveness of past actions; to initiate new actions; and to sustain, monitor, or delete goals already achieved."[154] After this review, activities will collect statistical data that shows achievements and shortfalls in the programs and forward the information through the major command to Headquarters, Department of the Army.[155]

Complementing these lower level plans, the Department of the Army has its own master affirmative action plan. One stated reason

---

ASSIGNMENT OF FEMALE SOLDIERS (27 Mar. 1992) [hereinafter AR 600-13]. The Army's assignment policy for female soldiers allows women to serve in any officer or enlisted specialty or position except where the routine mission of such unit, specialty, or position is to engage in direct combat or to collocate routinely with units assigned a direct combat mission. *Id.* para. 1-12. If a position routinely entails direct combat missions, the Army codes that position as "P1," indicating that female soldiers cannot hold the position. *Id.* para. 2-3.

151 AR 600-20, *supra* note 147, para 6-3b(2) (IO4, 17 Sept. 1993).

152 *Id.* para. 6-13a.

153 *Id.*

154 *Id.* para. 6-13b.

155 *See id.* para. 6-16a. The Department of Army compiles this information and records it on a Military Equal Opportunity Assessment form. *See* Dep't of Defense, Form 2509, Military Equal Opportunity Assessment (Dec. 1987) [hereinafter DD Form 2509]. *See* DODI 1350.3, *supra* note 145, encl. 2. The Army submits Military Equal Opportunity Assessments to the Department of Defense annually. The Army prepares separate assessment forms to capture data by racial, ethnic, and gender groups for accessions, promotions, military education, separations, augmentations, and other specified categories. *Id.*

For promotions, the Army prepares separate Military Equal Opportunity Assessments for each rank considered by promotion boards. Consequently, there are separate forms for the ranks of captain, major, lieutenant colonel, colonel, sergeant first class, master sergeant, and sergeant major. *Id.* encl. 2, para. 3b. Each assessment shows the total number of personnel considered by the board as compared to the total number selected in each racial, ethnic, and gender group. The assessments contain "no analysis of whether the observed promotion differences signify equal opportunity problems, or are simply due to random chance." CAROL A. ROBINSON & STEVEN S. PREVETTE, DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE, DISPARITIES IN MINORITY PROMOTION RATES: A TOTAL QUALITY APPROACH FISCAL YEARS 1987-1991, at 1 (1992). The Army analyzes this information separately on executive summaries. Telephone Interview with Sergeant Major Terry Stegemeyer, Senior Equal Opportunity Advisor, Headquarters, Department of the Army, Deputy Chief of Staff Personnel (Apr. 1, 1996).

for the Army's affirmative actions is to compensate minority groups "for disadvantages and inequities that may have resulted from past discrimination."[156] Another stated reason is to accomplish the military mission.

> Soldiers must be committed to accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. Leaders at all levels promote individual readiness by developing competence and confidence in their subordinates. A leadership climate in which all soldiers perceive they are treated with fairness, justice, and equity is crucial to the development of this confidence.[157]

The Army's plan establishes specific affirmative action goals that "are intended to be realistic and achievable."[158] These "[g]oals are not ceilings, nor are they base figures that are to be reached at the expense of requisite qualifications and standards."[159] For Army officer promotions, the goal is "selection rates for all categories" not less than "the overall selection rate for the total population considered."[160] After a promotion board has met, the Army compares the actual selection rates achieved to its affirmative action goals to highlight progress and identify problem areas.[161]

---

156 DEP'T OF ARMY, PAMPHLET 600-26, DEPARTMENT OF THE ARMY AFFIRMATIVE ACTION PLAN, glossary (23 May 1990) [hereinafter DA PAM 600-26].

157 *Id.* para. 1-4b.

158 *Id.* para. 2-1.

159 *Id.*

160 *Id.* para. 2-5a(4). While the Army's Affirmative Action Plan states that selection rates for each category should be compared to the "overall selection rate for the total population," the written instructions provided to selection board members limit the comparison to "all officers in the promotion zone (first time considered)." *Compare* DA PAM. 600-26, *supra* note 156, para. 2-5a(4) *with* DEP'T OF ARMY, MEMO 600-2, POLICIES AND PROCEDURES FOR ACTIVE COMPONENT OFFICER SELECTION BOARDS (26 Nov. 1993) [hereinafter DA MEMO 600-2].

Comparing minority and female selection rates to all officers considered or to first-time considered officers is important because it allows the board to determine whether it is selecting qualified minority and female officers at rates comparable to other officers considered for promotion. The rationale behind this selection rate is that "fair employment practices, over time, would result in a selection rate for minorities that essentially tracks the availability of minorities in the qualified labor market." Memorandum, Associate Attorney General, Department of Justice, to General Counsels, subject: Post-Adarand Guidance on Affirmative Action in Federal Employment, para. III.B.3 (29 Feb. 1996). For military promotions, the qualified labor market includes only military officers serving in the rank specified by the Secretary of the Army as eligible for promotion. *See infra* discussion parts III.B.1, III.C.3. Comparing minority and female selection rates to the broader Army population or to the civilian labor force would not be a proper comparison. *See infra* note 283 and accompanying text.

161 DA PAM 600-26, *supra* note 156, paras. 3-4a(1), 3-4a(2). The Army uses a representation index to measure any changes and determine the percentage of over- and under-representation in each category. *Id.* para. 3-4b. This index does not determine the cause of any change; it merely isolates particular areas that require closer examination. *Id.*

B. Officer Promotion Procedures

Congress charged the Secretary of Defense with the responsibility of promoting military officers to the next higher grade.[162] The Secretary of Defense delegated responsibility for developing written promotion procedures and administering promotion programs to the Secretaries of each of the military departments.[163]

1. Convening a Promotion Board—The Secretary of the Army convenes promotion boards[164] for Army officers.[165] These boards select officers for promotion from a select group of fully qualified officers. Before convening a board, the Secretary designates the officers eligible for consideration by their rank and the date they achieved that rank.[166] For example, the Secretary can convene a board for promotion to major and limit the officers eligible for consideration to captains with dates of rank[167] between January 1, 1995, and January 1, 1996. Captains possessing the requisite date of rank constitute the qualified pool of officers for the rank of major. During the promotion process, the board will identify captains fully qualified for promotion.[168] The board will then recommend captains who are "best qualified" for promotion from the group of fully qualified captains.

Once convened, the Secretary gives each member of the board written instructions containing the policies and procedures needed to conduct the board.[169] These instructions are generally the same for all Army promotion boards.[170] In the basic instructions, the

---

[162] 10 U.S.C. §§ 611-632 (1994).

[163] DEP'T OF DEFENSE, DIR 1320.12, DEFENSE OFFICER PROMOTION PROGRAM, para. E.2 (4 Feb. 1994) [hereinafter DOD DIR. 1320.12].

[164] 10 U.S.C. § 611(a) (1994). *See also* DOD DIR. 1320.12, *supra* note 163, para. E.2.h. Each board shall consist of five or more active duty Army officers. 10 U.S.C. § 612(a)(1) (1994). Each member of the board must be senior in rank to those being considered, but no member may be less than the rank of major. *Id.*

[165] The President, with the advice and consent of the Senate, appoints generals and lieutenant generals. 10 U.S.C. § 601a (1994). Commanders in the grade of lieutenant colonel or above are authorized to promote officers to the grades of first lieutenant and chief warrant officer W-2. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS, para. 1-7 (30 Nov. 1994) [hereinafter AR 600-8-29].

[166] 10 U.S.C. § 619(c)(1) (1994).

[167] "Date of rank" refers to the date the Army promoted the officer to their current rank.

[168] *See infra* note 176 and accompanying text.

[169] *See* 10 U.S.C. § 615(b)(6) (1994) (requiring the Secretary of the military department concerned to "furnish each selection board . . . with . . . guidelines as may be necessary to enable the board to properly perform its functions"). *See also* DOD Dir. 1320.12, *supra* note 163, para. F.1; AR 600-8-29, *supra* note 165, para. 1-33a.

[170] Department of the Army Memo 600-2 contains boilerplate language used in the Secretary's written instructions to each promotion board. DA MEMO 600-2, *supra* note 160. The Secretary sometimes modifies these instructions for specific boards.

Secretary describes the Army's commitment to equal opportunity for all soldiers and the role that equal opportunity plays in the selection process.[171] The Secretary also instructs the board to "be alert to the possibility of past personal or institutional discrimination . . . in the assignment patterns, evaluations, or professional development of officers in those groups" for which it has an equal opportunity selection goal.[172] All promotion boards have the following equal opportunity selection goal for minority and female officers:

> [A] selection rate in each minority and gender group (minority groups: Black, Hispanic, Asian/Pacific Islander, American Indian, and Others; gender: males for Army Nurse Corps (ANC) competitive category and females for all other competitive categories) that is not less than the selection rate for all officers in the promotion zone (first time considered).[173]

2. Promotion Board Procedures—Each promotion board has four phases. At least one board recorder is present during all board deliberations to assist the board and to ensure it strictly complies with the Secretary's Memorandum of Instruction.[174] During the first phase, the board reviews the files of each officer in and above the promotion zone[175] to identify officers who are fully qualified for promotion.[176] Each board member reviews each file, assigns a numerical score to it, and passes it to the next board member to do the same.[177] This process continues until all board members have reviewed all files. When every board member has finished reviewing a file, the recorder takes the file, adds the scores from all board members, and assigns the file one numerical score. Next, the recorder passes the file to another recorder who checks the score. A

---

171 Equal opportunity "is especially important to demonstrate in the selection process. To the extent each board demonstrates that race, ethnic background, and gender are not impediments to . . . promotion, our soldiers will have a clear perception of equal opportunity in the selection process." *Id.* para. 10.

172 *Id.* para. 10a.

173 *Id.* para. A-2.

174 DOD DIR. 1320.12, *supra* note 163, para. F.2.b. A board recorder is a commissioned officer who has completed, in the 12 months prior to the board, a program of instruction on the duties and responsibilities of board recorders and board members. *Id.*

175 DA MEMO 600-2, *supra* note 160, para A-8a. The promotion zone is the category of commissioned officers on the active duty list who are eligible for promotion consideration because they were promoted to their current rank during the requisite time period announced by the Secretary prior to convening the board. *See* AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. The "above the zone" category consists of commissioned officers who are eligible for promotion and whose date of rank is senior to any officer in the promotion zone. *Id.* at 33.

176 "Fully qualified officers are those, by definition, whose demonstrated potential unequivocally warrants their promotion to the next higher grade." DA Memo 600-2, *supra* note 160, para. A-8a(3).

177 Board members use "blind vote sheets" to vote officer files during promotion

programmer inputs the score into a database that arranges each officer's name in a single list containing the relative standings of all officers considered.[178] This list is commonly known as the "Order of Merit List."

After voting all files, the board verifies the numerical scores. It looks at the officers and the scores on the Order of Merit List and draws a line between "officers who are fully qualified and who are not fully qualified for promotion."[179] The board will not recommend for promotion any officer deemed not fully qualified. [180]

In phase two, each board member reviews the files of officers considered for promotion below the zone.[181] To be recommended for promotion, officers considered in this category must "possess the potential for promotion ahead of their contemporaries."[182] Each board member assigns a numerical score to each file considered. The board uses that score to determine the relative standing of below the zone officers.[183] After the board determines the minimum and maximum number of below the zone selections allowed, the programmer integrates the tentative below the zone selectees into the Order of Merit List for officers in and above the zone.[184] By the end of phase two, the board will have one Order of Merit List for all officers considered for promotion ranked by their numerical score from highest to lowest.

In phase three, the board identifies the officers on the Order of Merit List who are "best qualified" for promotion.[185] The board ini-

---

boards. This means that each member writes the score for each file on a voting card that has removable slips. After writing the score, the member tears off the slip with the score written on it. A master voting card is attached to the back of the removable slips and carbon paper ensures that an imprint of each score remains with the file. As files pass between board members, no one can see how the other members voted a particular file. There also is no discussion between the board members during the voting process.

[178] DA MEMO 600-2, *supra* note 160, para A-8a(2).

[179] *Id.* para. A-8a(3).

[180] *See* 10 U.S.C. § 616(c) (1994) (stating that a selection board "may not recommend an officer for promotion unless (1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members finds the officer is fully qualified for promotion"); *id.* § 616(d) (stating that "an officer on the active-duty list may not be promoted to a higher grade . . . unless he is considered and recommended for promotion to that grade by a selection board").

[181] Officers eligible for promotion consideration below the zone have served less time in their current rank than most of the other officers considered with them for promotion. AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. Below-the-zone consideration does not apply to promotions to captain. DA MEMO 600-2, *supra* note 160, para. A-8(b).

[182] DA MEMO 600-2, *supra* note 160, para A-8b(4).

[183] *Id.* para. A-8b(3).

[184] *Id.* para. A-8b(5).

[185] *Id.* para. A-8c(1).

tially determines who is best qualified by drawing a line on the Order of Merit List after the number of officers that the Secretary has authorized for promotion.[186] For example, if there are 1000 officers considered by the promotion board and the Secretary has authorized the promotion of 700 officers, the board will tentatively draw a line after the 700th name on the Order of Merit List.

After the board draws the line between those officers tentatively selected and those not selected, the board conducts an equal opportunity assessment.[187] The board compares the number of officers above the tentative selection line to the total number of first-time considered officers in the promotion zone to determine the selection rate.[188] The board then compares the total number of minorities and females selected to the total number of minorities and females first-time considered in the promotion zone to determine the selection rate for each minority and gender category identified by the Secretary.[189] If the board fails to achieve the same selection rate for minority and female officers as the selection rate for all other officers considered for the first time, the board must conduct another review of the files in the specific group or groups where it failed to achieve the same rate. "This review is required even if the selection of one additional individual in a minority or gender group would result in a selection rate equal to or greater than the equal opportunity goal for the minority or gender group."[190]

---

[186] In addition to providing general instructions to the board in the Memorandum of Instruction, the Secretary must tell each board member the maximum number of officers in each competitive category under consideration that the board may recommend for promotion to the next higher grade. 10 U.S.C. § 615(b)(1) (1994). *See also* DOD DIR. 1320.12, *supra* note 163, para. F.1.b(2); AR 600-8-29, *supra* note 165, para. 1-33a(1)(e).

[187] DA MEMO 600-2, *supra* note 160, para A-8c(2)(a).

[188] The board does not limit this comparison to those officers who are fully qualified.

[189] For example, if a board may select 700 of the 1000 officers considered, then the overall selection rate is 70%. If the overall selection rate is 70%, the selection goal in each of the stated minority and gender categories also should be 70%. This means that if there are 100 Black officers in the 1000 officers considered, the board would need to select 70, or 70%, of these officers to meet its selection goal. If 200 of the officers considered are female, then the board would need to select 140 of them to meet its selection goal. The goal is to promote all categories of officers considered at the same rate.

[190] The quoted language takes precedence over the language currently stated in the first sentence of Department of Army Memo 600-2, paragraph A-8c(2)(a)(1), and has been used in Memoranda of Instruction to promotion boards since November, 1995. In its entirety, the following language has replaced the general guidance contained in the first sentence of Department of Army Memo 600-2, paragraph A-8c(2)(a)(1):

> Your goal is to achieve a selection rate in each minority or gender group (minority groups: Black, Hispanic, Asian/Pacific Islander, American Indian, and Other/Unknown; gender group: Female) that is not less than the selection rate for all officers in the primary zone of consideration.

During this second review of the files, board members look for indicators of past personal or institutional discrimination against individual officers. "Such indicators may include disproportionately lower evaluation reports, assignments of lesser importance or responsibility, or lack of opportunity to attend career-building military schools."[191] If the board finds these indicators or any other evidence of discrimination, it must "revote the record of that officer and adjust his or her relative standing to reflect the most current score."[192] The new score could be higher, lower, or the same as the original score. If the new score is higher, this revote may result in the promotion of a minority or female officer who may not have been promoted based on initial scores. If a minority or female officer moves above the tentative select line on the Order of Merit List, another officer may move down the list. The officer who moves down may be a minority or a nonminority officer. This downward movement may result in the nonselection of an officer who would have been selected but for the revote of the minority or female officer's file.[193]

After completing the revote of files, the board must again determine whether it has met the Secretary's equal opportunity selection goals in each minority or gender category. If it still has not met the goals, it may not conduct any further votes on the files. However, the board must review the files in groups where it failed to achieve selection goals to "assess any patterns in the files of nonselected officers of that minority or gender group."[194] The board must discuss any patterns found and the nonattainment of specific selec-

---

> You are required to conduct a review of files for the effects of past discrimination in any *case* in which the selection rate for a minority or gender group is less than the selection rate for all first time considered officers. This review is required even if the selection of one additional minority or gender group would result in a selection rate equal to or greater than the equal opportunity goal for the minority or gender group.

See Memorandum of Instruction for Fiscal Year 1996 Lieutenant Colonel, Army Competitive Category, Promotion Board, released 14 Mar. 1996 (original on file with Headquarters, Department of the Army, Deputy Chief of Staff Personnel). The remainder of paragraph A-8c, remains unchanged.

191 DA MEMO 600-2, *supra* note 160, para 10.

192 *Id.* para. A-8(c)(2)(a)(1). If the board does not find any indication of discrimination against any officers, it has no authority to revote files.

193 Some promotion boards receive an "optimum number" and a "maximum number" of officers to select for promotion. *See id.* para. A-8(d)(6). If a board revotes a file and raises the numerical score, the affected officer will move up on the Order of Merit List. Officers who move down the list may fall below the optimum number of officers allowed to be selected, but still be above the maximum number of officers authorized for promotion. As a result, the officer moving down still may be recommended for promotion.

194 *Id.* para. A-8(c)(2)(a)(2).

tion goals in its after-action report to the Secretary.[195]

Besides assessing whether it has met equal opportunity goals, the board also must assess whether it has met other goals set by the Secretary.[196] If it fails to meet other goals, the board must follow the Memorandum of Instruction requirements for adjusting officers on the Order of Merit List.[197] The board also must discuss the failure to meet these goals in its after-action report. Once the board has finished conducting all of the required phase-three assessments, it draws a firm line on the Order of Merit List between those officers best qualified for promotion in light of the Army's needs and those who are not. The board uses the Order of Merit List to develop two separate lists to include as enclosures to its report to the Secretary. The names on both lists are in alphabetical order; the board does not reveal how it ranked officers on the Order of Merit List.

Throughout the promotion process, board members may identify files of officers who they think should be considered for possible involuntary separation. During phase four, each board member must reconsider each file so identified.[198] If a majority of the board determines officers should have to show cause why they should be retained on active duty, then the board will forward a list of those officers to the Secretary.[199]

C. Evaluation Under Adarand

In *Adarand*, the Supreme Court held that a strict scrutiny standard applies to "all racial classifications" imposed by federal, state, and local actors.[200] Applying this standard to the Army's promotion process raises three issues. The first issue is whether the promotion process involves a racial classification subject to *Adarand's* strict scrutiny standard. If it does, the second issue is whether there is a compelling Army interest justifying the use of the process. If a compelling interest exists, then the third issue is

---

[195] The after-action report to the Secretary also contains the list of officers that the board recommends for promotion, the list of those not recommended for promotion, the statistical summaries of the board, and the board's certification that it has followed all the instructions given to it. *Id.* para. I-1.

[196] Usually the Secretary establishes goals for selecting officers who served in joint duty assignments and specific career fields, and for selecting officers with special skills. *See id.* paras. A-8c(2)(b), A-8c(2)(c), A-8c(2)(d).

[197] The instructions establish revote procedures if a board fails to meet its goal for officers who served in joint duty assignments. *See id.* para. A-8c(2)(b). There also are specific instructions requiring the board to shift officers on the Order of Merit List if it fails to meet career field or skill selection goals. *See id.* paras. A-8c(2)(c), A-8c(2)(d).

[198] *Id.* para. A-8d.

[199] *Id.* para. I-1a(1). *See also* 10 U.S.C. § 617(b) (1994).

[200] Adarand Constructors, Inc v. Pena, 115 S. Ct. 2097, 2113 (1995).

whether the Army has narrowly tailored the process to achieve that compelling interest.

1. Racial Classification—Determining whether the Army's promotion process creates a racial classification subject to *Adarand's* strict scrutiny standard requires an examination of several sections of the Memorandum of Instruction to the board.

Paragraph ten of the Memorandum of Instruction, "Equal opportunity," contains an introduction and three subparagraphs.[201] The introduction briefly explains the Army's equal opportunity policy. Although the introduction mentions race and gender,[202] this is insufficient to create a racial or gender classification triggering review under either a strict scrutiny or intermediate scrutiny standard.[203] Other characteristics must be present to "transform the mere mention of race into a racial classification."[204]

The three subparagraphs of paragraph 10, coupled with the other board instructions, go beyond merely mentioning race and gender. These paragraphs impose specific selection goals[205] on the

---

201 DA MEMO 600-2, *supra* note 160, para 10.

202 The introduction to paragraph 10 reads in its entirety:

> The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity upon which our country was founded. People remain the cornerstone of readiness. To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but it is especially important to demonstrate in the selection process. *To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception of equal opportunity in the selection process.*

Id. (emphasis added).

203 *See* Baker v. United States, No. 94-453C, 1995 U.S. Claims LEXIS 236, at *29, *34-35 (Ct. Cl. Dec. 12, 1995). In *Baker*, 83 retired Air Force colonels challenged on equal protection grounds the Memorandum of Instruction given to a Selective Early Retirement Board in 1992. *Id.* One part of the instruction told the board to "be particularly sensitive to the possibility that past individual and societal attitudes" may have placed minority and female officers at a disadvantage from a total career perspective. *Id.* at *22. The instruction did not tell the board that it had to consider race or gender in its discharge decisions; it did not establish a quota or goal for the percentage of minorities or women to be discharged; and it did not list race or gender in the list of factors that the board members should consider in making separation decisions. *Id.* at *27. Because the instruction was "nothing more than a hortative comment . . . or reminder," the court held it did not constitute a racial classification subject to strict scrutiny. *Id.*

The Army's instruction would not be classified as a "horative comment." It lists specific minority groups, imposes goals for each of those groups, and requires special procedures anytime a board does not achieve a specific racial goal. The Army's instruction is, therefore, distinguishable from the instructions in *Baker*.

204 Characteristics that would transform the mere mention of race or gender into a race or gender classification include quotas, goals, and incentives. *Id.* at *29.

205 The selection goal for each of the stated minority and gender groups is "not less than the selection rate for all officers in the promotion zone." DA MEMO 600-2, *supra* note 160, para. A-8c(2)(a)(2).

board based on race and gender,[206] which require the board to look again at minority and gender files when selection goals have not been met,[207] and direct the board to report the extent to which it failed to achieve any goals by the end of the board process.[208] While the board bases its first review of files primarily on merit, the second review goes well beyond that; it clearly requires the board to isolate files based *solely* on race, ethnicity, and sex.

During the second review, the board searches the segregated files for any evidence of discrimination. If a board member subjectively "thinks" that there is evidence that the Army has discriminated against someone, the board must revote the file and assign it another numerical score. Merit plays no part in determining whether to revote a file. If the board still has not met its selection goals after revoting the files, it must explain the variance in writing. At no time does the Secretary require the board to document what evidence of discrimination prompted it to revote any file.

These equal opportunity instructions contain distinct race-and sex-based procedures that potentially benefit only minority and female officers. The plain language of the instructions forecloses the possibility that white males[209] could ever benefit from the revote procedure.[210] Differentiating between groups in this manner clearly creates racial and gender classifications.[211] After *Adarand*, such

---

[206] The first subparagraph alerts the board to the *possibility* that "officers in groups for which [it had] an equal opportunity selection goal" may have been subject to past personal or institutional discrimination. *Id.* para. 10a. The groups for which the board has selection goals are Blacks, Hispanics, Asian/Pacific Islanders, American Indians, and women (except for the Army Nurse Corps where there is a selection goal for men). *Id.* para. A-2.

[207] The second subparagraph explains that the selection goal is not to be interpreted as a quota. *Id.* para. 10b. However, if the board fails to meet the goals after the first review of the files, it is "required" to target the files in the minority or gender group where it did not meet the selection rate and "look again for evidence of discrimination." *Id. See also id.* para. A-8c(2)(a)(1).

[208] After reviewing the files again, if the board still has not met its selection goal, the last subparagraph requires the board to report "the extent to which minority and female officers were selected at a rate less than . . . nonminority officers." *Id.* para. 10c. *See also id.* para. A-8c(2)(a)(2) (requiring the promotion board to discuss in its after-action report the extent to which it does not meet equal opportunity selection goals and patterns in the files of nonselected officers of affected minority or gender groups).

[209] Only white males considered at Army Nurse Corps promotion boards may benefit from the revote procedure because they are in the minority of officers considered. While these white males receive the revote benefit like other minority officers, no majority group loses the benefit.

[210] *See* Contractors Ass'n of Eastern Pennsylvania, Inc v. City of Philadelphia, 6 F.3d 990, 999 (3d Cir. 1993) (finding a racial classification from the plain language of an ordinance that foreclosed a benefit to white males otherwise provided to minorities, women, and handicapped individuals).

[211] *See* Baker v. United States, No. 94-453C, 1995 U.S. Claims LEXIS 236, at *29, *32 (Ct. Cl. Dec. 12, 1995) (explaining in dicta that if the instruction to the Selective Early Retirement Board had "required a consideration of race, or if it had established racial goals and quotas," the court's conclusion that the instruction did not create a racial classification "may well have been different").

classifications[212] are subject to strict scrutiny review.[213]

2. Compelling Government Interest—For the equal opportunity instructions in the Army's promotion process to pass *Adarand's* strict scrutiny standard, the Army needs a compelling government interest justifying the racial classifications created by the instructions. Two potential compelling interests are remedying past discrimination and maintaining combat readiness. This section will discuss both of these interests in detail.

a. Remedying Past Discrimination—Remedying unlawful past discrimination is the only compelling interest that the Supreme Court has approved.[214] To advocate this interest, the Army needs documented evidence of discrimination in its work force. This evidence may include policies, witness statements, statistics, administrative or judicial findings of discrimination, or any other tangible evidence. Mere admissions of discrimination or evidence of societal discrimination against women and particular minority groups are inadequate.[215]

The Army has a long history of discrimination against Black soldiers. These soldiers have participated in every war in which America has fought.[216] During much of their participation, white soldiers and commanders treated Black soldiers like second class citizens by either rejecting their participation completely or by segregating them into separate units. From the Revolutionary War until 1940, Black soldiers served in the military only when the military needed them.[217] During World War II, the Army allowed Black soldiers to serve, but it excluded them from many jobs and forced them to serve in segregated units.[218] In 1948, President Truman took the

---

[212] Gender classifications may only be subject to an intermediate scrutiny standard. *See supra* notes 134-35 and accompanying text. Because the Court has not definitively resolved this issue, this article will analyze it under the higher strict scrutiny standard.

[213] *See* Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547, 609 (1990), *overruled in part* by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (professing that "[g]overnmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by [Supreme Court] cases, exact costs and carry with them substantial dangers"); City of Richmond v. Croson, 488 U.S. 469, 493 (1989) (explaining that classifications based on race "carry a danger of stigmatic harm" and "may promote notions of racial inferiority;" they must be "strictly reserved for remedial settings"); Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (applying constitutional scrutiny to "a program that employs racial or ethnic criteria, even in the remedial context").

[214] United States v. Paradise, 480 U.S. 149, 166 (1987).

[215] Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986).

[216] RICHARD J. STILLMAN, II, INTEGRATION OF THE NEGRO IN THE U.S. ARMED FORCES 1 (1968) (tracing the integration of Black soldiers into the United States military from the American Revolution until the Vietnam War).

[217] *Id.* at 20. "When it did not [need them], [the military] rejected them." *Id.* at 20-21.

[218] *Id.* at 22-23.

first affirmative action toward integrating Black soldiers into the armed forces when he signed an executive order requiring "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin."[219] Notwithstanding this action, true integration did not come until the Korean War when white commanders realized that segregated units diminished the overall effectiveness of the military.[220]

Although the Army finally ended segregation, discrimination did not end.[221] During Vietnam, there were very few Black officers and racial tensions ran high.[222] The Army then became more aggressive with its equal opportunity programs.[223] In 1971, only 3.5% of the Army's officer personnel and 13.7% of its enlisted personnel were Black.[224] As of September 1995, the Army's Black population increased to 11.2% of the total number of officers[225] and thirty per-

---

[219] Exec. Order No. 9981 (1948), *reprinted in* BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS 239 (Bernard C. Nalty & Morris J. MacGregor eds., 1981).

[220] 12 BLACKS IN THE UNITED STATES ARMED FORCES: BASIC DOCUMENTS 141 (Morris J MacGregor & Bernard C. Nalty eds., 1977). "By the end of 1953, the Army was ninety-five percent integrated and so the services have remained ever since." Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 521 (1991) (tracing the integration of Blacks, women, and gays into the armed forces).

[221] After the Korean War, the Army reduced its personnel. These reductions affected Blacks in greater proportions than other minorities. RICHARD O. HOPE, RACIAL STRIFE IN THE U.S. MILITARY: TOWARD THE ELIMINATION OF DISCRIMINATION 37 (1979). To help alleviate the problem, the Secretary of Defense issued a directive in 1963 clearly stating that the Department of Defense "was to conduct all of its activities free of racial discrimination and to provide equal opportunity to all personnel in the armed forces . . . irrespective of their race." *Id.*

[222] Karst, *supra* note 220, at 521.

[223] "In 1969, the Secretary of Defense issued a Human Goals Charter that remains the basis for [the Department of Defense's] equal opportunity program." UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/NSIAD-96-17, MILITARY EQUAL OPPORTUNITY: CERTAIN TRENDS IN RACIAL AND GENDER DATA MAY WARRANT FURTHER ANALYSIS 2 (1995). The Charter states "that [the Department of Defense] should strive to ensure that equal opportunity programs are an integral part of readiness and to make the military a model of equal opportunity for all, regardless of race, color, sex, religion, or national origin." *Id.* The equal opportunity and affirmative action directives, instructions, and regulations issued since the Charter all help to ensure equal opportunity.

[224] BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS 344 (Bernard C. Nalty et al. eds., 1981). *See also* UNITED STATES ARMY RESEARCH INSTITUTE FOR BEHAVIORAL AND SOCIAL SCIENCES, RACE RELATIONS RESEARCH IN THE U.S. ARMY IN THE 1970s: A COLLECTION OF SELECTED READINGS 413-71 (James A. Thomas ed., 1988) (describing institutional discrimination against Black personnel in the United States Army from 1962 to 1982).

[225] DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE, SEMI-ANNUAL RACE/ETHNIC/GENDER PROFILE OF THE DEPARTMENT OF DEFENSE FORCES, (ACTIVE AND RESERVE), THE UNITED STATES COAST GUARD, AND DEPARTMENT OF DEFENSE CIVILIANS 14 (1995) [hereinafter SEMI-ANNUAL RACE/ETHNIC/GENDER PROFILE].

Active duty Army officers generally are college graduates. During fiscal year 1993, approximately seven percent of newly commissioned officers were Black. OFFICE OF

cent of the enlisted personnel.[226]

The Army has an equally long history of discriminating against female soldiers. During World War II, the Army established the Women's Auxiliary Corps as a separate "auxiliary" force to meet manpower shortages.[227] These women experienced "unequal enlistment and discharge procedures, dependency benefits, and promotion and combat restrictions."[228] In 1948, Congress took affirmative action to establish permanent places for women in the military by passing the Women's Armed Services Act of 1948.[229] However, women still could not serve in combat positions[230] and could only join the Army in limited numbers.[231] In 1967, President Johnson signed a public law removing the restrictions on the careers of female officers and removing the two percent ceiling on the number of women allowed to serve.[232] Shortly thereafter, the Army promoted two women to brigadier general.[233] Since then, the Army's female

---

THE ASSISTANT SECRETARY OF DEFENSE [FORCE MANAGEMENT POLICY], POPULATION REPRESENTATION IN THE MILITARY SERVICES FISCAL YEAR 1993, iv (1994) [hereinafter POPULATION REPRESENTATION IN THE MILITARY SERVICES]. Because only seven percent of the 21- to 35-year-old college graduate civilian population also was Black, the seven percent accession rate of Blacks into the Army officer population shows proportional representation. *Id.*

[226] SEMI-ANNUAL RACE/ETHNIC/GENDER PROFILE, *supra* note 225, at 14. In fiscal year 1995, Blacks composed 12% of the officers entering active duty and 22.5% of the enlisted soldiers. *See* DD Forms 2509, *supra* note 155 (containing statistics from fiscal year 1995 Army officer and enlisted recruiting and/or accessions). Unfortunately, accurate statistics showing the percentage of Blacks qualified for officer and enlisted positions in fiscal year 1995 are not yet available.

Fiscal year 1993 statistics are the latest available. These statistics show that "throughout the history of the all-volunteer force, Blacks were amply represented in the military overall." POPULATION REPRESENTATION IN THE MILITARY SERVICES, *supra* note 225, at iii. "[W]ithin the enlisted force, Blacks were overrepresented among [non-prior service] duty accessions (17 percent) relative to the 18-23 year-old civilian population (14 percent)." *Id.*

[227] Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL'Y 199, 202 (1994).

[228] *Id.* The result of stereotyping women into support roles and excluding them from "the real action" is "a serious risk of demoralization." Karst, *supra* note 220, at 524.

[229] JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 113 (rev. ed. 1992).

[230] Reasons behind the combat exclusion included concerns about the physical strength of women, placing them among combat soldiers thereby distracting them, and very high attrition rates of women. *Id.* at 162. "Of enlisted women, 70 to 80 percent left the service before their first enlistments were up." *Id.* at 163. This turnover rate during the 1960s resulted in questions about the cost effectiveness of all programs for women. *Id.*

[231] The act imposed a two-percent ceiling on the proportion of women on duty in each service. *Id.* at 120.

[232] *Id.* at 192. The media saw Public Law 90-130 as a women's promotion law because of the serious problems that the military had in lower officer ranks. *Id.* at 193.

[233] *Id.* at 202.

population has increased from 6.3% to 13.4%.[234]

Along with historical evidence of discrimination, the Army also may use statistical evidence to demonstrate discrimination. Developing statistical evidence requires the Army to compare minority and female representation in specific ranks to the relevant labor pool. In the officer promotion process, officers eligible for promotion to a specific rank constitute the relevant labor pool.[235] The Army must compare the selection rates of minority and female officers to the selection rates of all other officers eligible for promotion at specific ranks. Statistically significant differences between these selection rates provide the Army with support for its affirmative actions. These differences must be great enough to provide the Army a "strong basis in evidence" for the conclusion that affirmative actions are necessary.[236] Evidence that boards have merely failed to achieve selection goals will be insufficient. Only a pattern of substantial disparities will undercut the presumption that race or gender did not impact the results.[237] The greater the statistical disparity over a period of time, the stronger the Army's argument that it needs to take affirmative action to remedy discrimination.

During the last twenty years, the Army has consistently taken affirmative actions to remedy its discrimination against Blacks, females, and other minorities. Even now, the Army engages in extensive recruiting and outreach programs targeting minorities and women.[238] It also provides training and sets goals to ensure that minorities and females progress in the service. Unlike many civilian jobs, soldiers cannot enter the Army at senior levels. It is a closed system that requires soldiers to enter at the lower enlisted and officer ranks and progress from there. As a result, the Army has few affirmative actions available to promote soldiers.

The affirmative action that the Army uses to promote officers is a selection goal for each minority and gender group considered by a

---

234 DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE, REPRESENTATION OF MINORITIES AND WOMEN IN THE ARMED FORCES: 1976-1995,5 (1996).

235 *See infra* discussion part III.C.3.a.

236 *See supra* notes 124-26 and accompanying text.

237 Currently, two standard deviations is the only statistical disparity expressly recognized by the Supreme Court as sufficient to constitute a "strong basis in evidence." *See* Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977).

238 *See* OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (PUBLIC AFFAIRS), NEWS RELEASE NO. 604-95, FY 1995 RECRUITING EFFORTS PRODUCE RIGHT-SIZED, QUALITY FORCE (1995); POPULATION REPRESENTATION IN THE MILITARY SERVICES, *supra* note 225. Army outreach and recruitment efforts that do not "work to create a 'minority-only' pool of applicants" or to place nonminorities "at a significant competitive disadvantage" should be "considered [a] race-neutral means of increasing minority opportunity" and not subject to the *Adarand* standards. Memorandum, Assistant Attorney General, United States Department of Justice, to General Counsels, subject: *Adarand*, 7 (28 June 1995). *See also* REPORT TO THE PRESIDENT, *supra* note 4, at 41.

promotion board. The Army designed its selection goals as a diagnostic tool so that the board could measure whether each group has received an equal opportunity for promotion.[239] Since 1992, statistics prove that the Army has consistently provided equal opportunity to several minority groups. For example, promotion boards have regularly selected Asian Americans and Native Americans at rates comparable[240] to the selection rates for all other officers considered by boards promoting officers to the ranks of captain, major, lieutenant colonel, and colonel.[241] The boards also have generally achieved comparable selection rates for Hispanics[242] and females.[243] Only promotion boards for the rank of colonel, however, have consis-

---

[239] DA MEMO 600-20, *supra* note 160, para 10b.

[240] The Army has developed an automated system that calculates the selection rates on all of its Military Equal Opportunity Assessments and determines whether the rates achieved are within a satisfactory range of the established goals. *See supra* note 155 and accompanying text. The computer then generates a Military Equal Opportunity Assessment that reflects whether "comparable" or "different" selection rates have been achieved. The author offers no explanation of the statistical difference between "comparable" selection rates and "different" selection rates because no written explanation could be located.

[241] Promotion boards for captains through colonels selected Asian Americans at comparable rates during all four fiscal years. *See* DD Form 2509, *supra* note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of captain through colonel).

Promotion boards for majors through colonels selected American Indians at comparable rates during all four fiscal years. *Id.* (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of major through colonel). Captains boards achieved comparable selection rates for fiscal years 1992 through 1994. The fiscal year 1995 captains board showed a statistical difference in selection rates, but the numbers do not appear egregious. There were 12 Native Americans considered by the board and the board selected nine of them, resulting in a 75% selection rate. The overall selection rate for the board was 91.59%. Had the board selected two more American Indians for a total of 11 out of the 12 considered, the board would have achieved a comparable selection rate. This result demonstrates that the smaller the number of officers available to consider in a minority or gender group, the greater the impact that not selecting one officer will have on the selection rate. *Id.* (containing promotion statistics from fiscal year 1992 through 1995 for the rank of captain).

[242] Promotion boards for lieutenant colonels and colonels selected Hispanics at comparable rates during all four fiscal years. *Id.* (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of lieutenant colonel and colonel).

Promotion boards to major achieved comparable rates of selection for fiscal years 1994 and 1995. *Id.* (containing promotion statistics from fiscal year 1992 through 1995 for the rank of major).

Captains' boards only achieved a comparable rate in fiscal year 1994. In fiscal year 1995, the board was four officers short of achieving its goal. Promotion boards for captains through colonels selected Asian Americans at comparable rates during all four fiscal years. *Id.* (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of captain through colonel).

[243] Colonels' boards selected females at comparable rates during all four fiscal years. *Id.* (containing promotion statistics from fiscal year 1992 through 1995 for the rank of colonel). Majors' boards achieved comparable selection rates during the last three fiscal years. *Id.* (containing promotion statistics from fiscal year 1993 through 1995 for the rank of major).

tently achieved comparable selection rates for Black officers.[244] Captain through lieutenant colonel boards have consistently fallen short of their goals for promoting Black officers.[245]

The failure of these boards to achieve comparable selection rates for Black officers does not mean that the Army has not provided them an equal opportunity for promotion or that it currently discriminates against them.[246] Yet the Army's consistent failure to achieve comparable selection rates at certain promotion boards, coupled with its extensive history of discrimination, demonstrates that the Army has a compelling interest in remedying past discrimination against Black officers at ranks where the selection rate is significantly lower[247] than the overall selection rate for all officers considered.[248] Accordingly, the Supreme Court's "compelling interest" analysis permits the Army to give an equal opportunity instruction to promotion boards to help increase the representation of Black officers.

The Army also may have a compelling interest in remedying discrimination against some female officers. While the numbers indicate that boards generally select female officers at rates comparable to the selection rate for other officers considered, the Army still precludes females from serving in certain combat positions.[249] To the extent the Army's combat restrictions have limited career-enhancing opportunities for female officers, the Army has a com-

---

Promotion boards for the ranks of lieutenant colonel and captain achieved comparable selection rates for females in fiscal year 1995. However, neither the lieutenant colonels nor the captains' boards achieved comparable selection rates for fiscal year 1994. The captains' boards also failed to achieve a comparable rate in fiscal year 1993. *Id.* (containing promotion statistics from fiscal years 1992 through 1995 for captains and lieutenant colonels).

244 *See id.* (revealing comparable selection rates for Black officers to the rank of colonel for fiscal years 1992 through 1995).

245 Captains' boards did not achieve comparable selection rates for Black officers in any of the last four fiscal years. Majors' boards only achieved a comparable rate in fiscal year 1995. Lieutenant colonels' boards achieved comparable rates in fiscal years 1992 and 1994. *Id.* (containing promotion statistics from fiscal years 1992 through 1995 for the ranks of captain through lieutenant colonel).

246 *See* UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/NSIAD-96-17, MILITARY EQUAL OPPORTUNITY: CERTAIN TRENDS IN RACIAL AND GENDER DATA MAY WARRANT FURTHER ANALYSIS 3 (1995) (noting that "the existence of statistically significant disparities does not necessarily mean they are the result of unwarranted or prohibited discrimination. Many job-related or societal factors can contribute to racial or gender disparities").

247 *See supra* discussion part IIC; *infra* part IV.C.2.a (elaborating on how great a statistical disparity must exist before race- or gender-conscious action is justified).

248 *See infra* discussion part IIIC.3 (explaining that the Army may only give equal opportunity instructions for certain ranks and certain minority or gender groups depending on the evidence that the Army has to support such instructions).

249 In April 1993, the Army lifted some of the restrictions placed on combat positions. Some restrictions remain in effect. *See* REPORT TO THE PRESIDENT, *supra* note 4, at 43; AR 600-13, *supra* note 150. These restrictions have interfered with the ability of some women to progress in the military. REPORT TO THE PRESIDENT, *id.*

pelling interest in alerting a board of its discriminatory policy.[250] The Army may use an equal opportunity instruction to alert boards considering females adversely affected by the policy, but it may not furnish a similar instruction to all boards. For instance, Army competitive category promotion boards[251] may receive this type of an instruction because females considered at those boards will be disadvantaged by their failure to hold certain positions.[252] Conversely, specialty branch promotion boards[253] should not receive the instruction unless the Army's combat exclusion policy adversely affects female officers considered at these boards.[254] Statistics demonstrate that selection rates for specialty branch officers are comparable to the overall selection rates for the relevant boards[255] and do not war-

---

[250] *See* WOMEN SOLDIERS 74 (Elisabetta Addis et al. eds., 1994) (discussing a lieutenant general's prediction that "if the combat exclusion was fully repealed, women's promotion rates would remain relatively unchanged, but a greater number would reach the colonel and general officer grades").

[251] A "competitive category" is a "group of officers who compete among themselves for promotion and, if selected, are promoted in order of rank as additional officers in the higher rank are needed." AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. The Army competitive category includes all branches of officers except those officers in one of the Army's specialty branches. *See infra* note 253 and accompanying text. Army competitive category branches include: Infantry, Armor, Field Artillery, Finance, Military Intelligence, Military Police, Signal, and Quartermaster. AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. All of these Army competitive category branches are considered together for promotion at a central Army promotion board.

[252] For example, a female officer considered for promotion at an Army competitive category promotion board may not have been able to hold an S3 (operations) position in a field artillery unit under the Army's female assignment policy. *See supra* note 150 and accompanying text. At a promotion board, failing to hold an S3 (operations) position in a field artillery unit may hurt that female soldier when she is competing against men who have held such positions. To ensure that the female officer receives an equal opportunity for promotion, the Army's current promotion procedures allow boards to look at the female officer's file and determine whether she was discriminated against because of the policy. If the board determines that she was, it may revote her file taking the discrimination into consideration. This revote does not guarantee that the female officer affected by the discrimination will be promoted. The board only will recommend that the Army promote her if the numerical score on her revote moves her name above the select line on the Order of Merit List. *See supra* discussion part III.B.2.

[253] The Army "specialty branches" include: Chaplain's Corps, Judge Advocate General's Corps, Medical Service Corps, Dental Corps, Veterinary Corps, Army Nurse Corps, and Army Medical Specialist Corps. AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. Each of these corps constitutes a separate competitive category and has its own promotion board apart from other branches.

[254] There are still some combat positions closed to female officers in the specialty branches, but the number of closed positions is fewer than in Army competitive category branches. Failure of a specialty branch officer to hold closed positions may not be as important during the promotion process. If the Army has evidence that a female officer's failure to hold a closed position in one of the specialty branches may hurt her, then it should give an appropriate equal opportunity instruction to the promotion board. *See infra* discussion part III.D.1, appendix A.

[255] In 1995, the Secretary of the Army convened 23 officer promotion boards for the various specialty branches. Twenty-one of these boards selected female officers at rates comparable to the first-time considered selection rate. Had the other two boards selected two more female officers, they too would have achieved comparable selection

rant an equal opportunity instruction.[256]

Although the Army has a compelling interest in remedying discrimination against Black officers and perhaps some female officers, it does not have a compelling interest in remedying discrimination against other minority officers.[257] The consistent achievement of comparable selection rates for Asian American, Native American, and Hispanic officers demonstrates that discrimination, to the extent it formerly existed against each group, has been remedied. The Army has established selection goals for each of these minority groups. The boards have regularly selected officers in each of these groups at rates comparable to the boards' first-time considered selection rates. Therefore, the Army no longer needs the instruction for these groups. If the Army continues to use selection goals for these minority officers, it would no longer be to attain a racial balance, but rather to maintain one. This action would ignore the remedial purpose of affirmative action and the Supreme Court's clear prohibition against employing racial and gender classifications indefinitely.[258]

While remedying past discrimination is the only compelling interest recognized thus far,[259] in *Adarand*, the Supreme Court

---

rates. *See* 1995 Statistical Run for Lieutenant Colonel/Dental Corps promotion board results from the board convened 11 April 1995 [hereinafter 1995 LTC/DC Promotion Board Results] (revealing that the board selected four of the seven female officers considered for a 57.1% selection rate; the overall selection rate for first-time considered officers was 75.8%); 1995 Statistical Run for Major/Army Medical Specialist Corps promotion board results from the board convened 31 January 1995 (revealing that the board selected nine out of ten of the female officers considered for a selection rate of 69.2%; the board's overall selection rate for first-time considered officers was 81.8%). The author obtained the above statistical results from the 1995 promotion boards through a Freedom of Information Act request to the Department of the Army, Deputy Chief of Staff Personnel. All future references to the 1995 promotion boards originate from this information.

256 PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 49 (Nov. 15, 1992) (stating that "there is no compelling reason to enact quotas and goals" to influence Department of Defense promotion policies).

257 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (explaining that remedying discrimination against one minority group for which there is evidence of discrimination does not justify remedying discrimination against other minority groups when there is no evidence of discrimination).

258 *See, e.g.*, Johnson v. Santa Clara Transportation Agency, 480 U.S. 616, 630 (1987) (observing that a plan "was not designed to maintain a racial balance"); United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (noting that a plan was a temporary measure; "it [was] not intended to maintain a racial balance, but simply to eliminate a manifest imbalance"). *See also* Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993) (cautioning that "even when race can be taken into account to *attain* a balanced work force, racial classifications may not be employed to *maintain* a balanced work force"); Ledoux v. District of Columbia, 820 F.2d 1293, 1302 (D.C. Cir. 1987) (agreeing that an employer "may voluntarily adopt a plan the long-term goal of which is 'to *attain* a balanced work force, not to maintain one'").

259 The *Bakke* Court indicated that ethnic diversity in a university furthers a compelling government interest if it encompasses a broad "array of qualifications and

stressed that the government may have other compelling interests that would justify a racial classification.[260] Despite this assertion, whether a majority of the current Justices will accept nonremedial interests to justify racial classifications is unclear.[261]

b. Maintaining Combat Readiness—Assuming that the Supreme Court will recognize a compelling interest that is not remedial, the Army could argue that "combat readiness" and "military necessity" compel it to maintain a diverse work force.[262] Providing equal opportunity instructions to promotion boards furthers this interest. These boards determine whether soldiers will progress in the military. Soldiers must believe that when promotion boards consider their files, the boards will treat them fairly. If boards do not treat soldiers fairly, or if soldiers believe that the boards will not treat them fairly, arguably, morale will decrease and frustration or anger will increase. These emotions can distract soldiers from their duties and

characteristics of which racial or ethnic origin is but a single though important element." Regents of the University of California v. Bakke, 438 U.S. 265, 256 (1978). The *Metro Broadcasting* Court recognized that the interest in enhancing broadcast diversity is "at the very least, an important governmental objective." Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547, 567-68 (1990), *overruled in part by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). Both *Bakke* and *Metro Broadcasting* were plurality opinions. Had the current Supreme Court decided these cases, the results would have been different. Four of the current Justices dissented in *Metro Broadcasting* because "the interest in increasing the diversity of broadcast views is clearly not a compelling interest." *Id.* at 612 (Rehnquist, C.J., O'Connor, Scalia, & Kennedy, JJ., dissenting).

[260] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (stating "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'").

[261] *See Croson*, 488 U.S. at 493 (Rehnquist, C.J., O'Connor, White, & Kennedy, JJ., plurality opinion) (stating that "[u]nless [racial classifications] are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"); *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in judgment) (professing that "[i]n [his] view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"); *id.* (Thomas, J., concurring in part and concurring in judgment) (maintaining that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice"); Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough*, 5 YALE L. & POL'Y REV. 402, 403 n.3 (1987) (professing that "preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context"). *But see Croson*, 488 U.S. at 511 (Stevens, J., concurring in part and concurring in judgment) (stating that he does not agree with the premise in *Croson* or in *Wygant* that "a governmental decision is never permissible except as a remedy for a past wrong"); O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (expressing her opinion that remedying a "past wrong is not the exclusive basis upon which racial classification must be justified").

[262] *See Bakke*, 438 U.S. at 311-12 (recognizing the "attainment of a diverse student body" as a "constitutionally permissible goal for an institution of higher education"). *See also supra* note 259 and accompanying text.

threaten their combat readiness. Such distractions are not acceptable in a military environment that requires all soldiers to be mentally prepared at all times to accomplish any assigned mission.

The Army also could argue that boards must promote soldiers within the various race, ethnic, and gender groups at comparable rates. While boards might promote groups at comparable rates even without an equal opportunity instruction, this is a risk that the Army cannot afford. The only way to ensure that boards achieve comparable selection rates is to remind them how important equal opportunity is in a military environment. Boards must conduct themselves fairly and soldiers must have extrinsic evidence that they can advance regardless of their race, ethnicity, or sex. Comparable selection rates and diverse military units provide that evidence. If soldiers do not believe that promotion boards are fair and that they have an equal chance to progress, then morale and discipline problems will arise which interfere with the military mission.[263]

The Army must convince the Court that its compelling interest in protecting combat readiness and the integrity of the military promotion process warrants using the equal opportunity instructions. It must present military policies, studies, and examples to the Court to sustain these interests. General assertions of military necessity will not sway the Court.[264]

Recent comments made within the Department of Defense and current military policies corroborate the Army's interest in combat readiness. For example, in his annual report, the Secretary of Defense told the President and Congress that "if [Department of Defense] personnel are not treated fairly, then missions they are asked to do will suffer."[265] Additionally, the Department of Defense's equal opportunity directive states it is the Department's policy to support the Military Equal Opportunity program "as a military and economic necessity."[266] The Directive also condemns unlawful discrimination because it is "contrary to good order and discipline" and "counterproductive to combat readiness and mission accomplishment."[267] The Army echoes that position in its command policy on

[263] *See, e.g.*, Karst, *supra* note 220, at 521 (discussing how racial tensions ran high in the Army during the Vietnam War because there were few Black officers and a general decline in discipline and morale).

[264] *See, e.g.*, *Croson*, 488 U.S. at 505.

[265] WILLIAM J. PERRY, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 62 (Feb. 1995).

[266] DOD DIR. 1350.2, *supra* note 143, para. D.1. The Department of Defense added this language when it issued its new directive in August 1995. The prior directive, dated December 1988, declared that the Military Equal Opportunity program was "an integral element in total force readiness."

[267] *Id.* para. D.3.

equal opportunity.[268] The Army briefly elaborates on the relationship between mission accomplishment and equal opportunity in its affirmative action plan.[269]

Presenting only the Secretary of Defense's comments and the military regulations claiming that equal opportunity is a military necessity will not be sufficient to prove that equal opportunity instructions are a military necessity. History will provide additional support.[270] The Army can refer to specific incidents from the Vietnam War[271] to prove that maintaining a diverse military force and ensuring equal opportunity in promotions are necessary for good order and discipline.[272] In 1969 alone, there were almost a hundred incidents of military misconduct because of racial tensions; in 1970 there were more than two hundred such incidents.[273]

> [T]he outbreaks of racial violence . . . could be seen as manifestations of a general collapse of morale and failure of purpose that permeated the armed forces . . . . At the root of the problem was a loss of confidence in the military as an institution, its officers, and its values. Mistrust gave

---

[268] *See* AR 600-20, *supra* note 147, para 6-1 (IO4, 17 Sept. 1993) (stating that the Army specifically designed its plan to "[c]ontribute to mission accomplishment, cohesion and readiness").

[269] *See supra* note 157 and accompanying text.

[270] Although history provides support for the Army's argument that it has a compelling interest in combat readiness, most of the historical support comes from the era of a draft Army and an active civil rights movement. Today there is an all volunteer Army that has been integrated for approximately 20 years. While historical examples may be persuasive, courts may want more current examples. The Army should study the effects of racial tensions in today's military environment. Analyzing the impact that allegations of "serious race-related problems" and "racism" are having on soldiers at Fort Bragg, North Carolina, is an ideal place to start. *See NAACP Seeks Military Race Training*, WASH. POST, Mar. 2, 1996, at A-2; SECRETARY OF THE ARMY'S TASK FORCE ON EXTREMIST ACTIVITIES, DEFENDING AMERICAN VALUES, 3, 14 (Mar. 21, 1996) (observing that a racial, ethnic, and cultural undercurrent at the lower Army ranks "must be addressed").

[271] Even before the Vietnam War, history provides the Army with evidence that equal opportunity is a military necessity. *See, e.g.*, STILLMAN, *supra* note 216, at 59 (discussing that when Black soldiers were serving in segregated units in World War II until the Korean War, the perception that "they were discriminated against and treated unfairly contributed to poorer performance in combat and racial tensions in peacetime assignments").

[272] *See* David Maraniss, *U.S. Military Struggles to Make Equality Work: Army Institute Confronts Racial Conflict Series*, WASH. POST, Mar. 6, 1990 (asserting that "[d]uring the 1960s and early 1970s, bases around the world were plagued by internal racial strife triggered by black frustration over discrimination in assignments, military justice and promotions. . . . In Vietnam, racial tensions reached a point where there was an inability to fight").

[273] *See* BERNARD C. NALTY, STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY 309 (1986). At that time, an investigative reporter found that even in combat units where the bonds of mutual respect and shared responsibility were strongest, racial tensions dissolved those bonds "as the two races lashed out at each other." *Id.* at 305.

> way to contempt, and contempt to disobedience and revenge.[274]

Racial tensions stemming from the Vietnam War adversely affected combat readiness and levels of unit cohesiveness until the late 1970s. Numerous studies show that unit cohesion[275] is "a critical variable affecting soldier handling of stress in combat."[276] "[T]here was widespread feeling that the high levels of unit cohesion . . . achieved in [Desert Storm] had been central to the absolute minimization of the number of casualties that U.S. ground forces had taken."[277] Maintaining "highly cohesive military units [is even] more important to the future than they even have been in the past . . . ."[278]

The Army must maintain equal opportunity and the perception of equal opportunity to preserve unit cohesion and combat readiness. Decisions made at promotion boards play a critical role in the process. If the Army does not alert board members to the importance of equal opportunity at the time they are deciding the fate of the officers considered, statistically significant differences in promotion rates may arise. That result would jeopardize the perception of equal opportunity and cast doubt on the entire promotion process. In turn, unit cohesion could disintegrate and combat readiness would

---

[274] *Id.* at 309. General (Retired) Colin Powell described his observations of racial tension in Vietnam as follows:

> [B]ases like Duc Pho were increasingly divided by the same racial polarization that had begun to plague America during the sixties. The base contained dozens of new men waiting to be sent out to the field and short-timers waiting to go home. For both groups, the unifying force of shared mission and shared danger did not exist. Racial friction took its place.

COLIN L. POWELL, MY AMERICAN JOURNEY 133 (1995). *See also* HOPE, *supra* note 221, at 39 (discussing the results of an investigation that said the major cause of "acute frustration" and "volatile anger" of Black soldiers in 1970 was "the failure in too many instances of command leadership to exercise the authority and responsibility" in monitoring military equal opportunity provisions).

[275] In its simplest form cohesion could be viewed as that set of factors and processes that bonded soldiers together and bonded them to their leaders so they would stand in the line of battle, mutually support each other, withstand the shock, terror and trauma of combat, sustain each other in the completion of their mission and neither break nor run.

Policy Concerning Homosexuality in the Armed Forces, Hearings Before the Senate Comm. on Armed Services, 103d Cong., 2d Sess. 266 (1993) [hereinafter *Hearings*] (prepared testimony of Dr. David H. Marlowe, Chief, Department of Military Psychiatry, Walter Reed Army Institute of Research) (discussing Walter Reed Army Institute of Research studies bearing on unit cohesion).

[276] *Id. See also id.* (testimony of William Darryl Henderson, Former Commander of the Army Research Institute, Author of *Cohesion: The Human Element in Combat*) (testifying that "the nature of the relationship among soldiers in combat is a critical factor in combat motivation").

[277] *Id.* at 264 (prepared testimony of Dr. David H. Marlowe).

[278] *Id.* at 276.

deteriorate. Military necessity dictates that the Army not tolerate such a result.[279]

3. Narrowly Tailored to Meet Compelling Interest—Once the Army evinces a compelling interest in either remedying past discrimination or in maintaining combat readiness, the Army must prove that it narrowly tailored its remedy to achieve only those interests. Courts determining whether the Army narrowly tailored its remedy will consider the following: "the necessity for the relief and efficacy of alternative remedies . . . ; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."[280] Courts also will consider whether the remedy so closely fits the interest that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice . . . ."[281]

Some portions of the Army's equal opportunity instructions clearly meet the narrowly tailored requirements of the strict scrutiny standard. The Army ties its selection goals directly to qualified officers in the zone for consideration.[282] This meets the requirement that employers make comparisons to relevant labor pools.[283] The selection goals are not quotas. Statistics prove they are aspirational goals.[284] Boards do not achieve comparable selection rates for every minority group in every rank.[285] While a promotion board considers

---

[279] Other federal agencies can make similar arguments. Yet unless these agencies work directly in hostile or life-threatening conditions, or in law enforcement functions, their arguments would not be as compelling as the Army's. Unit cohesion and teamwork are critical during the Army's diverse missions. If soldiers do not trust each other or if they harbor discriminatory biases, it could jeopardize the success of the missions. The Army must make every effort to prevent such circumstances from developing.

[280] United States v. Paradise, 480 U.S. 149, 171 (1987).

[281] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[282] *See supra* discussion in part III.B.2.

[283] *See, e.g., Croson*, 488 U.S. at 501-02 (explaining that when special qualifications are needed for a position, the relevant statistical pool for the purposes of demonstrating discriminatory exclusion must be the number of people qualified to hold the position); Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977) (stating that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value").

Comparing the officers selected to the total number of officers in the Army or some other large group would not meet judicial requirements. *See, e.g.*, Wards Cove Packing, Co., Inc. v. Atonio, 490 U.S. 642, 651 (1989) (determining that a comparison between the racial composition of a cannery work force with the noncannery work force was not proper because the cannery work force did not reflect "the pool of qualified job applicants").

[284] In 1995, the Army convened a total of 27 officer promotion boards for the ranks of captain through colonel. Only 14 of these boards promoted officers in all of the minority and gender groups considered at rates comparable to the selection rate for first-time considered officers.

[285] *See supra* discussion part III.C.2.a.

race, ethnicity, or gender to discover whether it has met selection goals, it does not consider those factors to judge whether an officer is fully qualified for promotion. The board looks only at "demonstrated professionalism or potential for future service. No single factor is overriding."[286] No officer considered for promotion has a "right" to be promoted. Each officer understands it is a competitive process and the Army only selects those officers who best meet its needs. As a result, the burden on officers not selected for promotion is minimal.

a. Identifying Specific Discrimination—While the Army narrowly tailors some aspects of its promotion process, it fails to narrowly tailor others. For example, the Army does not narrowly tailor the application of its equal opportunity instructions. The Army distributes its current instructions to centralized promotion boards for every rank and establishes selection goals for every minority and gender group. Evidence to support this broad application does not exist. To the extent that the Army is remedying past discrimination, no evidence exists that remedial instructions are necessary for certain minority or gender[287] groups at certain boards. Therefore, those boards should not be subject to selection goals.

For example, statistics[288] demonstrate that promotion boards for captains through lieutenant colonels have not selected Black offi-

---

[286] DA MEMO 600-2, *supra* note 160, para 8.a. "However, board members may properly base their recommendation on disciplinary action, relief for cause, cowardice, moral turpitude, professional ineptitude, inability to treat others with respect and fairness, or lack of integrity." *Id.* The Army does not list race, ethnicity, or gender as factors that make an officer eligible for promotion from the outset. They only become considerations if the board has not met its selection goals.

[287] At most boards, women are the minority gender group. However, at promotion boards considering officers from the Army Nurse Corps, men are the minority gender group. *See* DA MEMO 600- 2, *supra* note 160, para. A-2. If the Army has evidence that it discriminated against men in the Army Nurse Corps or evidence showing a significant statistical disparity between men and women in that corps, the Army may give an equal opportunity instruction for males considered for promotion in the Army Nurse Corps.

[288] The statistics referenced are from the Army's Military Equal Opportunity Assessments for fiscal years 1992 through 1995. These assessments consolidate the statistical results from all Army competitive category and individual specialty branch officer promotion boards held during an entire fiscal year into one report. *See supra* notes 155, 240, 251, 253 and accompanying text. The assessments fail to distinguish between selection rates for all officers considered by the board and those officers considered for the first time. Therefore, this section will use the overall selection rate from the assessments to analyze the need for specific promotion instructions.

When the Army analyzes whether it has a compelling interest to justify an equal opportunity instruction for a specific minority or gender group at a specific rank, it must focus on the first-time considered selection rates from previous boards similar to the one being convened. For example, when the Army convenes a board to consider the promotion of Dental Corps officers to the rank of lieutenant colonel, it must look only at the selection rates for minority and female officers at prior Dental Corps promotion boards for lieutenant colonel. If prior results reveal gross statistical disparities between selection rates for minority or female officers when compared to the first-time considered selection rates, then the Army has a compelling interest in giv-

cers at rates comparable to overall selection rates[289] while colonel boards have achieved comparable selection rates for Black officers.[290] A narrow tailoring of the Army's instruction requires that the Army only furnish equal opportunity instructions for Black officers at boards recommending officers for promotion to captain, major, or lieutenant colonel.[291] Once the Army regularly achieves selection rates comparable to its selection goals at each of these ranks, it should cease issuing the instruction. Because boards consistently have achieved selection goals for Black officers at the colonel level, remedial instructions for these boards would be overbroad and, therefore, should be eliminated.

If the Army argues that it is necessary[292] to use selection goals at the colonel level—even after boards have consistently achieved comparable selection rates because representation levels are low—the Army will lose. The proper comparison for determining whether minority and female representation levels are low is to evaluate the pool of individuals qualified to hold the higher ranking position. Lieutenant colonels with the requisite time in grade are the only people in the relevant pool for promotion to colonel. Because the Army has been selecting Black officers from this pool at rates comparable to the selection rates of all other officers considered, the Army has achieved comparable representation. The representation of Black officers will increase at the higher rank proportionate to the availability of Black officers at the lower rank. To ensure increases in minority representation at the higher ranks, the Army should focus on increasing the availability of qualified officers at lower ranks[293] instead of focusing on an instruction that has already served its purpose at the colonel level.

Just as the Army should limit its instructions to specific ranks where it has evidence of discrimination, it also must limit them to specific minority groups. For example, the Army should not mention Asian Americans, Native Americans, or Hispanics in its instructions

ing a narrowly tailored equal opportunity instruction for the affected minority or gender groups at that promotion board. *See* 1995 LTC/DC Promotion Board Results, *supra* note 255 (revealing an overall selection rate of 75.8% and comparable selection rates for all but Asian and female officers; report does not reveal the statistical significance of lower selection rates for Asian and female officers).

[289] *See supra* note 245 and accompanying text.

[290] *See supra* note 244 and accompanying text.

[291] Similarly, the Army should only provide equal opportunity instructions for female officers to boards considering female officers who may have been harmed by the Army's combat exclusion policy. This would not include most specialty branch promotion boards, unless statistical evidence supports such an instruction. *See supra* notes 252, 254 and accompanying text.

[292] Critical to this argument is that the Army is a closed system and promotions are the only way that minorities and females can advance in it.

[293] The Army's efforts to increase minority and gender representation at the

to officer promotion boards because the statistics demonstrate that remedial instructions are not necessary for those minority groups.[294] To the extent that the Army includes specific instructions for these groups at officer boards, the instructions are overinclusive and not limited in duration (*i.e.*, they are not narrowly tailored).[295]

b. Limiting Board Discretion—The instructions also fail the narrowly tailored requirement because they authorize the board too much discretion to determine whether the Army has discriminated against an officer during a military career. The Army instructions state:

> be alert to the possibility of past personal or institutional discrimination—either intentional or inadvertent—in the assignment patterns, evaluations, or professional development of officers in those groups for which you have an equal opportunity selection goal. Such indicators may include disproportionately lower evaluation reports, assignments of lesser importance or responsibility, or lack of opportunity to attend career-building military schools. Taking these factors into consideration, assess the degree to which an officer's record as a whole is an accurate reflection, free from bias, of that officer's performance and potential.[296]

Considering these instructions, if a majority of the promotion board "thinks" that it sees something in an individual officer's file indicating Army-related discrimination,[297] it can revote that officer's file and assign it a new numerical score. If that score is high enough, the board will recommend that officer for promotion.

While these instructions require boards to identify discrimination against the individual before engaging in remedial revotes of the file, the instructions are not specific enough to prevent the board from remedying discrimination that does not exist. It is impossible for a board member to look, for example, at an officer's assignment

lower ranks should include aggressive recruiting and outreach to encourage accessions, as well as training individuals once accessed to ensure that they possess the qualifications needed for advancement.

294 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (demonstrating that discrimination against one group does not justify remedying discrimination against another when there is no evidence that remedial action for those groups is necessary).

295 *See Croson*, 488 U.S. at 506.

296 DA MEMO 600-2, *supra* note 160, para 10a.

297 Read in its entirety, the board instructions appear to remedy only Army-related discrimination. However, read another way, the instructions could allow a board to remedy past personal discrimination in career development unrelated to an Army career. The Army must ensure that it is correcting only Army-related discrimination; correcting societal or educational discrimination unrelated to the Army is not allowed.

history and determine whether the officer did not have more challenging positions because of race or gender. This conclusion fails to consider other possible explanations for the assignments. Perhaps the officer repeatedly requested certain assignments because of geographic location or because the officer did not want the responsibility of more challenging assignments. When requesting those particular assignments, the officer may have understood these were not career enhancing, but requested them anyway. To allow a board to later look at the assignment history in the officer's file—absent additional information—and determine that the Army discriminated against the officer, is erroneous. The board ultimately may reward an officer for lack of judgment, ambition, or achievement.

Authorizing promotion boards to make subjective determinations of discrimination fails to narrowly remedy discrimination. Either the Army should investigate past discrimination in other forums[298] or it should draft more specific board instructions. For example, under the Army's assignment policy for females,[299] female officers cannot serve in certain combat-related positions. At promotion boards where the members will consider files of women who are adversely affected by this policy, the Army should instruct the boards to be sensitive to that policy and its potential impact on the assignments of female officers.

Anytime the Army allows a board to remedy discrimination, the board must document the discrimination that it is remedying. If the board does not document it, as in the current procedures, the Army will be unable to prove to a court that it made the required showing of discrimination before it conducted a revote, thereby creating a racial or gender classification.

c. Ensuring Combat Readiness—Should the Army pursue an interest in combat readiness, it must change the current promotion instructions to further that interest.[300] The Army's promotion poli-

---

[298] The Army has several forums better suited for conducting investigations into alleged discrimination. *See* AR 600-20, *supra* note 147, para. 6-8 (IO4, 17 Sept. 1993) (establishing procedures for processing discrimination complaints for military personnel); DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) (establishing procedures for investigations and boards of officers not specifically authorized by other directives); DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977) (establishing procedures for requesting that errors or injustices be removed from military files); UCMJ art. 138 (1995) (establishing procedures enabling service members who believe themselves wronged to request redress from superior officers).

[299] *See supra* note 150 and accompanying text.

[300] In addition to revising the promotion instructions, the Army also will need to revise its affirmative action plans, equal opportunity regulations, and promotion regulations to reflect the rationale behind continuing those plans.

cies use the terms "mission accomplishment," "unit cohesion," and "readiness."[301] The Army does not, however, convey these concepts in the actual promotion instructions.[302] The instructions mention that people are the "cornerstone of readiness" and that equal opportunity "is the only acceptable standard for our Army."[303] Yet, the revote procedures protect only the Army's interest in remedying past discrimination. A board that finds no evidence of discrimination in an officer's file has no authority to make any adjustment based on equal opportunity. If the Army has a compelling interest in maintaining diversity to ensure combat readiness, then limiting the board to making changes based solely on remedying discrimination is inconsistent with that interest. The Army must modify its instructions to reflect its combat readiness interest. If it does not, and if it pursues that interest, the instructions will fail the narrowly tailored prong of the strict scrutiny standard.

4. Deference by the Courts—The Army has two compelling interests justifying its current promotion procedures: remedying past discrimination and combat readiness. When reviewing the Army's procedures,[304] courts will give "great deference to the professional judgment of [the Army] concerning the relative importance of a particular military interest."[305] "This deference is at its highest when the military, pursuant to its own regulations, effects personnel changes through the promotion . . . process."[306]

---

301 *See* DA PAM 600-26, *supra* note 156, para. 1-4b; AR 600- 20, *supra* note 147, para. 6-1 (IO4, 17 Sept. 1993).

302 The current instructions mention mission accomplishment, but only remedy past discrimination. The Army needs to shift the focus of board instructions to combat readiness. It also must ensure that boards select officers based on qualifications, not race or sex.

303 DA MEMO 600-2, *supra* note 160, para 10.

304 Courts will not even review internal military affairs unless there is "(a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." Mindes v. Seaman, 453 F.2d 197, 201 (1971).

305 Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that the First Amendment does not prohibit a military regulation from restricting a service member from wearing a yarmulke while on duty and in uniform).

306 Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979). *See also* Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (stating that "a claim to a military promotion . . . is limited by the fundamental and highly salutary principle that judges are not given the task of running the Army"); John N. Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147 (1993) (providing a thorough discussion of the deference accorded to the military by courts and the rationale behind it). *See also* Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI-KENT L. REV. 265 (1994) (criticizing the Supreme Court for the hands-off approach it has taken towards the military).

Courts recognize that military necessity sometimes compels discriminatory treatment:[307]

> [F]rom top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[308]

Although courts will give the Army more latitude than civilian employers who engage in discriminatory practices, courts will not accord the Army blind judicial deference.[309] The Army must articulate and demonstrate military reasons sufficient to override a soldier's constitutional rights.[310]

When the Army determined that equal opportunity instructions best met its need for remedying past discrimination, it exercised discretion. Determining whether the Army still suffers from discrimination or statistical disparities in minority or gender groups is not a discretionary question; it is a factual question. Accordingly, courts may not afford the Army as much deference as they otherwise would have. Even if the courts accord the Army considerable deference, the Army still must present sufficient evidence to pass the strict scrutiny standard established by *Adarand*.[311] Because the Army does not have evidence to justify its promotion instructions for every minority group at every promotion board, the current instructions will fail judicial scrutiny.

The Army's determination that combat readiness and military necessity justify promotion instructions which create racial and gender classifications is a discretionary determination. The Army's mis-

---

307 Orloff v. Willoughby, 345 U.S. 534, 540 (1955) (refusing to interfere with the decision not to commission an Army officer).

308 *Id.*

309 *See, e.g.*, Anderson v. Laird, 466 F.2d 283, 296 (D.C. Cir. 1972) (declaring invalid a military regulation that required chapel-church attendance for West Point cadets when it was not "vital to our immediate national security, or even to military operational or disciplinary procedures").

310 *See id.*

311 *See* Goldman v. Weinberger, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting) (requiring that even when the government is pursuing its most compelling interests, it must remain within the bounds of the law).

sion is to prepare for and fight wars.[312] Any challenge to this determination would be a challenge to the Army's assessment of what is necessary for military personnel to be combat ready. Because military necessity and combat readiness are discretionary determinations, courts will accord the Army great deference if its promotion procedures are challenged and reviewed under *Adarand's* strict scrutiny standard.[313]

D. Proposed Changes

To pass strict scrutiny, the Army needs to change the language and the application of the equal opportunity instructions provided to promotion boards. The Army must initially determine whether it has evidence justifying a compelling interest in remedying past discrimination or in maintaining diversity to ensure combat readiness. If the Army has insufficient evidence to establish a compelling interest, it must cease using equal opportunity instructions at all promotion boards or it must employ instructions that do not create race or gender classifications.

If the Army determines that it has a compelling interest in providing an equal opportunity instruction to a specific promotion board, it must draft instructions appropriate to that interest. This subpart explains three possible instructions proposed at Appendices A through C. The objective of each of these instructions is to protect the Army's compelling interests while also protecting the soldier's right to equal protection. Only an instruction designed to remedy past discrimination (Appendix A) or an instruction that is race and gender neutral (Appendix C) will pass judicial scrutiny. However, if the Army successfully argues that maintaining diversity to ensure combat readiness is a compelling interest, then the courts may allow it to use an instruction narrowly tailored to further that interest (Appendix B).

1. Instruction to Remedy Past Discrimination—An equal opportunity instruction designed to remedy past discrimination must specifically identify the discrimination that boards may correct. The Army should have this information prior to convening a board. Authorizing a board during its deliberations to search a file and "guess" that discrimination occurred before it revotes that file is insufficient. If the Army lacks adequate evidence to support an equal opportunity instruction for a specific minority or gender group

[312] *See Hearings, supra* note 275, at 50 (explaining the different standards for uniformed and civilian employees in the Congressional Research Report to Congress on Homosexuals and U.S. Military Personnel Policy).

[313] *See* Baker v. United States, No. 94-453C, 1995 U.S. Claims LEXIS 236, at *19 (Ct. Cl. Dec. 12, 1995).

prior to convening a board, then it should not mention that group in the board instructions.

The Army may establish selection goals for minority or gender groups when it has evidence of discrimination or evidence of significant statistical disparities in selection rates. However, the Army must ensure that these goals remain aspirational and do not become inflexible quotas. If a board fails initially to meet a selection goal, the Army may allow the board to review files for evidence of specifically identified discrimination against a specific minority or gender group. The board also may review the files to ensure that it has provided each person in the affected group with an equal opportunity for promotion. If the board finds the specified discrimination or determines that it did not provide an officer with an equal opportunity for promotion, it may revote the affected file. When the Army allows a board to review an officer's file for discrimination, the Army must require the board to document the evidence it relied on and the remedy that it took.

The Army may authorize an equal opportunity instruction for a particular minority or gender group only until boards consistently achieve selection rates comparable to the selection rates of all officers considered. The Army should establish an objective end date for use of the instruction. One such date could be on achievement of comparable selection rates at consecutive promotion boards over a designated period of time. The Army also must implement a review procedure to monitor this information. Appendix A contains an instruction designed to further the Army's interest in remedying past discrimination.

2. Instruction to Ensure Combat Readiness—The ideal instruction for ensuring combat readiness is one that clearly conveys the critical role that diversity plays in the military and in the selection process, but that does not mention specific minority groups, establish selection goals, or authorize a revote procedure. This type of instruction would not create racial or gender classifications. Accordingly, it would not be subject to strict scrutiny under *Adarand*.

A combat readiness instruction that contains selection goals or revote procedures would be subject to constitutional review. This review would focus not only on whether combat readiness is a compelling interest, but also on whether the Army has narrowly tailored an instruction to serve that interest. The Army's argument is that it needs diversity in its units to ensure combat readiness. Assuming a court recognizes this interest, the question becomes how may the Army achieve diversity. Outreach and targeted recruiting programs

are ways the Army can increase minority and female representation in the pools of qualified individuals from which it selects new soldiers. The more minorities and females available in these pools, the greater the likelihood that the Army will select them, thereby increasing their representation at the entry ranks. As minorities and females progress through the system, their representation at the higher ranks will increase.

Using outreach and recruiting programs will increase minority and female representation at the lower ranks, but it will not initially increase their representation at the higher ranks. Selection goals and revote procedures imposed as part of a promotion instruction will increase representation at higher levels. Courts will not, however, recognize these procedures as narrowly tailored unless the Army has evidence to that effect. The Army must demonstrate that even after recruiting specific groups, conducting extensive outreach, and furnishing a promotion board instruction that sensitizes boards to the need for diversity in the ranks, it will not be able to further its compelling interest in combat readiness. The Army must convince a court that selection goals and revote procedures are the most narrowly tailored alternative the Army has to achieve this interest. If it does not, a court will not allow it to employ such procedures.

Assuming that the Army is able to persuade a court that an instruction containing selection goals and relook procedures is narrowly tailored, the court should allow the Army the use of an instruction similar to that proposed at Appendix B. While using this instruction, the Army must carefully monitor the procedures to ensure that boards strictly adhere to them. If the aspirational goals become quotas, or the second vote is based solely on race or gender, the Army will fail the strict scrutiny standard. The Army also must ensure that boards continue to select officers best qualified to meet the Army's needs. Failure to do so will result in a constitutional violation.

3. Race and Gender Neutral Instruction—For minority or gender groups where the Army has no evidence of discrimination or significant statistical disparities,[314] it may furnish an equal opportunity instruction that is race and gender neutral. Appendix C proposes a neutral instruction that conveys the significance of equal opportunity in the Army. Because this instruction does not list any specific minority or gender groups, does not impose any selection goals, and limits itself to conveying only the Army's equal opportunity policy, it does not create racial or gender classifications. Courts will not, therefore, apply the strict scrutiny standard to review this instruction.

---

[314] *See supra* notes 122-26 and accompanying text.

IV. Civilian Personnel

Besides its military personnel, the Army also employs more than 280,000 civilians.[315] The Army regularly decides which of these employees to promote, train, assign, and fire. Each of these employment decisions follows different procedures. Sometimes the consideration of race, ethnicity, or sex impacts on these decisions. As a public employer of civilians, the Army must justify such considerations under Title VII and the Due Process Clause of the Fifth Amendment.[316] After *Adarand,* the Fifth Amendment requires that public employers have a compelling government interest justifying the use of race-conscious affirmative action programs.[317] Even with a compelling interest, public employers must narrowly tailor affirmative action programs to accomplish that interest. Title VII's requirements are not as strict.[318] The Army should, therefore, ensure that its affirmative action programs pass *Adarand's* strict scrutiny standard. By doing so, its programs also will pass Title VII's requirements.

The Army's civilian promotion process is vastly different from the military promotion process. While the Army centralizes the military process at the Department of the Army level, it affords local installations wide latitude to develop their own merit promotion procedures for civilian employees. A general understanding of these local procedures and of the Army's affirmative action policies form the factual basis for determining how *Adarand* impacts the civilian promotion process.

A. Affirmative Action Programs

The United States government's policy is to provide "equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex or national origin."[319] Each federal agency administers its own equal

---

315 Randall Rakers Interview, *supra* note 137.

316 *See supra* discussion part II.B.2, II.C. A civilian employee who challenges discrimination by a federal agency must base a claim on Section 717 of Title VII. 42 U.S.C. § 2000e-16 (1988 & Supp. V 1993). *See* Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976) (holding that "§ 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment"). However, the "federal government . . . is [still] obligated to act in accordance with the Constitution, and, therefore, use of race-based decisionmaking in federal government" must comply with the constitutional standards set by *Adarand.* Memorandum, Office of the Associate Attorney General, United States Department of Justice, to General Counsels, subject: Post-*Adarand* Guidance on Affirmative Action in Federal Employment (29 Feb. 1996).

317 *See supra* discussion parts II.B.2, II.C.

318 *See supra* discussion parts II.A, II.C.

319 Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969). *See also* Exec. Order No. 10,590, 20 Fed. Reg. 409 (1955) (prohibiting "discrimination against any employee or

employment opportunity process for civilian personnel.[320] The Equal Employment Opportunity Commission has review and oversight responsibilities for the process.[321]

The Equal Employment Opportunity Commission requires each federal agency to maintain "a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies."[322] The Commission does not require affirmative action[323] plans or programs that are race, sex, or nation-

applicant for employment in the Federal Government because of race, color, religion, or national origin," and establishing a "President's Committee on Government Employment Policy"); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (repeating the "positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons" seeking employment with the federal government and establishing the "President's Committee on Equal Employment Opportunity"); Exec. Order No. 11,197, 29 Fed. Reg. 1721 (1965) (establishing the President's Council on Equal Opportunity); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965) (stating the United States policies of nondiscrimination in government employment and in employment by government contractors and subcontractors); Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967) (amending Executive Order No. 11,246 to include "sex" as a prohibited form of discrimination).

320 EARNEST C HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW AND PRACTICE 13 (8th ed. 1995).

321 *Id.* *See also* Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978) (transferring responsibility for enforcement of equal employment opportunity programs from the Civil Service Commission to the Equal Employment Opportunity Commission); J. EDWARD KELLOUGH, FEDERAL EQUAL EMPLOYMENT OPPORTUNITY POLICY AND NUMERICAL GOALS AND TIMETABLES: AN IMPACT ASSESSMENT 13-23 (1989) (tracing the history of equal employment opportunity in the federal government and the progression of responsible agencies).

322 29 C.F.R. § 1614.102(a) (1995). For agencies with more than 500 employees or installations with more than 2000 employees, there are seven steps in the development and submission of an affirmative employment program. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, MANAGEMENT DIR. 714, INSTRUCTIONS FOR THE DEVELOPMENT AND SUBMISSION OF FEDERAL AFFIRMATIVE ACTION PLANS 1-5 (1988) [hereinafter MD 714]. First, the agency must conduct a program analysis. This is a comprehensive "analysis of the current status of all affirmative employment efforts within an agency." *Id.* at 1. Included in the program analysis is a work force analysis during which an agency should identify and document which equal employment opportunity groups require affirmative action efforts. *Id.* at 2.

Second, the agency uses the results from the program analysis to identify any problems or barriers that the employer has. *Id.* at 3. The directive defines a "problem" as a situation or condition which needs to be corrected or changed." *Id.* A "barrier" is a "principle, policy or employment practice which restricts or tends to limit the representative employment of applicants and employees, especially protected group members." *Id.*

Third, the agency develops objectives and action items to eliminate the problems or barriers. *Id.* at 4. This should ensure equal opportunity for all employees. The agency may establish numerical goals as part of its action items, but the Equal Employment Opportunity Commission does not require it to do so. *See id.*

Fourth, the agency submits its multiyear plan to the Equal Employment Opportunity Commission. *Id.* at 4. Fifth, the Commission reviews the plan and meets with the agency to discuss it. "The ultimate objective of these meetings will be approval of all submissions." *Id.* Sixth, the Commission approves the agency plan. *Id.* Once the Commission approves the basic plan, the agency must submit annual accomplishment reports and updates to the Commission as the seventh step in the process. *Id.*

323 The Commission defines "affirmative actions" for the purposes of part 1608 as "those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." 29 C.F.R. § 1608.1(c) (1995).

al origin conscious.[324] Nevertheless, agencies often adopt such plans to improve conditions for minorities and women.[325] To protect agencies[326] voluntarily adopting these affirmative action plans from "reverse discrimination"[327] claims, the Equal Employment Opportunity Commission established guidelines describing when a federal agency can take affirmative actions and what kinds of actions it may take.[328]

The guidelines allow a federal agency to take affirmative action to correct the effects of prior discriminatory practices, to correct an actual or potential adverse impact[329] caused by an existing or contemplated employment practice, or to increase minority and female representation in labor pools[330] from which the agency makes selections.[331] A federal agency must include three elements in any plan it establishes: a reasonable self-analysis, a reasonable basis for concluding action is appropriate, and reasonable action.[332]

---

[324] *See id.* § 1614.102(b)(1) (requiring that agencies "[d]evelop the plans, procedures and regulations necessary to carry out its program".

[325] *See id.* § 1608.1(a).

[326] The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement . . . The Commission believes that it is now necessary to clarify and harmonize the principles of Title VII in order to achieve these Congressional objectives and protect those employers . . . complying with the principles of Title VII.

Id.

[327] When an employer makes a race, sex, or national origin conscious employment decision "to achieve the Congressional purpose of providing equal employment opportunity," its decision may be challenged "as inconsistent with Title VII" *Id.* This is commonly referred to as a "reverse discrimination" claim. *Id.*

[328] *Id.* § 1608.1(d).

[329] "Adverse impact" is a theory of discrimination that "does not require a showing that the employer intentionally discriminates" HADLEY, *supra* note 320, at 447.

> [T]he adverse impact theory focuses on the effects of the alleged discriminatory practice. The consequences of employment policies rather than the employer's motivation or intent is of paramount concern. The essence of the adverse impact theory is a showing that a policy or practice has a substantial adverse impact on a protected group, notwithstanding its equal application to all individuals.

SCHLEI & GROSSMAN, *supra* note 52, at 1287. "Statistics are almost always determinative in adverse impact cases." *Id.*

[330] Steps designed to increase minority and female representation in the relevant labor pools from which selections will be made include recruitment and outreach programs designed to attract minority and female applicants, and training programs geared towards assisting employees in career advancement. 29 C.F.R. § 1608.4(c)(1) (1995).

[331] *Id.* § 1608.3.

[332] *Id.* § 1608.4.

The agency conducts a reasonable self-analysis to determine "whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment[333] of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination."[334] "The Commission does not mandate any particular method of self-analysis, but such analysis may take into account the effects of past discriminatory practices by other institutions or employers."[335] If the self-analysis reveals the effects of uncorrected past discrimination or an employment practice resulting in an adverse impact, then the agency has a reasonable basis for establishing an affirmative action plan.[336] Any corrective action taken pursuant to a plan must be reasonable "in relation to the problems disclosed by the self analysis."[337] "[R]easonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees."[338]

Pursuant to the guidelines established by the Equal Employment Opportunity Commission,[339] the Department of Defense developed its Civilian Equal Employment Opportunity Program.[340] Through this program, the Department of Defense recognizes "equal

---

[333] "Disparate treatment" is the easiest theory of discrimination to understand. The essence of it "is different treatment: that Blacks are treated differently than whites, women differently than men. It does not matter whether the treatment is better or worse, only that it is different." SCHLEI & GROSSMAN, *supra* note 52, at 13. *See also* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (disparate treatment occurs when an employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin").

[334] 29 C.F.R. § 1608.4(a) (1995).

[335] HADLEY, *supra* note 320, at 580. *See also* 29 C.F.R. § 1608.4(a) (1995) (stating that "[i]n conducting a self analysis, the employer . . . should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions").

[336] 29 C.F.R. § 1608.4(b) (1995).

[337] *Id.* § 1608.4(c). "The plan should be tailored to solve the problems which were identified in the self analysis . . . and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole." *Id.* § 1608.4(c)(2)(i).

[338] *Id.* § 1608.4(c). When the Equal Employment Opportunity Commission initially became responsible for supervising the federal equal employment program in 1979, it required agencies to adopt numerical goals and timetables for achieving those goals in any instance "where agencies found under-representation to exist." KELLOUGH, *supra* note 321, at 21. The Commission backed away from this requirement during the Reagan Administration. Under its 1987 guidelines, goals and timetables no longer are required. *Id.*

[339] *See* 29 C.F.R. § 1614.103(b)(1) (1995) (stating that part 1614 applies to the military departments).

[340] *See* 32 C.F.R. § 191.1(a) (1995). The Civilian Equal Employment Opportunity Program defines "equal employment opportunity" as "[t]he right of all persons to work and advance on the basis of merit, ability, and potential, free from societal, personal, or institutional barriers of prejudice and discrimination." *Id.* § 191.3.

opportunity programs, including affirmative action programs,[341] as essential elements of readiness that are vital to the accomplishment of the . . . national security mission."[342] "Equal employment opportunity is the objective of affirmative action programs."[343]

The Department of Defense requires each of the military services to "[d]evelop procedures for and implement an affirmative action program for minorities and women."[344] As part of this program, the services must ensure that installations "establish upward mobility and other development programs to provide career enhancement for minorities [and] women . . . ."[345] Installations also must establish "focused external recruitment programs to produce employment applications from minorities [and] women . . . who are qualified to compete effectively with internal [Department of Defense] candidates for employment at all levels and in all occupations."[346]

In accordance with Department of Defense requirements, the Department of the Army established civilian equal employment opportunity and affirmative action programs. The purpose of these programs is to acquire, train, and retain "a work force that is reflective of the nation's diversity."[347] The Army's policy is to take "affirmative action to overcome the effects of past and present discriminatory practices, policies, or other barriers to equal employment opportunity. These affirmative actions are designed to work toward achievement of a work force, at all grade levels and occupational categories, that are [sic] representative of the appropriate civilian labor force."[348]

---

341 The Department of Defense defines "affirmative action" as a "tool to achieve equal employment opportunity. A program of self analysis, problem identification, data collection, policy statements, reporting systems, and elimination of discriminatory policies and practices, past and present." *Id.* § 191.3 (1995).

342 *Id.* § 191.4(a) (1995). *See also* DEP'T OF DEFENSE DIR. 1440.1, THE DOD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY PROGRAM, para. E.2.c (21 May 1987) [hereinafter DOD Dir. 1440.1] (requiring the Service Secretaries to "treat equal opportunity and affirmative action programs as essential elements of readiness that are vital to accomplishment of the national security").

343 DOD DIR. 1440.1, *supra* note 342, para. D.2. Affirmative action plans must be "designed to identify, recruit, select, and select qualified personnel." *Id.*

344 *Id.* para. F.2.a.

345 *Id.* para. E.2.j.

346 *Id.* para. E.2.k.

347 DEP'T OF ARMY, REG. 690-12, CIVILIAN PERSONNEL EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION, para. 1-1 (4 Mar. 1988) [hereinafter AR 690-12]. The Army ensures equal employment opportunity for minorities and women by implementing "aggressive affirmative action programs that are designed to meet locally established goals and objectives." *Id.* para. 1-6a.

348 *Id.* para. 2-1.

All Army installations and activities with more than 2000 employees have affirmative employment plans.[349] Each plan includes aggregate work force and accomplishment data, and identifies barriers to the employment and advancement of minorities and women.[350] On a yearly basis, installations, activities, and major Army commands with affirmative action plans submit accomplishment reports and updates to local Equal Employment Opportunity Commission offices and the Department of the Army.[351]

In addition to local plans, the Department of the Army has its own master affirmative employment plan.[352] The Army's plan[353] includes a summary analysis of its civilian work force. To analyze its work force, the Army uses guidance developed by the Office of Personnel Management to classify its civilian employees into the following six categories: professional,[354] administrative,[355] techni-

---

[349] *See id.* para. 2-3 (requiring installation affirmative action program plans to meet the requirements of the Equal Employment Opportunity Commission's management directives). *See also* MD 714, *supra* note 322, at 1 (requiring affirmative employment plans for installations with 2000 or more employees).

[350] AR 690-12, *supra* note 347, para 2-3b. *See also* MD 714, *supra* note 322, at 2-4.

[351] AR 690-12, *supra* note 347, paras 2-3g, 2-3h. *See also* MD 714, *supra* note 322, at 4.

[352] MD 714, *supra* note 322, at 1 (requiring "departments, agencies or instrumentalities with 500 or more employees" to submit an affirmative employment plan).

[353] The Army's Affirmative Employment Plan consists of the base plan dated June 1988 and annual updates submitted thereafter with accomplishment reports to the Commission. The Army submitted its last accomplishment report on June 1, 1995; it did not submit an update for 1995. This report reflects fiscal year 1994 data.

[354] The "professional" category includes:

> White collar occupations that require knowledge in a field of science or learning characteristically acquired through education or training equivalent to a bachelor's or higher degree with major study in or pertinent to the specialized field, as distinguished from general education. The work of a professional occupation requires the exercise of discretion, judgment, and personal responsibility for the application of an organized body of knowledge that is constantly studied to make new discoveries and interpretations, and to improve the data, materials, and methods.

OFFICE OF PERSONNEL MANAGEMENT OPERATING MANUAL, DATA ELEMENT STANDARDS 140 (13 Apr. 1993) [hereinafter OPM DATA STANDARDS].

[355] The "administrative" category includes:

> White collar occupations that involve the exercise of analytical ability, judgment, discretion, and personal responsibility, and the application of a substantial body of knowledge of principles, concepts, and practices applicable to one or more fields of administration or management. While these positions do not require specialized education majors, they do involve the type of skills (analytical, research, writing, judgment) typically gained through a college level general education, or through progressively responsible experience.

Id.

cal,[356] clerical,[357] other,[358] and blue collar.[359] The acronym customarily used for these categories is "PATCOB."[360] Once categorized, the Army determines what percentage of employees in each of these six categories falls into each of the relevant minority or gender groups.[361] It then compares the percentage of each minority and gender group in each PATCOB category to a modified version of the national census availability data[362] that also is arranged by PAT-

---

[356] The "technical" category includes:

> White collar occupations that involve work typically associated with and supportive of a professional or administrative field, that is nonroutine in nature: that involves extensive practical knowledge, gained through on-job experience and/or specific training less than that represented by college graduation. Work in these occupations may involve substantial elements of the work of the professional or administrative field, but requires less than full competence in the field involved.

Id.

[357] The "clerical' category includes:

> White color occupations that involve structured work in support of office, business, or fiscal operations; performed in accordance with established policies, or techniques; and requiring training, experience or working knowledge related to the tasks to be performed.

Id.

[358] The "other white collar" categories include "[w]hite collar occupations that cannot be related to the . . . professional, administrative, technical, or clerical categories." *Id.*

[359] The "blue collar" category includes "[o]ccupations comprising the trades, crafts, and manual labor (unskilled, semiskilled, and skilled), including foreman and supervisory positions entailing trade, craft, or laboring experience and knowledge as the paramount requirement." *Id.*

[360] The Office of Personnel Management assigned each occupational series within the federal government to a specific PATCOB category. *See id.* at 114-38. The Department of the Army codes each job title at the time that it fills each position so that the position clearly falls within the proper category. Telephone Interview with Ana Ortiz, Director, Affirmative Employment Planning, Equal Employment Opportunity Agency, Office of the Assistant Secretary of the Army (Manpower & Reserve Affairs) (Mar. 5, 1996) [hereinafter Ana Ortiz Interview]. For example, the occupational series for a nurse is "0610" and the PATCOB category is "professional." OPM DATA STANDARDS, *supra* note 354, at 119. The occupational series for a practical nurse is "0620" and the PATCOB category is "technical." *Id.* To the extent that there is any overlap between these categories, the Army resolves the issue at the time that it codes the position. Ana Ortiz Interview, *supra*. Once coded, the category normally does not change.

[361] The minority groups relevant to the Army's affirmative employment program are: Blacks, Hispanics, Asian American/Pacific Islanders, Native Americans/Alaska Natives, whites, males, and females. DEPARTMENT OF THE ARMY, ANNUAL AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT FOR FISCAL YEAR 1994 3 (1995) [hereinafter 1994 ACCOMPLISHMENT REPORT].

[362] The Census Availability Data represents "persons, 16 years of age or over, excluding those in the armed forces, who are employed or who are seeking employment." UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/T-GGD-91-32, FEDERAL AFFIRMATIVE ACTION: BETTER EEOC GUIDANCE AND AGENCY ANALYSIS OF UNDERPRESENTATIO NEEDED 2 (1991) (containing the statement of Bernard Ungar, Director, Federal Human Resource Management Issues, General Government Division, before the Committee of Governmental Affairs, United States Senate).

COB categories.[363] This comparison demonstrates that if there is a "conspicuous absence"[364] or "manifest imbalance"[365] of any minority or gender group in one of the PATCOB categories in its work force. If there is a conspicuous absence or a manifest imbalance, the Army may take affirmative action to correct the situation.[366] In 1995, the Army reported a manifest imbalance of women in the professional category,[367] Hispanics in the administrative category,[368] Hispanics and Asian Americans in the technical category,[369] Hispanics in the clerical category,[370] women in the "other" category,[371] and women and Hispanics in the blue collar category.[372] The Army did not report what caused these imbalances.

---

[363] The United States collects census data every ten years. The last census was conducted in 1990. The census includes data related to the national civilian labor force, which the United States uses to classify people under PATCOB.

The Equal Employment Opportunity Commission recognizes that comparing members of the federal work force to pure PATCOB data from the census would not be a reliable comparison for affirmative action purposes. The Commission, therefore, adjusts some of the data reflected in the census to provide more accurate data to which to compare the federal work force. For example, under PATCOB, beauticians would normally fall into the professional category. Because the federal government does not employ beauticians, the Equal Employment Opportunity Commission subtracts data collected for beauticians before comparing civilian professionals to that category. Ana Ortiz Interview, *supra* note 360.

[364] The Army plan defines "conspicuous absence" as "a particular [equal employment opportunity] group that is nearly or totally nonexistent from a particular occupation or grade level in the workforce." 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 3.

[365] The Army plan defines "manifest imbalance" as a "representation of [equal employment opportunity] groups in a specific occupational grouping or grade level in the agency's workforce that is substantially below its representation of the appropriate [civilian labor force]. *Id.*

[366] *See* MD 714, *supra* note 322, attach. A, at 3.

[367] Women in the Army's professional workforce increased from 28.6% in fiscal year 1993 to 28.9% in fiscal year 1994. This representation was below the Census Availability Data of 37%. *See* 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 6.

[368] Hispanics in the administrative category increased from 3.2% to 3.3% between fiscal years 1993 and 1994. Census Availability Data showed 5.2% for Hispanics in this category. *Id.*

[369] In the technical category, Hispanics increased from 5.7% to 5.9% between fiscal years 1993 and 1994. The Census Availability Data was slightly higher at 6.6% for Hispanics. *Id.* Asian Americans/Pacific Islanders increased from 3.0% to 3.1%. Their 1990 Census Availability Data showed 3.5%. *Id.*

[370] In the clerical category, Hispanics increased from 5.4% in fiscal years 1993 to 5.5% in fiscal year 1994. *Id.* at 7. The Census Availability Data in the clerical category showed 6.9%. *Id.*

[371] The representation of women in the "other" category increased from 11.3% in fiscal year 1993 to 11.5% in fiscal year 1994. *Id.* The Census Availability Data for women in the "other" category was 15.7%. *Id.*

[372] In the blue collar category, the representation of women declined from 8.1% in fiscal year 1993 to 7.9% in fiscal year 1994. *Id.* According to the Census Availability Data, the representation of women available in this category was 19.9%. *Id.* The representation of Hispanics remained constant in the blue collar category at 7.7%. *Id.* The Census Availability Data showed Hispanic availability of 10.3%. *Id.*

Besides reporting the representation of minorities and women by PATCOB category, the Army reported the representation of these groups by grade levels. The grade-level statistics revealed that the representation of women and all minority categories except Hispanics exceeded the Census Availability Data for grades GS-1 through GS-8.[373] For grades GS-9 through GS-12, the representation of women and Hispanics failed to exceed the availability data.[374] For GS-13 through GS-15, the representation of Blacks and Asian Americans failed to exceed the availability data for professionals, and Hispanics and women failed to exceed the data for the professional and administrative categories.[375] The Army did not report how the representation of women and minorities fared against the Census Availability Data at the Senior Executive Service level.[376]

Considering its work force analysis, the Army identified specific problems and established objectives for overcoming those problems.[377] One problem that the Army identified was the low representation of minorities and women in higher civilian grades,[378] including the Senior Executive Service.[379] To resolve this problem, the Army: commissioned a study to determine how to overcome barriers;[380] focused command attention on the issues at commanders' conferences, training committees, and other general officer level

---

[373] *Id.* at 8.

[374] *Id.*

[375] *Id.* at 9.

[376] *See id.* Senior Executive Service positions in the federal government include those positions classified above a GS-15 or an equivalent position, "which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate." 5 U.S.C. § 3132(a)(2) (1994). Senior Executive Service employee responsibilities include directing the work of an organizational unit; being responsible for the success of one or more specific programs or projects; monitoring progress towards organizational goals and periodically evaluating and adjusting those goals; supervising the work of employees other than personal assistants; or exercising important policy-making, policy-determining, or other executive functions. *Id.*

[377] The Army first identified many of the problems listed in its Accomplishment Report for fiscal year 1994 several years ago. Because the Army is still working on these problems, it continues to report them. The Army also reports the progress made on each problem.

[378] The Army identified the low number of women and minorities in grades GS-13 to GS-15 as a problem. 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 14.

[379] The Army first identified the low number of women and minorities at the senior civilian levels in its 1988 Accomplishment Report. DEPARTMENT OF THE ARMY, ANNUAL AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT FOR FISCAL YEAR 1988, at 3-10 (1989) [hereinafter 1988 ACCOMPLISHMENT REPORT]. The Army continues to report the problem because it has not resolved it and it is still reporting progress on its corrective actions.

[380] One study commissioned by the Army is the "Glass Ceiling" study. This study considered "statistical analysis, focus groups, interviews, and an Army-wide survey." 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 19. The purpose of the study is to determine whether a glass ceiling exists which prevents minorities or women from advancing in the civilian work force and, if so, how to overcome existing barriers. The Army anticipates releasing the results of this study in 1996. Ana Ortiz Interview, *supra* note 360.

forums;[381] and emphasized the representation of women and minorities at long-term training programs.[382] The Army's affirmative actions to correct the low representation of women and minorities at the higher grades are ongoing.

B. Merit Promotion Procedures

The Army promotes most of its competitive service[383] civilian employees using a merit promotion plan.[384] Each installation develops its own merit promotion plan for positions it will fill at the local

[381] In 1988, when the Army first identified the low number of women and minorities in Senior Executive Service positions as a problem, the Assistant Secretary of the Army initiated a new affirmative action policy for referring and selecting applicants for Senior Executive Service positions. *See* Memorandum, Assistant Secretary of the Army, Manpower and Reserve Affairs, to Director of the Army Staff, subject: Senior Executive Service (SES) Affirmative Action Policy (23 Sept. 1988); Message, Headquarters, Dep't of Army, DACS-ZD, subject: Senior Executive Service (SES) and GS/GM-15 Affirmative Action Policy (261700Z Oct 88); Memorandum, Assistant Secretary of the Army, Manpower and Reserve Affairs, to Assistant Secretaries of the Army and Army General Counsel, subject: SES Selection Documentation (3 Jan. 1989). There are three major elements of this policy:

> First, Secretariat and Army staff functional officials are required to play a more active role in the recruitment process through review of the recruitment efforts and the development of the finalist lists for these positions. Second, in those cases where either no minorities or women applied for a position or none were placed on the best-qualified list, the policy prohibits the selection of any individual for the position unless functional officials are satisfied that efforts were made to locate and attract qualified minority group and women applicants. Third, if a woman or a minority group member is on the best-qualified list, the comments of the concerned functional official must be solicited and considered before selection of another competitor is permitted.

Ernest M. Willcher, *Speech Before the 1989 Army Major Command EEO Officer Conference: The Army Senior Executive Service Affirmative Action Policy*, ARMY LAW., Sept. 1989, at 11. *See also* 5 C.F.R. § 317.501 (1995) (establishing rules for the recruitment and selection for initial Senior Executive Service career appointments).

[382] 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 14-19

[383] Competitive service employees include:

> (1) all civilian positions in the executive branch of the Federal Government not specifically excepted from the civil service laws by or pursuant to statute, by the President, or by the Office of Personnel Management, and not in the Senior Executive Service; and
>
> (2) All positions in the legislative and judicial branches of the Federal Government . . . .

5 C.F.R. § 212.101(a) (1995). The most common way to acquire competitive status is by completing a probationary period under a career-conditional appointment. *See id.* § 212.301 (1995). *See also* 5 U.S.C. § 2102 (1994) (designating positions in the competitive service of the federal government); *id.* § 2103 (stating that the "executive service" includes civil service positions that are not in the competitive service or Senior Executive Service); 5 C.F.R. § 213.101 (1995) (echoing the definition of excepted service from the United States Code).

[384] The Army uses merit promotions and internal placement programs to promote civilian employees who already are employees in the federal government. These procedures do not apply to civilians who are trying to enter the federal employment system. *See* 5 C.F.R. § 335.102 (1995) (describing specific employees who may be promoted under the merit promotion process).

level.[385] At installations where there is a collective bargaining agreement, the installation must negotiate the contents of the merit promotion plan with the bargaining unit representative. The installation does not have to negotiate position qualifications or the applicant pool from which the installation will promote.[386] Because each installation develops its own plan, the procedures that each employs will be different from all others.

This section generally describes the Army's merit promotion process and identifies various procedures used at individual installations. These local procedures cannot be used to draw Army-wide conclusions. However, they illustrate the procedural differences that may determine whether local procedures will be subject to *Adarand's* strict scrutiny standard. They also underscore the general misapplication of constitutional standards in the merit promotion process.

1. Generally—When someone leaves a competitive service position or when a new position covered by the merit promotion plan[387] becomes available, the manager with the available position notifies the civilian personnel office and requests recruiting to fill the opening. The civilian personnel office prepares a merit promotion announcement that identifies the position available and the area of consideration for the position. The manager with the available position can limit the area of consideration to applicants within the

---

[385] *See id.* § 335.103(b) (requiring each federal agency to "establish procedures for promoting employees which are based on merit and are available in writing to candidates"); DEP'T OF ARMY, REG. 690-300, EMPLOYMENT: CIVILIAN PERSONNEL, ch. 335, paras. 1- 3a(1), 1-3b(6) (15 Oct. 1979) (C16, 1 Oct. 1986) [hereinafter AR 690-300] (requiring appointing officers in the Department of the Army to "set up [written] merit promotion plans").

In addition to using merit promotion procedures to fill competitive service positions at the local level, the Army uses merit promotion procedures to fill career program positions. These positions usually are at higher grade levels and require applicants to submit applications at the Department of Army level for processing. *See* DEP'T OF ARMY, REG. 690-950, CIVILIAN PERSONNEL: CAREER MANAGEMENT (8 Sept. 1988) (establishing merit placement procedures for specific career program positions) [hereinafter AR 690-950]. Merit promotion procedures for career program positions are outside the scope of this article.

[386] *See* 5 U.S.C. § 7106(a)(2)(c) (1994) (stating management's right to make selections from "among properly ranked and certified candidates for promotion; or . . . any other appropriate source . . . ").

[387] For civilian positions, it is important to remember that individual employees do not have any "rank." The rank is in the position that the employee holds. This is contrary to the military where individuals have rank and positions do not. For example, a civilian personnel officer can grade an attorney position as a GS-13. As long as an attorney is in that position, the Army will pay that attorney at that grade. However, when the attorney leaves, the GS-13 position remains open for another attorney to fill.

When a military attorney with the rank of major leaves a position, the attorney retains the military rank. If a captain replaces the major, the captain uses that rank.

organization, applicants outside the organization, or applicants from a specific geographic region. Any applicant who meets the stated qualifications required for a position may apply.

The civilian personnel office rates all applicants by their qualifications and prepares a referral list for the manager making the promotion decision. On receipt of the referral list, a manager may interview the applicants or select an applicant based on the written qualifications without regard to race, color, or sex. The manager bases the hiring decision "solely on job related criteria."[388] Once a manager makes a promotion decision, the manager must document the merit-based reasons for the decision and forward the information to the civilian personnel office.[389]

2. Local Installations—Some Army installations add steps to the merit promotion process. At Fort Knox, Kentucky,[390] for example, the Civilian Personnel Office advises managers with open positions on which area of consideration[391] is appropriate[392] based on the availability of qualified minority representation in that area. The manager need not follow the advice of the Civilian Personnel Office. The manager may select someone from whichever area best meets the needs of the office.[393]

---

[388] *See* 5 U.S.C. § 2301(b)(2) (1994) (establishing that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to . . . race, color, . . . national origin, [or] sex . . . ."); 5 C.F.R. § 335.103(b) (1995) (mandating that promotion decisions be "based solely on job-related criteria," and without regard to race, sex, or national origin); *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4E (1995) (stating that although affirmative action programs may be race, sex, and ethnic conscious, "selection procedures under such programs should be based upon the ability or relative ability to do the work").

[389] 5 C.F.R. § 335.103(b)(5) (1995). The installation must maintain "a temporary record of each promotion sufficient to allow reconstruction of the promotion action, including documentation on how candidates were rated and ranked." *Id.* The installation also must maintain data on the sex, race, and national origin of applicants for analysis. *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4A (1995) (providing that "[e]ach user should maintain and have available for inspection records or other information which will disclose the impact which its . . . selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group . . . .").

[390] Telephone Interview with Sam Jones, Civilian Personnel Officer, Fort Knox, Kentucky (Mar. 7, 1996). Mr. Jones provided all information about Fort Knox's promotion process referenced in this article.

[391] The recommended area of consideration also can be to a specific pool of potential applicants. *Id.*

[392] *See* AR 690-300, *supra* note 385, ch 335, para. 1-4, requirement 2a (C16, 1 Oct. 1986) (compelling civilian personnel officers to "provide for areas of consideration which support [equal employment opportunity] affirmative action needs").

[393] *See* 5 C.F.R. § 335.103(b)(4) (1995) (establishing an agency obligation to determine which source "is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals").

The Fort Knox Civilian Personnel Office also sends a copy of all referral lists to the installation equal employment opportunity office. The Equal Employment Opportunity Office may contact the manager making the promotion decision to ensure that the manager knows if women or minorities are underrepresented in similar positions.[394] Even if there is an underrepresentation of women and minorities in similar positions, the manager need not select a woman or minority from the referral list.[395]

The Fort Lewis, Washington, Civilian Personnel Office[396] also sends a copy of every referral list to the Installation Equal Employment Opportunity Office.[397] However, the Equal Employment Opportunity Office does not contact a manager making a selection decision unless it has evidence of a manifest imbalance of minorities or women in a job category[398] and of some other problems in hiring for the available job series.[399] If evidence of a manifest imbalance exists, then, along with the referral list, the Civilian Personnel Office sends a separate note to the manager notifying him or her of the imbalance and stating whether the referral list contains a member of the underrepresented group, but without identifying the member. The manager obtains that information by interviewing the applicants.

At Fort Belvoir, Virginia, the Civilian Personnel Office serves several different organizations.[400] Once the Civilian Personnel

---

[394] *See* AR 690-300, *supra* note 385, ch. 335, para. 1-4, requirement 4b (C16, 1 Oct. 1996) (requiring selecting officials to consider "the activity's approved [affirmative action plans]. . . for minorities and women . . . as part of the selection process").

[395] Neither the civilian personnel office nor the equal employment opportunity office necessarily tell the manager that he need not select a minority or a female.

[396] Telephone Interview with Michael Hankins, Civilian Personnel Officer, Fort Lewis, Washington (Mar. 28, 1996). Mr. Hankins provided all information about Fort Lewis's promotion process referenced in this article.

[397] This requirement is part of the merit promotion agreement that Fort Lewis negotiated with all of its unions. The unions also receive a copy of every referral list. *Id.*

[398] The Fort Lewis civilian personnel office works in conjunction with the installation equal employment opportunity office to examine PATCOB job series and determine whether there are manifest imbalances of minority and gender groups in its work force. If there are, the installation engages in recruitment and outreach to increase the number of applicants from the underrepresented groups. Fort Lewis does not engage in targeted recruiting after it receives notice of a vacancy unless it has a delegation from the Office of Personnel Management. *Id.*

[399] The equal employment opportunity office uses the referral lists to analyze selection and referral patterns and identify potential problem areas.

[400] Telephone Interview with John Raymos, Deputy Director, Civilian Personnel Office, Fort Belvoir, Virginia (Mar. 28, 1996). Mr. Raymos provided all information related to Fort Belvoir's promotion process referenced in this article.

The Fort Belvoir civilian personnel office has agreements with each of the organizations it services on conducting personnel matters. Because these agreements differ, the civilian personnel office may not perform all of the steps briefly described in this article for every job vacancy.

Office learns of a vacancy, it drafts an announcement for the position and advertises it. If the vacancy is in a job category where there is an underrepresentation of minorities or women,[401] the Civilian Personnel Office sends a copy of the announcement to areas targeted[402] to increase the number of applications received from members of those groups. When the Civilian Personnel Office sends the referral list to the selecting official, it also sends a copy to the relevant organization's equal employment opportunity office if there is a previously identified underrepresentation.

C. Evaluation Under Adarand

Under the Equal Employment Opportunity Commission's guidelines, the Army may successfully use its written affirmative action plan to defend itself against a Title VII action alleging unlawful discrimination.[403] However, the Army's plan will not constitute a defense to a challenge on constitutional grounds.[404] When a constitutional challenge arises, a court will review the Army's actions and its affirmative action plan to determine first, whether the plan or the Army's actions create a racial or gender classification. If they do, the Army must have a compelling government interest justifying its actions and it must narrowly tailor its actions to achieve that interest.

1. Racial Classification—Pursuant to requirements imposed by the Equal Employment Opportunity Commission and the Department of Defense, the Army adopted an affirmative employment plan for its civilian employees. Under this plan, the Army has monitored its work force to determine the representation of minorities and women in various grade levels and positions. Where the Army has identified a manifest imbalance between the representation of these groups in its work force and the representation of these groups according to the Census Availability Data, the Army has initiated corrective actions designed to increase minority and female representation.

---

401 The civilian personnel office identifies such underrepresentations in conjunction with the equal employment opportunity office of each of the organizations it services. *Id.*

402 Targeted areas may include universities or organizations with a large number of individuals from the relevant minority group.

403 *See supra* note 63 and accompanying text. *See also* HADLEY, *supra* note 320, at 581. *But see* THE BUREAU OF NATIONAL AFFAIRS, INC., AFFIRMATIVE ACTION TODAY: A LEGAL AND PRACTICAL ANALYSIS 54 (1986) (demonstrating that in court cases, "[c]ompliance with the affirmative action requirements of a federal agency does not automatically translate into compliance with Title VII").

404 The Equal Employment Opportunity Commission's guidelines do not address the possibility that a federal agency will face a constitutional challenge. *See* Brian C. Eades, Note, *The United States Supreme Court Goes Color-Blind: Adarand Constructors Inc. v. Pena*, 29 CREIGHTON L. REV. 771 (1996) (arguing that racial preferences are impermissible under the Constitution).

Thus far, the affirmative employment actions taken at the Department of Army level include, *inter alia*, reminding senior officers and officials of the importance of increasing minority and female representation, developing a policy requiring careful deliberation before selecting a nonminority or a male for a high-level position, and conducting studies to identify problems and determine possible solutions. From the Army's Affirmative Action Accomplishment Reports, it appears that Army officials stress only the importance of increasing minority and female representation; they do not focus on any specific minority group. The Army does not require any selecting official to promote or to make any selection decision based on race, national origin, or sex.[405] The Army requires selecting officials to promote the best qualified person to fill a position regardless of race or sex. The Army does not have goals[406] or quotas for any minority or gender groups.[407] Its policies and actions are race and gender neutral. Consequently, they do not create race or gender classifications and would not be subject to the strict scrutiny standard imposed by *Adarand*.

While Army-level affirmative actions do not create racial or gender classifications, some local actions have created such classifications. Army installations with more than 2000 employees have

---

[405] In 1988, the Army considered developing a policy permitting the consideration of race, national origin, and sex in the promotion process. *See* 1988 ACCOMPLISHMENT REPORT, *supra* note 379, at 3-15. However, the Army canceled that proposal after the Office of General Counsel determined that case law did not permit such considerations. *See* DEPARTMENT OF THE ARMY, ANNUAL AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT FOR FISCAL YEAR 1989 3-15 (1990).

[406] Federal "[a]gencies frequently do not set measurable affirmative employment goals . . . ." United States General Accounting Office, GAO/T-GGD-94-20, EEOC: Federal Affirmative Planning Responsibilities 8 (1993) [hereinafter Federal Affirmative Planning Responsibilities] (containing the testimony of Nancy Kingsbury, Director of Federal Human Resource Management Issues, on how managers must be held accountable to achieve equal employment opportunity progress). Such "[s]pecificity is needed to truly gauge how successfully the executives are carrying out their affirmative employment responsibilities." Id.

[407] The adoption of goals does not guarantee that minorities or women will increase in representation at higher grade levels. See Kellough, supra note 321, at 37-40 (explaining that the addition of numerical goals and timetables to federal equal employment opportunity policy has not resulted in significant increases in the progression of Blacks and females to higher level positions).

> [However,] goals do urge the selection of minorities or women over nonminority males when both are equally capable of performing the job and when previous discriminatory practices have caused minorities and women to be under-represented in such positions. Goals are essentially numerical targets which call attention to minority and female under-representation, and thereby help to guide recruitment, training, and selection processes toward the correction of that under-representation.

Id. at 107. Because the use of goals results in attention to specific minority or gender groups during the selection process, they create racial or gender classifications. As such, they would be subject to a strict scrutiny standard on judicial review.

their own affirmative action plans.[408] As part of these plans, local installations "may include goals and timetables . . . which recognize the race, sex, or national origin of applicants or employees."[409] Installations that include goals in their plans create race and gender classifications that are subject to review under *Adarand*.[410]

Adarand also may apply to installation practices that require managers making promotion decisions to coordinate those decisions with the installation equal employment opportunity office.[411] During this coordination, equal employment opportunity representatives tell managers whether an underrepresentation of women or minorities exists in certain positions or at certain grade levels. While the equal employment opportunity representative cannot require managers to select women or minorities to fill open positions, they may strongly infer that managers should consider race, national origin, or gender when making a selection. Because of this inference, courts can legitimately find that this practice creates racial or gender classifications during the selection process. Courts reviewing this practice will certainly apply the strict scrutiny standard to analyze it.

2. Compelling Government Interest—Installations that use goals to increase minority representation or permit equal employment opportunity representatives to brief managers during the selection process[412] on when minority underrepresentation exists are creating racial classifications subject to *Adarand's* strict scrutiny standard. To pass this standard, an installation must have a compelling interest justifying its actions.

a. Remedying Past Discrimination—As previously discussed,[413] the only compelling interest that the Supreme Court

---

[408] *See supra* note 349 and accompanying text.

[409] 29 C.F.R. § 1608.4(c) (1995).

[410] *See supra* notes 210-13 and accompanying text.

[411] *See supra* discussion part IV.B.2.

[412] Equal employment opportunity briefings designed to inform commanders when there is minority or female underrepresentation on the installation for recruitment and outreach purposes are not objectionable. Recruitment and outreach efforts are not part of the actual employment decision and, therefore, generally are permissible. Commanders must be told, however, that the purpose of the briefing is to develop and focus outreach efforts designed to increase the number of minorities and females in the pool of qualified applicants. The purpose is not to get commanders to use the selection process to increase needed representation.

Equal employment opportunity representatives also must limit these briefings to individuals who serve recruitment and outreach functions. The only purpose behind including supervisors who make selection decisions, but who do not play any part in outreach or recruitment, would be to encourage them to use race or sex in their hiring and promotion decisions. Without the proper evidence, *Adarand* prohibits such considerations.

[413] *See supra* discussion parts II.B, III.C.2.a.

currently recognizes is remedying past discrimination. An installation or activity that has evidence demonstrating that it systemically discriminated against women or minorities in the past may take affirmative actions to remedy that discrimination. Evidence of discrimination may include discriminatory policies, judicial or administrative findings[414] of discrimination, statements of witnesses, or statistics.

Installations may only remedy discrimination that they caused in the past or that they helped to perpetuate as a passive participant.[415] Contrary to Equal Employment Opportunity Commission's guidelines, installations may not remedy "potential discrimination" caused by a "contemplated employment practice."[416] Additionally, installations may not remedy discrimination caused "by other persons or institutions."[417] While the Equal Employment Opportunity Commission may argue that these actions meet Title VII requirements, they do not meet constitutional requirements under *Adarand*.[418]

Installations also may take affirmative actions if a statistical disparity exists between the percentage of minorities or women in the installation work force and the percentage of minorities or women in the relevant labor pool "great enough [to cause] an inference of discriminatory exclusion."[419] The Supreme Court never has defined how great a disparity must exist in a constitutional challenge to a racial classification before it will infer that the disparity resulted from a pattern or practice of discrimination. However, the Court may not allow a statistical disparity that is less than the disparity required in Title VII cases.[420] Installations must have more than just a "low representation" of minorities or women in the work force.[421] At a minimum, installations must have a statistical disparity sufficient to show that its selection or employment practice "has caused the exclusion of applicants for . . . promotions" because of

---

414 Administrative findings of discrimination include findings from discrimination complaints filed with the Equal Employment Opportunity Commission as well as findings from local command investigations.

415 *See supra* discussion part II.B.

416 29 C.F.R. § 1608.3(a) (1995).

417 *See supra* notes 75-78 and accompanying text

418 *See supra* discussion part IIB.

419 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 502 (1989).

420 *See supra* discussion part II.C.

421 *Croson*, 488 U.S. at 502. The Court's reference to Title VII statistical disparities in discrimination cases involving constitutional challenges supports the argument that the Court will apply no less of a standard in constitutional cases. The Court may apply the same "gross statistical disparities" standard in constitutional cases since that may form a "strong basis in evidence." *See id.* at 501.

their race, ethnicity or sex.[422]

b. Achieving Diversity—In the first paragraph of its civilian equal employment and affirmative action regulation, the Army states that it established its programs to acquire, train, and retain "a work force that is reflective of the nation's diversity."[423] If the Army or any installation argues that it has a compelling interest in maintaining the diversity of its civilian work force, it will lose. A majority of the Supreme Court has never recognized diversity as a compelling interest justifying the creation of a racial classification.[424] Additionally, four Justices on the current Court would likely reject such an interest.[425] Two of the Justices have said that an interest in diversity is too "trivial" to justify a racial classification.[426]

Accordingly, an Army installation should couple any attempt to prove a diversity interest with a combat readiness argument.[427] The installation could argue that military necessity and combat readiness dictate not only that the Army maintain diversity in its military ranks,[428] but also in its civilian population. Civilian employees are part of the total military force structure. They work side by side with military personnel performing the mission. The Army uses "civilian employees in all positions that do not require military

[422] *See* Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988). In *Watson*, the Court said that "the plaintiff's burden in establishing a prima facie case [in a Title VII action] goes beyond the need to show that there are statistical disparities in the employer's work force." *Id.* The plaintiff also must "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* at 1000. If statistical disparities are substantial enough, they will raise an "inference of causation." *Id.* at 995. This is the proof that the Court requires in a Title VII case when there is no showing of intentional discrimination by an employer. In a constitutional case, the Court probably will require proof just as strong, if not stronger, before it will infer a discriminatory employment practice.

[423] AR 690-12, *supra* note 347, para 1-1. *See also* 5 C.F.R. § 720, app. (1995) (citing the Civil Service Reform Act of 1978 as establishing the policy of the United States "to provide . . . a Federal workforce reflective of the Nation's diversity"); FEDERAL AFFIRMATIVE PLANNING RESPONSIBILITIES, *supra* note 406, at 1 (1993) (discussing the "Equal Employment Opportunity Commission's . . . role in creating a federal workforce that is discrimination free and reflective of the nation's population").

[424] *See supra* notes 259-61 and accompanying text.

[425] *See supra* note 259 and accompanying text.

[426] *See* Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547, 633 (1990), *overruled in part by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (Scalia & Kennedy, JJ., dissenting) (expressing their disagreement with the Court "that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as 'broadcast diversity'").

[427] However, the Army must recognize that courts will not accept a compelling interest in diversity plus combat readiness for civilian employees unless the Army has sufficient evidence to support that interest.

[428] *See infra* discussion part III.C.2.b.

incumbents."[429] When the military deploys, it also must deploy civilian support personnel.[430]

The installation could maintain that because civilian employees are such an integral part of the Army's total force, equal opportunity is crucial not only in the military ranks, but also in the civilian ranks. If the Army does not maintain diversity in its *entire* force structure, combat readiness will suffer:

> Army readiness begins with people and is basically a human condition. Without a sincere and dynamic commitment to the total well being of people, all our equipment modernization efforts will fail. Our ultimate high technology weapon is the soldier. That soldier, *and the civilian who supports the soldier,* must know, in every possible way, that he or she will be evaluated fairly, treated with dignity and compassion, and given every opportunity to realize their full capacity and potential.[431]

To prove a diversity and combat readiness interest for civilian personnel, the installation needs solid evidence to support its position. No such evidence currently exists in the Army. Either the installation or the Army must develop it through a study or some other means. Installations that have a large number of deployable civilians may succeed in developing this evidence. However, installations composed predominantly of nondeployable civilians are more likely to fail. Uncorroborated assertions certainly will not be able to withstand judicial scrutiny.[432]

3. Narrowly Tailored to Meet Compelling Interest—Assuming that an installation has a compelling interest in remedying past discrimination within its civilian work force or in maintaining diversity for combat readiness reasons, the installation still must prove that it narrowly tailored its remedy to achieve its interests. This requires courts to consider the necessity of the remedial action, the relationship of numerical goals to the relevant labor market, the duration of

---

[429] DEP'T OF DEFENSE, DIR. 1400.5, DOD POLICY FOR CIVILIAN EMPLOYEES, para. C.1 (21 Mar. 1983).

[430] *See, e.g.*, Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 116 n.7 (1995) (discussing the number of civilians who deployed on military operations in the Persian Gulf, Haiti, and the Former Yugoslav Republic of Macedonia); DEP'T OF ARMY, PAMPHLET 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE (1 Nov. 1995) [hereinafter DA PAM 690-47].

[431] Department of the Army, Multi-Year Affirmative Employment Plan 2 (1988) (emphasis added). The Army states this policy in the front of its basic affirmative action plan. If the Army intends to use this policy to further its compelling interest in maintaining combat readiness, then it should repeat the policy in its civilian equal employment opportunity and affirmative action regulation. *See* AR 690-12, *supra* note 347.

[432] *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 505 (1989).

the remedial action, and how closely the remedy fits the compelling interest.[433]

a. Identifying Specific Discrimination—An Army installation with evidence to support a compelling interest in remedying discrimination against specific female or minority civilian employees may take affirmative action to remedy that discrimination. This action may include using numerical goals to increase representation of the affected groups, or receiving information from the equal employment opportunity representative on the underrepresentation of the affected groups. However, the installation must limit the use of these actions to those groups where it has evidence of discrimination or of significant statistical disparities in certain positions.

For example, an installation that has evidence that Black women are grossly underrepresented in engineering positions may use goals or require coordination with the equal employment opportunity office to increase their representation in those positions. The statistical disparity of Black women in engineering positions would not, however, justify the use of these actions for other minority groups where there is no evidence of discrimination. Installation practices that include goals or require coordination where no evidence of discrimination exists are overinclusive and fail the narrowly tailored requirement of the strict scrutiny standard.

b. Employing Temporary Actions—Even when the installation has evidence of discrimination, it may only use goals or require coordination temporarily to remedy the identified discrimination. Once the installation corrects the discrimination or eliminates the significant statistical disparities,[434] it must terminate the use of goals or prior notice of underrepresentation to selecting officials for the affected minority groups or civilian positions. Failure to do so results in the action becoming a nontemporary and nonremedial measure; nontemporary remedial measures and nonremedial measures are not narrowly tailored.

c. Using Appropriate Labor Pools—Determining whether an installation has a statistical disparity sufficient to justify a race- or gender-based employment practice requires a comparison of the installation work force in the jobs at issue to the appropriate labor pool.[435] An installation may not rely on the more convenient comparison of its minority population to the minority population in the general civilian work force or even to the minority population in one of the PATCOB categories.[436] Those labor pools are too broad to be of

---

[433] *See supra* discussion part III.C.3.

[434] *See supra* discussion part II.C.

[435] *See supra* note 48 and accompanying text.

any probative value. Rather, the installation must limit its comparison to the labor pool of applicants who most closely possess the qualifications required by the available position.

An installation determining whether it has a statistically significant underrepresentation of Black nurses, for example, would compare the percentage of Black nurses it has in its local work force with the percentage of Black nurses in the qualified applicant pool. It would not compare its work force to the total number of Blacks in the civilian labor force, or to the total number of Blacks in the "professional" category of PATCOB statistics.[437] Most of the individuals included in these broad categories, whatever their race, would not qualify for a nurse's position. Therefore, they cannot be considered when determining statistical disparities.

An installation also must use current data to compare its work force to the qualified applicant pool. If reasonably current data is not available for the relevant civilian work force, the installation should work with the Office of Personnel Management to assemble such data.[438] The installation cannot rely on data collected during the last decennial census. Several years after that data is collected, it becomes too outdated to be of any value.

d. Maintaining Combat Readiness—Assuming that the Army has sufficient evidence to support a compelling interest in combat readiness, it may employ race- and gender-conscious actions narrowly tailored to further that interest. For example, the Army can require the civilian personnel office to send copies of the referral list for open positions to the equal employment opportunity office. An equal employment opportunity representative who determines that there is a significant underrepresentation of minorities or women in a certain position as compared to the appropriate labor pool can relay that information to the manager making the selection. The representative should not, however, coordinate with the manager making the selection if no evidence of significant disparity exists.

---

[436] *See supra* discussion part IV.A. Not only are PATCOB categories insufficient for measuring installation minority and gender representation levels, they also are insufficient for measuring representation levels at the Army level. Each PATCOB category includes too many different types of employees to provide a comparison sufficient to justify a selection decision based on race, ethnicity, or gender. Because PATCOB categories do not provide a sufficient basis for comparison, the Army should use different data for the analysis that it conducts on its work force in its affirmative action plan. *See supra* notes 367-72 and accompanying text.

[437] *See* Memorandum, Office of the Associate Attorney General, United States Department of Justice, to General Counsels, subject: Post-*Adarand* Guidance on Affirmative Action in Federal Employment (29 Feb. 1996).

[438] *See id.* (stating that the "[Office of Personnel Management] and the Census Bureau have agreed to conduct preliminary statistical studies to help agencies match job requirements and appropriate applicant pools").

Regardless of the representation levels of women or minorities, the manager making the promotion decision must select the individual who is best qualified for the position. The manager must not be required to select a lesser-qualified woman or minority.

4. Deference by the Courts—The Constitution of the United States charges Congress "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.'"[439] In exercising this authority, Congress passed Title VII of the Civil Rights Act of 1964 to eliminate discrimination in employment.[440] "The Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, requires federal agencies to develop and implement affirmative employment programs to eliminate the historic underrepresentation of women and minorities in the workforce."[441] Pursuant to this requirement, the Army developed its equal employment opportunity and affirmative action program for its civilian employees.

Because Congress is a coequal branch of the federal government, the Supreme Court generally has granted "appropriate deference" to congressionally authorized affirmative action programs.[442] Before *Adarand,* this deference meant that congressionally authorized programs were subject to a lower level of judicial scrutiny than applied to state and local government programs.[443] However, in *Adarand,* the Supreme Court repudiated its prior level of deference and held that congressionally authorized programs must meet the same constitutional standards as state and local government programs.[444] The Court then refused to comment on how much deference it would provide to congressionally authorized programs in the future.[445]

---

[439] Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (citing U.S. CONST. art. I, § 8, cl. 1; amend. 14 § 5).

[440] 42 U.S.C. § 2000e-2 (1988 & Supp. V 1993). *See also supra* discussion part II.A.

[441] Affirmative Planning Responsibilities, *supra* note 406, at 1 (explaining the background of the Equal Employment Opportunity Commission's "role in creating a federal workforce that is discrimination free").

[442] *Fullilove,* 448 U.S. at 472. *See* discussion *supra* part II.C. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (acknowledging that Congress has "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment").

[443] *See* discussion *supra* part II.B.

[444] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2114 (1995).

[445] *Id. See also* Eades, *supra* note 404 (arguing that Congress is not entitled to any more deference than are states).

Courts still may afford some deference to affirmative actions authorized by Congress, but how much is unclear. Because of this uncertainty, the Army and all federal employers should not expect any special judicial deference when reviewing and revising their affirmative action programs. The Army must instead concentrate on using programs that pass constitutional requirements.

D. Proposed Changes

The legal parameters of constitutionally permissible federal affirmative actions are difficult to understand because of the numerous questions left unanswered by *Adarand*. The Army must help installations answer some of these questions by developing policy guidance for civilian employment decisions. At a minimum, this guidance should address:

> (1) the statistical disparity that must exist before an installation can employ race- or gender-based actions,
>
> (2) the types of evidence indicative of historical discrimination,
>
> (3) the number of incidents of discrimination that must exist to constitute a pattern of discrimination, and
>
> (4) the length of time that an installation can continue remedial efforts to insure that it has corrected a discrimination problem.

Army guidance is necessary to sensitize installations to the pending issues and to direct them on how to address these issues. Without such direction, installations will continue to engage in practices that may meet Title VII requirements but will undoubtedly fail constitutional requirements.

During the selection process, equal employment opportunity representatives must stop notifying selecting officials if there are shortages of women or minorities in the local work force. Managers often misinterpret that notice to mean that they should take race or gender into account when they make promotion or other selection decisions. This approach is not appropriate after *Adarand*. Unless the installation has specific evidence of past discrimination,[446] or of gross statistical disparities, selecting officials must not consider race or gender when selecting from qualified candidates. If they consider

[446] Despite the Equal Employment Opportunity Commission's guidelines, the Army must not take affirmative actions to correct discrimination that has not yet occurred or to correct discrimination caused by other agencies. To satisfy constitutional requirements, the Army must only take affirmative actions to correct its own past discrimination.

race or gender, or if they give the appearance that they are considering race or gender, then their actions will fail judicial scrutiny.

When determining whether statistical disparities exist, Army installations must compare jobs at issue in their work force to the civilian labor pool composed of individuals available and qualified for such jobs. They may not rely on comparisons to PATCOB categories or on outdated census data to determine whether statistical disparities exist or to make promotion decisions. Decisions based on comparisons to the wrong labor pools will fail constitutional muster under the strict scrutiny standard imposed in *Adarand*.

The Army should change its equal employment opportunity and affirmative action regulation to reflect an interest other than merely maintaining a diverse work force. Diversity alone will not pass judicial scrutiny. The Army should reflect a compelling interest in remedying past discrimination to the extent it still has such an interest. The Army also may consider a combat readiness interest; however, adequate evidence supporting that interest does not yet exist. The Army must develop that evidence before even attempting a combat readiness argument for its civilian employees.

V. Conclusion

For the last two decades, the Army has used affirmative action as a remedy for past discrimination. During that time, the Army has increased the number of minorities and women in both its military and civilian work force. The Army continues to take steps to improve minority and female representation in leadership positions for both its military and civilian employees. These steps should be encouraged if adequate evidence exists to support them. However, the Army does not have evidence to support all of its affirmative action efforts and some of those efforts must end. Now is the time for the Army to reevaluate its military and civilian affirmative action and promotion programs. If it determines that these programs are still necessary to further a compelling interest, then it must mend them to ensure they comply with the strict scrutiny standard imposed by *Adarand*. If the programs are no longer necessary, the Army must end them.

The procedures used to promote Army officers are especially subject to challenge. The Air Force and the Navy already are defending against *Adarand* attacks on their selection procedures.[447] The

[447] *See* Baker v. United States, No. 94-453C, 1995 U.S. Claims LEXIS 236 (Ct. Cl. Dec. 12, 1995) (relying on *Croson* and *Adarand* to challenge the instructions used by the Air Force at a selective early retirement board); Monforton v. Dalton, No. SACV 95-424 LHM (EE) (D.C. Central Dist. of Cal. 1996) (relying on *Adarand* to challenge the Navy's affirmative action plan as it applies to Judge Advocate General's Corps accessions).

Army's officer promotion procedures may be next. The current promotion board instructions will not pass constitutional scrutiny. They do not clearly further a compelling interest in remedying past discrimination or in ensuring combat readiness. The instructions are overinclusive, not limited in duration, and allow boards too much discretion in remedying discrimination that may not even exist. As a result, they are not narrowly tailored. The Army should seize this opportunity to mend its officer promotion procedures while the courts are still battling over the impact of *Adarand*. Failure to do so ultimately may result in a court order requiring the Army to end the use of these instructions altogether.

Although the procedures used to promote the Army's civilian employees are not as objectionable as its military procedures, potentially troublesome areas exist at the local level. Installation practices that allow equal employment opportunity representatives to inform selecting officials on shortages of minorities or women in the work force must end. These practices suggest to selecting officials that race, ethnicity, and gender are valid selection factors even when no evidence of prior discrimination or of significant statistical disparities exists. After *Adarand*, this procedure will fail. The Army and installations also must cease relying on PATCOB data to make work force comparisons for their affirmative action plans and for filling available positions. This data is outdated and too broad to provide any useful information. The Army and installations employing affirmative actions to improve minority and female representation must develop more reliable data to use for comparison purposes. Comparisons based on unreliable data will not survive a constitutional challenge under *Adarand*.

President Clinton directed all federal agencies to mend, but not end their affirmative action programs. Therefore, the Army must reevaluate and redefine its programs to comply with the President's order and with the constitutional mandates of *Adarand*. Implementing the recommendations made in this article will enable the Army to continue its programs and remain as the nation's model employer for equal opportunity.

APPENDIX A

Proposed Instruction for Remedying Specifically Identified Past Discrimination

DA Memo 600-2, para. 10 introduction (unchanged):

The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity on which our country was founded. People remain the cornerstone of readiness. To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but is especially important to demonstrate in the selection process. To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception of equal opportunity in the selection process.

DA Memo 600-2, para. 10a (changes italicized):

In evaluating the files you are about to consider, *you should be sensitive that (female officers have not been permitted to serve in certain combat positions) (Black officers have not been selected for promotion at rates comparable to that of other officers and may be suffering from the lingering effects of past discrimination). This may place these officers at a disadvantage from other officers from a career perspective.* Taking this into consideration, assess the degree to which an officer's record as a whole is an accurate reflection, free from bias, of that officer's performance and potential.

DA Memo 600-2, para. 10b (changes italicized)

You have been given an equal opportunity selection goal *for (female officers) (Black officers)* at the applicable appendix. *This goal is not a requirement to meet a particular quota.* Comparison of tentative selection rates to the goal offers you a diagnostic tool to ensure that all officers receive equal opportunity in the selection process. You are required to review the records of *(female officers) (Black officers) if you do not achieve the selection goal. During this second review, you must look for evidence that (female officers were disadvantaged by their inability to serve in combat positions) (Black officers are suffering from the lingering effects of past discrimination). You also must ensure that you provided each of these officers an equal opportunity to be promoted. If, during this second review, you find evidence that (a female officer was disadvantaged) (a Black officer was discriminated against) (you may not have provided these*

officers with an equal opportunity), you will revote the file of that officer, taking into account the apparent disadvantage, and adjust that officer's relative standing accordingly. *This revote must not result in the promotion of an officer who is not fully qualified for promotion. If you do not find any evidence of (disadvantage) or (discrimination), or both, and you are satisfied that all officers received an equal opportunity for promotion, then you should not revote the file of any officer.*

DA Memo 600-2, para. 10c (changes italicized)

Prior to recess, *you must document any (evidence of disadvantage) (evidence of discrimination) (dissatisfaction you had with the initial vote on these officers) discovered during your second review. You also must document any action you took to remedy the situation. You must provide information sufficient to allow a reconstruction of your review process, including the numerical adjustments in ranking made after any revote. To help the Army meet its equal opportunity reporting requirements, you also must prepare a report of minority and female selections as compared to the selection rates for all officers considered by the board.*

DA Memo 600-2, appendix A, A-2 (consider moving to para. 10a)

(Female officers) (Black officers): Your goal is to achieve a selection rate for (female officers) (Black officers) that is not less than the selection rate for all officers in the promotion zone (first-time considered).

DA Memo 600-2, appendix A, para. A-8c(a) (changes italicized)

(a) Equal opportunity assessment

1. *Your goal is to achieve a selection rate for (female officers) (Black officers)* that is not less than the selection rate for all officers in the primary zone of consideration. *If the selection rate for (female officers) (Black officers) is less than the selection rate for all first-time considered officers, you are required to conduct a review of files (for evidence of disadvantage against a female officer caused by an inability to serve in a combat position) (for evidence of the lingering effects of discrimination against Black officers) (to ensure that [female officers] [Black officers] received an equal opportunity for promotion during the board's first review).* If you find an indication that an officer's record may not accurately reflect his or her potential for service at the next higher grade due to discriminatory practices, revote the record of that officer and adjust his or her relative standing to reflect the most current score.

2. After completing any revote of files, review the extent to which the board met the equal opportunity selection goal. *If the board has met the goal, report the selection rate along with the selection rate for other minority or gender groups in the after action report. In cases where the board has not met the goal, assess any patterns in the files of nonselected (female) (Black) officers for later discussion in the after action report.*

APPENDIX B

Proposed Instruction for Ensuring Combat Readiness

DA Memo 600-2, para. 10 introduction (changes italicized):

The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity on which our country was founded. People remain the cornerstone of readiness. *To accomplish any mission, soldiers must be properly trained and in a proper state of readiness at all times. Soldiers must be committed to accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. A leadership climate in which soldiers perceive that they are treated with fairness, justice, and equity is crucial to the development of this confidence.*

To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but is especially important to demonstrate in the selection process. To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception of equal opportunity in the selection process.

DA Memo 600-2, para. 10a (changes italicized):

In evaluating the files that you are about to consider, *you must clearly afford minority and female officers fair and equitable consideration. Combat readiness demands that soldiers see visible evidence of equal opportunity in promotion results. If soldiers do not perceive that they have an equal opportunity for advancement, there will be a detrimental impact on morale, unit cohesion, combat readiness, and ultimately on the Army's ability to accomplish its mission.*

DA Memo 600-2, para. 10b (changes italicized)

To ensure that each soldier perceives they have an equal opportunity for advancement, your goal is to achieve a selection rate for minority and female officers comparable to the selection rate for all officers considered by the board. This goal is not a requirement to meet a particular quota. Comparison of tentative selection rates to the goal offers you a diagnostic tool to ensure that all officers receive equal opportunity in the selection process.

If you do not achieve your selection goal, you must review the records of those minority or gender groups that fall below the selection goal. During this second review, you must ensure that you provided each officer an equal opportunity to be promoted. If, during

this second review, you are not satisfied that you provided an officer with an equal opportunity, you will revote the file of that officer and adjust that officer's relative standing accordingly. *If, during the second review, you are satisfied that all officers received an equal opportunity for promotion, then you should not revote the file of any officer.*

DA Memo 600-2, para. 10c (changes italicized)

Prior to recess, *you must document any dissatisfaction that you had with the initial vote on any officer discovered during your second review. You also must document any action that you took to correct the situation. You must provide information sufficient to allow a reconstruction of your review process, including the numerical adjustments in ranking made after any revote. To help the Army meet its equal opportunity reporting requirements, you also must prepare a report of minority and female selections compared to the selection rates for all officers considered by the board.*

DA Memo 600-2, appendix A, A-2 (consider moving to para. 10a)

To ensure that each soldier perceives they have an equal opportunity for advancement, your goal is to achieve a selection rate for minority and female officers that is not less than the selection rate for all officers in the promotion zone (first-time considered).

DA Memo 600-2, appendix A, para. A-8c(a) (changes italicized)

(a) Equal opportunity assessment

1. *To ensure that each soldier perceives that they have an equal opportunity for advancement, your goal is to achieve a selection rate for minority and female officers* that is not less than the selection rate for all officers in the primary zone of consideration. *If the selection rate for minority or female officers is less than the selection rate for all first-time considered officers, you are required to conduct a review of files to ensure that these officers received an equal opportunity for promotion during the board's first review. If you are not satisfied that a minority or female officer received an equal opportunity during the board's initial review, revote the record of that officer and adjust his or her relative standing to reflect the most current score. If you are satisfied that these officers received an equal opportunity for promotion, then do not revote any files.*

2. After completing any revoting of files, review the extent to which equal opportunity selection goals were met. *To help the Army meet its equal opportunity reporting requirements, report the selection rate in each minority or gender group in the board's after action report.* In cases where the goal has not been met, *assess any patterns in the files of nonselected minority and female officers for later dis-*

cussion in the after action report.

**Note: Should the Army decide to employ a race- and gender-neutral instruction geared toward combat readiness, then it may use the changes proposed for Department of Army Memo 600-2, paragraphs 10 (introduction) and 10a. It should delete reference to the other paragraphs contained in this appendix.

APPENDIX C

Proposed Race- and Gender-Neutral Instruction for all Promotion Boards

DA Memo 600-2, para. 10 introduction (unchanged):

The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity on which our country was founded. People remain the cornerstone of readiness. To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but it is especially important to demonstrate this principle in the selection process. To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception of equal opportunity in the selection process.

DA Memo 600-2, para. 10a & 10b (deleted)

DA Memo 600-2, para. 10c (changes italicized)

To help the Army meet its equal opportunity reporting requirements, prior to recess you must prepare a report of minority and female selections as compared to the selection rates for all officers considered by the board (first-time considered).

DA Memo 600-2, appendix A, A-2 (deleted)

DA Memo 600-2, appendix A, para. A-8c(a) (deleted)

THE TWENTY-FIFTH ANNUAL KENNETH J. HODSON LECTURE: GENERAL KEN HODSON—A THOROUGHLY REMARKABLE MAN*

MAJOR GENERAL MICHAEL J. NARDOTTI, JR.**

Ladies and gentlemen, it is truly an honor for me to have this opportunity to speak. It had been our intent at the 1995 Continuing Legal Education Workshop to honor General Hodson for his extraordinary lifetime of selfless service and his monumental contributions to our Army and our Corps. Being above all a man of great humility, General Hodson was reluctant to be so honored. At the time I prevailed upon him saying that we really needed to do this for our Corps and, for our Corps, he agreed. As all of you know, however, his health deteriorated. We did not honor him on that occasion and he passed away in November of 1995. It is not my intention to do today what I would have done on that occasion in October. There is much more to say today—and much more to remember.

Many honors have been bestowed on General Hodson. This lecture has honored and will continue to honor him in ways that one speech could never equal. However, on this occasion, the lecture named in his honor closest to his passing, I feel even more strongly that it is important to talk about him and what he did for all of us. Sometimes the introductory comments about General Hodson that we've heard so many times become too familiar: The Judge Advocate General from 1967 to 1971, the first Chief Judge of the Army Court of Military Review, and a principle architect of the Military Justice Act of 1968—which created the independent judiciary, redesignated law officers to military judges, redesignated the old Boards of

* This article is an edited transcript of a lecture delivered on 26 April 1996 by Major General Michael J. Nardotti, Jr., The Judge Advocate General, United States Army, to members of the Staff and Faculty, distinguished guests, and officers attending the 44th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on June 24, 1971. The chair was named after Major General Hodson who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and was a member of the original Staff and Faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

** The Judge Advocate General, United States Army.

Review to the Court of Military Review, and created enhanced powers for military judges to ensure the proper conduct of proceeding at courts-martial. All of this is very true, but there is more to the story. On this occasion, I think that it is entirely appropriate to talk not only about what he was able to accomplish, but the times in which he served and how his accomplishments continued to mean so much, not just to judge advocates but to soldiers and the Army. Upon his passing, a colleague from the American Bar Association, Dick Lynch, described General Hodson as a great friend and as a thoroughly remarkable man. Allow me a few moments to tell you why.

To the extent that any of the observations I make today appear or seem to be particularly perceptive, I give all due credit to a former judge advocate, Colonel Bob Boyer. He undertook the oral history of General Hodson in 1971 for the Army Center of Military History and created a transcript of interviews conducted during December 1971 and January 1972. This work was of immense help to me in gaining insights into General Hodson's views and recollections of almost twenty-five years ago.

By way of background, it is important to understand General Hodson's beginnings. He is part of that unique generation that lived through the Depression, stepped forward to serve in World War II, and for those special people who remained in military service, continued to deal with many challenging issues in an increasing complex Army and nation. It never was easy for him. His father died when General Hodson was sixteen. When the Depression hit soon thereafter, as he described it for his mother and two brothers and sister, "It was tough sledding."

There was a time when General Hodson did not know whether he would get to college, let alone law school. He was a good student, but the means to make that opportunity available were at some point questionable. He did get to college, however, through the generosity of folks who lived in his town. He was given a $300 scholarship to enter the University of Kansas in 1930 to cover four years of education. Obviously that amount did not go too far, and he had to work his way through college and law school. He raked leaves, cleaned basements, and washed windows. He even was a fishing guide and horse wrangler in Jackson Hole, Wyoming. While he never said that he walked to school five miles in the snow, he did ride a small motorcycle from Lawrence, Kansas, to Jackson Hole, Wyoming, to work at that summer job.

Incidentally, he did take part in the ROTC program. He entered ROTC at the urging of a noncommissioned officer, whom he described as a "great salesman." He continued his Reserve activities

while he was in the practice of law in Jackson Hole, Wyoming, and that connection came to mean something very significant later.

The time he spent in private practice is important to note for two reasons: number one, it gave him an eminent sense of the practical—that is, what is necessary to make the practice of law work at ground level where people need help. He understood that point, and, by the way, he was happy in private practice and he intended to remain in Wyoming. If certain events had not occurred, he probably would have stayed there. He was in a practice with an elderly gentleman who was looking for somebody he trusted and liked and to whom he could turn over his practice. Life was good and he enjoyed it. As with many members of his generation, however, World War II changed that life, and he was called to active duty in May of 1941.

The other point to note about his civilian practice was that it gave him a reference point. In the four years between his graduation from law school and the time he came into the military, he did many things in civilian practice. This understanding of legal practice in the civilian world—compared to the entirely different practice he had not anticipated in the Army, particularly in the area of military justice—was an important reference point for his later evaluation of and work within the military legal system.

As you know, when he was commissioned, it was not as a judge advocate, but as a Coastal Artillery Officer. As he described it in 1971, "In over thirty years of service, the hardest job that he ever had was as a battery commander in the Coastal Artillery." There were many difficult and unique challenges during that period of time. One concerned his unit. In the days of the segregated Army, there were units with black and white soldiers and white cadre, and there were units with black soldiers and white cadre. He was in a unit with black soldiers and white cadre. This experience seared into his memory—not that he did not know this beforehand—the evils inherent in segregation. The deplorable conditions that it brought were evident not only in the fundamental unfairness of the concept, but also in terms of what it meant in an organization like the Army and its ability to function properly.

General Hodson was drawn into legal work in the Army because his unit was providing more than its fair share of courts-martial. His unit had ten percent of the troops and about seventy-five percent of the cases. The commanding general of the Trinidad Sector, where he was serving at the time, said to the regimental commander, "You need to pay part of the bill. You need to provide some help." The regimental commander knew Lieutenant Hodson had some legal experience and decided to allow him to perform func-

tions as a lawyer, which he did very well. When the regimental commander later said that he wanted Lieutenant Hodson back as a commander, the commanding general declined—he needed this talented lieutenant as a lawyer.

His first case, incidentally, was as a defense counsel. In those days, there was court-martial jurisdiction over civilians accompanying the Army overseas. General Hodson defended a civilian who ran the commissary and was accused of embezzlement. As General Hodson tells it, he couldn't do much with the facts. The evidence of guilt was overwhelming, but he had some question about the propriety of the Army exercising jurisdiction over a civilian in a court-martial. He filed a motion to dismiss, which was denied. When this civilian went back to the United States, then Lieutenant Hodson said, "You may want to raise this issue later on." The civilian did just that and the Army decided not to pursue the case. The civilian walked away. Thus, his first victory in the military justice arena was on a fundamentally important issue as a defense counsel.

He did so well in supporting the legal functions that the JAG Department, as it was known then, decided that this was an officer it ought to have. After about twenty-one months of service in Trinidad and Surinam, he was brought back to Fort Logan, Colorado, and then sent to Ann Arbor, Michigan, where he attended the JAG Basic Course. He said it was an interesting environment at the University of Michigan at the time. Because of the war, the number of students were very low—six or seven students in the law school class—so the Army had great circumstances under which to run a Basic Course. That probably would have been a very opportune time to attend the prestigious University of Michigan Law School. All you had to do was pass and you could forever brag that you graduated in the top ten of your law school class.

Upon completing the Basic Course, he was asked where he wanted to go and he said one of two places: to a combat division going east into the fighting in Europe or to a combat division going west into the fighting into the Pacific. Even though PP&TO did not exist in those days, the Personnel Management Office of that time occasionally also was somewhat mysterious in its decisions. After duly considering General Hodson's request for assignment to Europe or the Pacific, they sent him to the 52d Medium Port Facility in New York City. He was there for only a few months when finally he did go to Europe. Incidentally, during his time at the 52d Medium Port and before, many things were happening to generate a great deal of legal work in the Army. The practice wasn't confined to criminal justice. While assigned in Trinidad and Surinam, for example, there were foreign claims, international law issues, serious questions about

criminal and civil jurisdiction, and procurement issues involving base construction and local leasing. It was a complex and fascinating practice.

At the 52d Medium Port, however, not all aspects of the operation were running smoothly. When the command examined the situation, they discovered they did not have a standing operating procedure, an SOP. General Hodson—by this time a Major—decided to do something about the problem and he wrote an SOP, which was contrary to the contemporary thinking that people in the JAG Corps should not be involved in fixing a problem unless it was 100% legal. He saw it differently—there was a need and a judge advocate had the ability to solve the problem. It did not matter that it was a non-legal problem. This is an interesting philosophy that reinforces what we, as a Corps, have said over the years. It also teaches that there are no new ideas—the important ones have been thought of before.

General Hodson went to Europe and was part of the Normandy, Chanor, and Western Base Sections. This was a very important time in his life because his experience in military justice had a profound impact. To put things in context, in 1938 the JAG Department of less than 100 officers and about half were located in Washington. By about 1941, the JAG Department was up to about 400, and, at its peak during World War II, the Corps increased about five times up to 2000. On the other hand, the Army in 1941, as a result of mobilization, was up to about 780,000, but then increased about ten times during the course of the War to about 8 million. There were 1.7 million courts-martial in World War II—many for minor offenses. That total was about a third of the criminal justice cases in the entire country at that time. Toward the end and after the War, there were many very difficult cases in the military justice arena: murders, rapes, burglaries, and an incredible number of desertions. In France alone, at one point, there were 25,000 deserters. During one eight-month period, General Hodson's office tried 1000 cases. Ninety to one hundred cases a month was not uncommon. Although he was very proud that, in that eight-month stretch, they never lost track of a case, he was very quick to note that given this large number, judge advocates could not be and were not involved in all cases. Nonlawyers were involved in many of those cases, while the judge advocates were involved in the most serious, and certainly in the capital cases. Judge advocates were enormously overworked; there were cases that they just did not get to—cases that should have been tried. They were not tried because, in the greater scheme of things, they were not as important as others. Quite frankly, General Hodson noted, "when you try cases in those numbers and at that pace, sometimes you don't do it very well." It

became a very important lesson for him about providing military justice in a workable system under extraordinarily demanding circumstances. This lesson would be an important one for him as he continued his career.

Just as General Hodson had no intention of going into the Army in the first place until World War II came over the horizon, there were times he wasn't certain whether he was going to continue a career in the JAG Corps. He had intentions of going back to Wyoming eventually. He had an opportunity to go to EUCOM in Paris, however, and he decided to go. The rest is well-settled history.

Following the war, he came to the Office of The Judge Advocate General. It was a very critical time because of the many complaints about the military justice system—repeating a common theme—the negative impact of unlawful command influence on the administration of justice in the military. What was very important about this time was the degree to which Congress was involved in the corrective process. Much occurred in a very compacted period of time from 1948 to 1951.

As some of you may know, for military justice purposes at that time the Army was governed by the Articles of War and the Navy was governed by the Articles for the Government of the Navy. We just had a new service stand up, the United States Air Force, presumably governed by the same rules as the Army from which it emerged. These differences in the newly-formed Department of Defense were important. Even though there was recognition of an effort to correct problems in the military justice system in legislation known as the Elston Act, which amended the Articles of War and resulted in further amendment, in 1949, of the Manual for Courts-Martial. Those actions still were not enough for many in Congress because of the differences among the Services. Congress saw that we needed a uniform approach; hence, the adoption of the Uniform Code of Military Justice in 1950 and the rewrite of the *Manual* in 1951. General Hodson authored the procedural sections of that Manual, and received accolades from the Department of Defense General Counsel and many, many others for that work.

What was important about that time was not simply General Hodson's contribution to a product that significantly impacted military practice, but the recognition by him and others that, when there were so many problems in the administration of military justice, Congress could not sit by and allow the situation to right itself. There was a clear willingness in Congress to step in and deal with the issues. That recognition was very important in General Hodson's later experiences.

In 1951, he came to Charlottesville as a member of the inaugural faculty at the Judge Advocate General's School where he was able to apply the considerable expertise he had developed. In 1953, he went to Command and General Staff College, an experience which he considered quite valuable and important to judge advocates.

General Hodson headed for Korea in 1955. In those days, the long arm of PP&TO was not quite as long as it is today. Before he arrived in Korea, he stopped at Army Forces Far East Command in Japan. The staff judge advocate, knowing a good thing when he saw it, said, "Soldier, you're staying here in Japan." General Hodson never made it to Korea. He stayed in Japan where he dealt with a number of exotic, complex, and sensitive legal issues.

We have all read about the recent controversy surrounding the disposition of military criminal cases in Okinawa. There were equally high visibility cases in that period of time arising out of our new relationship with Japan and our attempts to deal with the question of jurisdiction. What do you do when an American soldier in Japan commits misconduct? The determination of whether the Japanese courts or a court-martial would handle a criminal incident was exclusively in the hands of the American military commanders who had to determine whether or not the soldier was acting within the scope of official duties. In one case, a soldier on guard outside of a military installation saw some Japanese women scrounging for pieces of brass. He went over and, in a departure from his duties, handed her some brass and told her to run off. As she ran off, he loaded a round in his grenade launcher and fired at her, striking her in the back of the head. The woman died as a result of soldier's misconduct. General Hodson, then a lieutenant colonel, and the legal staff understood that this was not an act within the scope of official duties. They advocated that position, but the command disagreed. That issue eventually was elevated for consideration all the way up to the President of the United States. General Eisenhower concluded that there was no way a soldier so acting was in the scope of his official duties. The soldier was eventually tried criminally by the Japanese and sentenced to three years in prison, much of which was suspended.

The important point of that incident was the potential that this kind of decision by American commanders could have on the relationship of the United States with other countries in the exercise of jurisdiction. If, in such an incident, Americans demonstrated arbitrariness or unreasonableness in determining the scope of official duties, what was the message to other nations that were preparing to enter into agreements with the United States? Could they rely on the United States for the proper exercise of judgment? General

Hodson, as a lieutenant colonel, had the ability to see the larger picture. What could a wrong decision such as this do to us in the long term—not just in this case? Not only could he see the long term detrimental impact, but he also had the courage to try to prevent it.

General Hodson attended the Army War College following his assignment in the Far East, and then he returned to the Office of The Judge Advocate General in Washington, D.C. to serve in successive assignment. First he became head of the Military Personnel Division. Of particular note at that time were the recruiting policies of the Corps. The leadership of the Corps felt very strongly that judge advocates should be recruited from Harvard and the schools of the Ivy League. General Hodson recognized the considerable legal talent in other schools. He believed the most important attribute for a judge advocate, particularly one in a division, is common sense and good judgment. He used to say, "You don't need a legal genius to deal with down-to-earth problems at division level." He was one of the first to argue forcefully that we ought to look to the many other fine law schools to fill our ranks. So those of you non-Harvard graduates out there, like me, remember that we owe our opportunity to serve in this great Corps to General Hodson's foresight.

Following the Military Personnel Division tour, he served as Chief of the Military Justice Division and then as Executive Officer for TJAG. As an interesting aside, before that assignment, this was the only time that he asked for a specific assignment—to be the Commandant of this School. He felt that he was qualified for the position based on his experience—not because he had taught before, but because of all that he had done in his JAG career. However, The Judge Advocate General said, "No, you're going to be my XO." Within a year, he was selected for brigadier general. Although disappointed, he recognized that he didn't have much to complain about. Starting in 1962, as a brigadier general, he served as the Assistant Judge Advocate General for Military Justice, and then became The Judge Advocate General, serving in that position from 1967 to 1971. This was a critical period for the Army and for the Corps, and what he did in his capacity as Assistant Judge Advocate General for Military Justice and as The Judge Advocate General have had a monumental impact.

The focus on military justice in 1967 was not something that materialized out of thin air. Even though there had been significant legislative changes in the late 1940s and early 1950s, the fight for and against reform was not over. Because of the abuses evidenced in military practice for some period of time, there were those who essentially wanted to "civilianize" the system. Of course, those on the other side of the issue argued that there was no way you could go in that direction and not undermine the commander's ability to

maintain good order and discipline. These respective camps split in a very significant way. It is particularly important to appreciate the significance of the command influence issues at this time. Even though there were many abuses reported following World War II, General Hodson's belief was, in comparison to what he had observed in civilian practice, that courts-martial generally did a very good job in terms of efficient court proceedings and in findings of fact. Where the command influence came into play was in the sentencing, and particularly in the special courts-martial. Commanders took the position that they wanted to have more to say about sentencing because court-martialed soldiers who were not discharged invariably returned to their units. Commanders wanted some leverage. Not an entirely unreasonable approach from the commanders' perspective, but, of course, no less unlawful command influence.

The command influence issue goes back many years for those of you who know the history of the Corps and the Crowder-Ansell dispute. The issues Brigadier General Ansell raised in his time concerning the influence of commanders in the military justice process were well taken. He was considered a man thirty years ahead of his time. Of course, the manner in which he chose to raise that dispute left something to be desired and he retired as a lieutenant colonel. Nevertheless, he raised an important issue—and the critical lesson for us is the recurrence of this issue—in the 1920s—during and after World War II—and then in the Vietnam era. This issue continued to focus on how much authority commanders would be allowed in the process. In the late 1960s, Congress was actively involved in trying to find a solution to a problem that simply did not arise overnight but to one that persisted over a period of years.

This latest round of combat over this issue actually began in the mid-1950s. It had become a fifteen-year battle by the time legislation addressing the issue was proposed. At one point, there were about eighteen separate pieces of legislation dealing with changes to the military justice system. A delicate balance had to be struck to satisfy competing interests in this process. General Hodson demonstrated extraordinary abilities as an advocate, as a person of great intellect, and as a leader in successfully striking that balance. He was the Department of Defense's point man on this issue because of his experience and ability to understand and articulate the position in the most sound and reasonable manner. He understood the need to maintain the balance between commanders' and reformers' interests. He knew that the ability to exercise iron-fisted discipline was not the answer. The product of these changes had to be one that maintained the balance of good order and discipline and ensured fairness to soldiers. He personally was involved in negotiations with

Senator Ervin, a sponsor of much of the legislation, and arrived at what they both agreed was the right solution. That accomplishment did not end the battle, however. The other Services had to be convinced that his was the right solution. General Hodson accomplished this mission well, bringing all of the Department of Defense on board. That effort was not the end of the battle, however, because there were members of Congress who firmly supported the Services' traditional view of the need for more unfettered command involvement in the military justice process, and congress had to be convinced as well. General Hodson's testimony on these issues before Congress, by those who observed the process from an objective posture, was the most convincing of any of the presentations made to justify that these changes were the right balance between the competing needs and the right solution to the problem. As a result, the Military Justice Act of 1968 became law.

The challenge did not end there, and there was still potential for disaster. Consider just a few events that took place during that time that could have tipped the balance in a direction which would have been a great misfortune for the Services and for soldiers. The Military Justice Act of 1968, scheduled to become effective on 1 August 1969, made dramatic changes. Just a couple of months before, however, the *O'Callahan* decision was announced. *O'Callahan* was tried in 1956. Military Justice had changed since then, but that fact was not evident to most people when the *O'Callahan* decision was issued. Particularly disturbing about the decision, beyond the establishment of the service connection requirement to court-martial soldiers, were the extremely disparaging comments about the military justice system made by the Supreme Court. This result was unfortunate but perhaps not unexpected. When that case went before the Court, General Hodson's very clear recollection was that the Deputy Solicitor General who argued it was less than enthusiastic about the Services' position. That lack of enthusiasm, plus the lack of knowledge of and appreciation for a court-martial generally undermined his credibility so substantially that losing the case was not a surprise. That experience produced an important lesson which General Hodson took to heart. When the next opportunity came to raise the same issue of the service connection requirement in the *Relford* case, General Hodson personally prevailed on Solicitor General Griswold to argue the case and Solicitor General Griswold did. The result was markedly different and the long road back to undo the impact of *O'Callahan's* service connection requirement and to repair the damage to the credibility of the military justice system began.

What were some of the other issues? To appreciate the context,

it is necessary to understand that in the early years of the Vietnam conflict the war and related events—such as the administration of military justice—seemed to go well. However, when the war began going badly, virtually everything associated with it went badly as well, and everything the military did was subject to negative scrutiny and significant criticism. This was particularly true of the military justice system. This was all happening while we were making major adjustments to the military practice and to the military justice system. There was great potential for consequences that would neither benefit soldiers nor the Army.

The Presidio of San Francisco mutiny cases occurred at that time. Overcrowding in the Presidio confinement facility resulted in inmate soldiers protesting and refusing to do what they were told by their cadre. Clearly, this was disobedience of orders, but the soldiers were tried instead for mutiny and the ringleader was sentenced to fifteen years. Of all the places for such an event to take place during the Vietnam War, the San Francisco area was just about the worst. It was a principal focal point of anti-war protest. You can imagine the outcry and figurative daggers thrown at the military justice system as a result of this incident. The case made it through the convening authority with no reduction in sentence. There was very serious concern within the senior leadership of the Army as to whether the Secretary should intervene and reduce what was widely seen as an unjust sentence. In a very gutsy move, General Hodson, in the exercise of his delegated clemency authority, brought the case up for review in short order and reduced the sentence, quickly making the issue go away. I am sure this action by TJAG did not sit well with the Convening Authority, or with his staff judge advocate who oversaw prosecution of the case. General Hodson, however, took the long view, clearly seeing the potential adverse impact on the military justice system and acted to preclude it. Unquestionably, this was a hard decision that had to be made at the right time. Our Judge Advocate General took the action needed.

What else happened during that time? The My Lai cases took place—Calley, Medina, Henderson, and others. It is interesting to note when you look back to those cases and as they took place, many disparaging comments were made about the Army—but not about the military justice process in the terms of the conduct of those trials. If there had been problems in the process, you can be sure they would not have escaped notice. Beyond the conduct of courts-martial, there were other extremely sensitive, high-visibility cases. One involving the Americal Division commander, Major General Sam Koster, is probably the best example. General Koster, originally was criminally charged with dereliction of duty for failing to investigate

the My Lai incident.. The initial reports after the My Lai operation listed 128 enemy dead and three weapons captured and only one lightly wounded soldier. These undisputed facts should have been an indication that something untoward may have happened. Yet, the incident was not thoroughly investigated. When it finally was, almost two years later, the fact that hundreds of Vietnamese women, children, and older people had been murdered became clear. General Koster was a distinguished soldier. He had been severely wounded, and highly decorated in World War II. He had served flawlessly as Superintendent of the United States Military Academy for two years when this incident surfaced. When it was determined that criminal charges should not be pursued, the decisions for the Army leadership was what, if any, administrative action should be pursued. Once again, General Hodson was a key player in the process. The action to be taken against the most senior officer involved in this incident and its aftermath was particularly sensitive in light of the criminal prosecution of subordinates. While not criminal, General Koster's failure to ensure a proper investigation was extremely serious, and he was administratively reduced to brigadier general and retired in that grade. This was a particularly painful exercise for Secretary Resor who had personally selected General Koster for appointment as the Superintendent at West Point. If you think you may have particular difficulty with a convening authority over how to deal with a sensitive case, consider General Hodson's challenge in advising the Secretary of the Army in this case. Once again, General Hodson made the hard decision when needed.

Other events happened at that time to generate criticism of the military at that time. If you were to go back and read the press reports or view some of the television accounts, you would see that the state of discipline in the Army, particularly in Vietnam, was deplorable. There were race problems, drug problems, and disobedience to orders. Some old soldiers, like retired General Hamilton Howze, a former commander of the 1st Cavalry Division, pointed to these problems and said that this was evidence that the new military justice system completely undermined the ability of commanders to maintain good order and discipline. General Hodson, in fighting that battle, responded, "No, you look at what is really happening. We're trying more cases better and we're doing it faster."

General Hodson had an effective ally in this fight. The Chief of Staff of the Army, General Westmoreland, dispatched a team of experienced combat arms officers to Vietnam and to other places in the Army to evaluate the state of discipline. A young Captain Barry McCaffrey, highly decorated as a commander in Vietnam, was part of that team. When they returned to the Pentagon and met with

General Hodson, then Captain McCaffrey told him that the problem was not in the Uniform Code of Military Justice and military justice system but that the problem was leadership. The Army was turning over commanders after only six months tenure in Vietnam. General Hodson agreed that you cannot expect a young commander of such limited experience to understand all of the important aspects of leadership and to be able to properly use all of the tools available—including those in the military justice system—to effectively maintain discipline. The Uniform Code of Military Justice and the military justice system were, in Captain McCaffrey's opinion, just fine.

In a time when the military justice system was seriously challenged, General Hodson was at the right place and time as the warrior needed to defend it. The full appreciation of what he did there, does not end there, however. It's especially important to consider the magnitude of his achievements with the benefit of twenty-five years of hindsight. What do we really know about the system of which he was one of the principle architects? Recall post-World War II, and then in the years just prior to the Military Justice Act of 1968, and the active involvement by Congress in changing the system. What has the track record been since then? We have made changes, not because they were demanded by Congress, but because they were needed and were initiated by the Services. As clear evidence of this, consider some more recent events. The command influence cases that came out of the 3d Armored Division in the early 1980s are the best examples. These cases, as serious as they were, could have produced even greater trauma for the Army. Command influence—which occurred in the early part of this century, World War II, and in the 1960s—was once again an issue in the 1980s. Despite having had the Military Justice Act of 1968 working for a number of years, we still had command influence problems. What do you think the recurrence of such a serious problem might suggest to Congress about the need to take corrective action? Congress, however, chose not to act. This is extremely significant because the Army was allowed to fix the problem. We went back and conducted hundreds of rehearings. Although this effort involved a lot of work and was a very difficult task, it was an extraordinary show of confidence by Congress to allow the institution that had the problem—the Army—to fix it without legislative interference. That was an extraordinary show of confidence in our judiciary—in our trial judges, in our appellate judges—and in the judge advocates who were, and are today, deeply involved in the day-to-day administration of military justice.

I have said this many times before, and I say it again—we can do many exotic legal missions in our practice and we can do them well, but if we do not do our military justice mission right, we might as well not be here. This mission is our reason for existence. If you

doubt it, all you need do is consider the delicate balance between maintaining good order and discipline and ensuring fairness to our soldiers. This is the JAG Corps' principal purpose in life. General Hodson's contributions to our ability to successfully achieve that end cannot be overstated. And our Corps continues to do this mission right. Look at the cases that have recently captured public attention. While there is always criticism from the uninformed, those who understand the system know that it is being administered properly. If it were being done wrong, most assuredly it would be reported as such in the press. That simply does not happen. Difficult cases are tried and they become "non-news" because of what our team does in the process is done right. This is all part of General Hodson's legacy. What a legacy it is!

So Dick Lynch's words about General Hodson—that he was a thoroughly remarkable man—are entirely true. A senior Department of the Army civilian and former judge advocate who received his diploma from General Hodson when he went to the basic course said recently, "I always looked at him as the epitome of what a general officer should be." At the memorial service for General Hodson, I was so presumptuous as to say that if you named on one hand those judge advocates in our two-hundred year history who have been the most influential and have had the most positive impact on our Corps and our Army, General Hodson clearly would make anyone's list. I firmly believe that because, in the times in which he served and had some influence over critical decisions, the practice of law in the military became something different—and better—than what it previously had been. Our ability to do so many things so well today is the product of General Hodson's influence.

In all of this, we must remember that General Hodson never forgot the basic lessons that he learned during his early home life. His mother always told him to work hard, never quit, and be sincere and honest in everything that he did. When asked in his oral history how he wanted to be remembered, he did not say that he wanted to be remembered as the architect of arguably the most important piece of legislation affecting military justice. No. Instead, he said, "I want to be remembered as someone who treated people fairly and as someone with a sense of integrity who was willing to make the hard decisions when they had to be made." He was truly that someone and much, much more—an unusual combination of extraordinary talent, ability, achievement, and humility. I believe that it is critically important for us to remember General Hodson. He came in a crucial time. He worked hard throughout his career. He was able to make extraordinary contributions. He was truly a model for all of us to emulate.

THE SECOND ANNUAL HUGH J. CLAUSEN LEADERSHIP LECTURE: ATTRIBUTES OF A LEADER*

LIEUTENANT GENERAL HENRY H. SHELTON**

In thinking about what to talk about on leadership, I went back to the time when I came in the Army, which was the summer of 1963—probably before some of you were born, or at least while some of you were still in diapers. I looked at a speech that was given then by General Barksdale Hamlet, who was the Vice Chief of Staff for the Army. He addressed the JAG Conference and his subject was, "A Command View of the Judge Advocate." In describing the type of judge advocate that he wanted on the staff, General Hamlet discussed the environment that necessitated such an officer. In reading through his lecture notes for that day, I began to wonder what has changed in the last thirty-three years in our armed forces?

Certainly in the thirty-three years that I have been in the service, I have noticed a host of things that are somewhat different than they were in those days. If I look specifically at the Army and what changes have taken place in our institution, I think that we all realize that in those years we have engaged and disengaged in two major conflicts in Southeast Asia and Southwest Asia. We have transitioned from a draft to an all-volunteer force. We have fought, and won, the Cold War and, not surprisingly, the new world order that we thought we could achieve in that process has turned out to be a little more elusive than we originally had anticipated. As a matter of fact, we find that we live in an even more complex, volatile, and in some cases, a more unpredictable world than we did in that bipolar era. Peace keeping, peace enforcement, and military operations

---

* This is an edited transcript of a lecture delivered by Lieutenant General Henry H. Shelton to members of the Staff and Faculty, their distinguished guests, and officers attending the 44th Judge Advocate Officer Graduate Course and the 139th Judge Advocate Officer Basic Course, at The Judge Advocate General's School, Charlottesville, Virginia, on 30 January 1996. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, United States Army, from 1981 to 1985 and served over thirty years in the United States Army before retiring in 1985. His distinguished military career included assignments as the Executive, Office of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood; Commander, United States Army Legal Services Agency and Chief Judge, United States Army Court of Military Review; The Assistant Judge Advocate General; and finally, The Judge Advocate General. On his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

** Infantry, United States Army. Presently assigned as the Commander in Chief of the United States Special Operations Command, MacDill Air Force Base, Florida. B.S., 1963, North Carolina State University; M.S., 1973, Political Science,

other than war were only things that were thought about in academic circles to some degree; however, today we find that we are involved with them to a very large degree.

There are those who ask whether we should be involved in the law enforcement role. Others are saying that we may be involved in too many roles. Is this detracting from our primary purpose, which is to fight and win the nation's wars? In what seems like a paradigm of our time, missions have begun to proliferate, while resources have dwindled. Within the 1990s, we have seen the United States Army go from about 780,000 down to little over 500,000. We have gone from eighteen divisions to ten active divisions. So we have seen a significant change in the structure of the United States Army. Similarly, over the course of the last five years, we have seen our Department of Defense budget begin to dwindle and decline in real terms, raising some real questions about our long-term modernization and our ability to stay ahead technologically.

However, I think that no discussion of the past thirty-three years would be complete without saying that, with the implementation of Goldwater-Nichols in 1986, we have seen some significant changes in the way that we as services do business. Certainly, few would argue that the days of the single service type of war will ever exist again. I think we all realize that in the future we are going to have to rely on the complementary capabilities of each of our services to have the most effective force that America can field.

I am also very pleased to note that, in that time, your School has adjusted to those changes. I see a large contingent of officers from other services—Air Force, Navy, and Marine—who are students as well as those who serve on the faculty. You have added a number from the Reserve Components to your faculty and certainly that is a key point because, as you know, we will rely more and more on our Reserve Components. Of course, the soldier-citizen remains the American ideal and I think that we are seeing that this will be a

---

Auburn University. His significant military education includes the Infantry Officer Basic and Advanced Courses, the Air Command and Staff College, and the National War College. General Shelton deployed to Saudi Arabia and participated in Operations Desert Shield and Desert Storm and was the Joint Task Force Commander during Operation Uphold Democracy in Haiti. Previous duty assignments include Commander, XVIII Airborne Corps and Fort Bragg; Commander, 82d Airborne Division; Assistant Division Commander for Operations, 101st Airborne Division (Air Assault); Commander, Detachment A-104, 5th Special Forces Group, Republic of Vietnam; Commander, Company C, 4th Battalion, 503d Infantry, 173d Airborne Brigade; Commander, 3d Battalion, 60th Infantry, 9th Infantry Division, Fort Lewis, Washington; Commander, 1st Brigade, 82d Airborne Division, Fort Bragg, North Carolina; Deputy Director for Operations, J-3, Organization of the Joint Chiefs of Staff, Washington, D.C.; Chief of Staff, 10th Mountain Division (Light), Fort Drum, New York; Division G-3 (Operations), 9th Infantry Division, Fort Lewis, Washington; and as a Brigade S-1 and S-3 Officer, Deputy Division G-1 and Infantry Battalion Executive Officer, 25th Infantry Division, Hawaii.

key part of our future. I also am pleased to see that our friends from the international community are here and I welcome you. I am pleased to see that we have added you to the course because I think we all realize, if recent history is any indication of the future, that is the way things are going to take place and our allies will be even more important to us. Finally, I understand that you have established a division within the School to deal with the study and practice of operational law. I understand that after a big search for a title, you came up with "CLAMO." Considering some of the alternatives, like "BLAMO" and "WHAMO," I think you made a wise decision.

While some of these changes have been rather momentous over the years, I think that in this short period of time we see that each of these changes has had a significant impact on the way we do business today. In light of these changes, and the times that we live in today, I began to wonder what changes there have been in leadership. What attributes do we look for in leaders today, maybe even more so than we did in the past? And I think, as I asked myself that question, I was able to answer it with a resounding, "Yes and no." Now, you say that is a nonanswer. Let me explain why I feel that way.

I think that we all know that there have been changes in leadership that have taken place over the last few years—many have been positive—and there are certainly many aspects of the armed forces that we would never want to go back to. The day when you told a troop, soldier, airman, or sailor, "That is the way it is, because I said so," are clearly gone. The young men and women who serve in today's armed forces expect, and deserve, more than that. Will there be occasions when you have to say, "That's it, get on with it right now," in the interest of discipline and move out quickly to avoid the loss of lives? Of course. But for the most part, we take more time than that with the obviously intelligent, articulate troops that we have in today's services. I also think that we are beyond that era when we were demanding zero defects. Now, we all have to be on guard, particularly in today's declining service populations, that this mentality does not creep back in. But, as you may know, in the 1960s, zero defects was a big deal. We all strived to attain that. Some corporations in America even adopted the zero defect philosophy and had little pins that you wore with the words, "Zero Defects." We have long since moved beyond that thinking.

Now, as we talk about leadership, it may be helpful to briefly discuss exactly what leadership means. I would tell you, as I looked at the *Webster's New Twentieth Century Unabridged Dictionary*—as opposed to the old abridged dictionary—I found a definition, and it

said: "The position or guidance of a leader." Because I did not find that to be very helpful, I went to another source, a book written by Mr. William A. Cohen, *The Art of the Leader.* He defines leadership as the "art of influencing others to their maximum performance to accomplish any task, objective or project." Well, that helps a little bit more, at least we are starting to get there. But, in truth, the most relevant one I found came from an Army regulation on leadership, which stated that leadership was "the process of influencing others to accomplish the mission by providing purpose, direction and motivation." I think that this definition, regardless of service, is one that all of us can live with when we think about the leaders we have known and what to expect from those who provide us with purpose, direction, and motivation.

There are a couple of other things I hope that we do not get confused because, while they may be somewhat integral to leadership, they are clear and distinct. For example, consider management. We all like to think that we are good managers and you could say that if you are a good leader you are probably a good manager. But management is the process of acquiring, assigning, or prioritizing—allocating, if you will—resources in an efficient manner. Or we could talk about command. I am sure that everyone knows the definition of command, which is basically the legal authority vested in an individual in an appointed position. So while some of these have some crossover, we are going to talk about the attributes of a leader, not command nor management.

In his book, *Nineteen Stars*, Edward Puryear provides some support for the attributes of a leader when he discusses "the pattern of successful leadership." He concludes that as you look at leaders over a period of time, there are certain qualities that seem to jump out. I do not think that any of us today would find it as a great surprise, but he goes on to talk about the traits of dedication, character, sound judgment, decision-making ability, craving for responsibility, sponsorship, and communications. I think we all agree that in most successful leaders—good leaders that we have worked for—that we have found some of these attributes, and more in some cases than others. Mr. Cohen echoes these traits when he refers to being willing to take risks, being innovative, and taking charge.

I feel that Mr. Puryear was right on the money with a lot of the attributes that you find in a leader. However, the judgment demonstrated by an officer or a noncommissioned officer over their careers is, or should be, a significant consideration in any type of assignment or in the value that we place on that individual as a leader. I am sure that there are those who would argue the point, but I think we all know that we do try to avoid giving the really tough jobs to

those who have demonstrated poor judgment in the past. In the same vein, a military leader has got to be able to communicate the ideas, vision—and the intent—to subordinates. A leader who cannot is not providing vision to the organization, and this takes us back to the definition of leadership.

The leader in today's environment will encounter, in many cases, situations that are vague, uncertain, complicated and ambiguous. This is known as "VUCA." "V-U-C-A," which stands for vague, uncertain, complicated, and ambiguous. Any doubts that I might have had about the significance of that point were certainly eradicated as we kicked off Operation Uphold Democracy in Haiti. I had attempted to communicate my intent to the task force and we had developed a plan. We were en route to the objective for forceful entry as directed by the National Command Authority. However, while en route, the mission changed. Instead of going in with a very clearly defined mission of, among other things, neutralizing the FAHD, and protecting American citizens, the mission changed to reestablishing the legitimate government of Haiti in an atmosphere of cooperation and coordination. We rapidly turned that around and came up with a new plan. The next morning, as we landed at Port au Prince, I was met at the Port au Prince airfield by the Haitian major in charge of the airfield security—the same airfield that we had been planning to hit early on in the battle, if it had gone that way. As we walked off that airfield together I could not help but think that under the original plan, in force just ten hours earlier, there would have been very little left for the major to be in charge of.

Likewise, concerning the mission, "cooperate in an atmosphere of coordination and cooperation," what does that mean? I was forced as a leader to redefine it first of all for General Cedras by saying, "The way I interpret this is that I will coordinate with you about what I plan to do and you will cooperate and as long as you cooperate. I will continue to coordinate and when you do not you will cease to exist as an institution." He understood that and he took very detailed notes.

So, in many cases, as leaders, we deal in this vague, uncertain, complicated, and ambiguous environment. But I will submit that there are basically four traits that will see you through all of that and put you in good stead as a leader. I am not going to attempt to go through an exhaustive list or come up with four original traits, because I think each of you understand that there is not very much original to be said about leadership. It is simply a process of sorting out in our own minds what are the most important traits that we must have as leaders. I do not think that anybody is expected in today's age to come up with anything that is very original and I can

tell you that I have not. But, if you look back at the biographies of famous leaders you will see that even though a great number of things start to jump out, you can boil them down to some common characteristics.

One common trait I found was what Puryear identifies as dedication, but I would classify as competence. The distinction in my mind is in the form of substance because my characterization focuses on the ultimate result while I think Mr. Puryear focuses on the process. Mr. Puryear defines dedication as "a willingness to work, study and prepare for the responsibility," and to that I would add "and the willingness to put forth the effort to carry it out." I recognized this truth in my high school language classes. I doubt that anyone was more dedicated than me, but competent was another matter all together. And so, not only must we understand how the organization operates and why, but we also must be able to translate that into action.

Consequently, I would say competence is the thing that the most successful leader must have. General George Patton provides a somewhat dated, but I think a great, example of that because here is a man who devoted his life to studying the potential for the roles of armor. But more importantly, when the chips were down, he showed that not only did he understand the roles of armor and how to apply it, but that he was capable of carrying it out on the battlefield. A much more recent example occurred in the airborne operation in Just Cause in Panama. General Carl Stiner was faced with putting together an airborne operation of immense size—despite having limited time and that the last airborne operation of this magnitude occurred forty-five years ago. The plan was highly successful—hitting twenty-seven targets almost simultaneously—and, as you know, we won that skirmish overnight. So again, the application of dedicated study—what we call competence—comes into play.

Like Mr. Puryear, I also see character as a fundamental component. We are talking specifically about integrity and courage. This occurs when a leader sets the moral and ethical climate for his or her organization or unit. If the organization is to be successful, I think that tone has got to include candor, honesty, fairness, and understanding. I think that this is essential when you go into the command positions. A commander who brings integrity, honesty, candor, and fairness to actions and decisions does not have to worry about whether he or she is doing the right thing. Equally as important, that commander does not have to worry about the signal being sent to subordinates because without these attributes as an anchor the commander is embarking on a dangerous journey. A commander who cuts corners in this area and starts taking short cuts and gets

out of step with character, given the implications of the *Joint Ethics Regulation,* as an example, is treading on dangerous ground; basically walking into quicksand. I think we all know that a commander who desires, can stretch the rules. Commanders can bend the rules or can try to live with the intent, but not the spirit, of the regulation or the law. And ultimately the line begins to blur. When the line begins to blur for the commander, it also begins to blur for subordinates. When that happens, we are on the slippery slope to disaster. Only through character can a leader ensure that decisions and conduct are correct. And I think equally important is that only through character can the leader send the correct message to subordinates. Only through character can the leader establish the requisite trust that permits leadership, and you know as well as I, that the American people expect no less from their military leaders.

Today we enjoy a great reputation in the armed forces for the leadership and the capabilities that we provide the nation. I imagine that all of us are proud of this and it pains us when we see leaders who are taken to task for getting on that slippery slope and making mistakes that would not have happened if they had really been solid and grounded in character. I recently had what some would say the tremendous good fortune of traveling with my staff judge advocate to visit the Secretary of the Army in Washington, D.C. I also traveled with Lieutenant General Scott from Fort Bragg, United States Army Special Operations Command. I am pleased to report that in our excursion to Washington we were traveling by commercial air—and I would like all of you to make a note of that. What an experience! We were traveling in uniform, and every time airline officials saw us coming, it was a perk here and an upgrade there and whatever. They tried to force it on us. Fortunately, as I said, I was traveling with my staff judge advocate, so he can attest that we turned them down, left and right. It was an experience I think that my aide, Major Burke Garrett, will never forget. And I think to this day, it is because the staff judge advocate was with us that those perks were being offered to us. But I am pleased to report that Jim Hatten can give me a clean bill of health on my polite declinations on all these upgrades to include even a cart ride from one airline to connect with another flight in Charlotte. They wanted to put us on a cart with our briefcases and drive us over. I also think that Jim regretted that I turned that one down because it was a long trip. And even though I say this in jest, senior leaders certainly can be, and routinely are, offered things that would personally benefit them. Of course, character dictates that they never avail themselves of those types of opportunities.

Competence and character in my mind clearly are two fundamental traits that we find in great leaders. There are many competent individuals who possess great character but are not necessarily

great leaders. There is something else. What is it?

In my mind, it is two other things: desire and confidence. I think you have got to have desire. You have to want to do the job, to lead, and to give your all to the mission, to the job, and to the soldiers that you serve. You also must possess the confidence to know that you can carry out whatever directions are given to you. Most often, we find that leadership is sought after and earned and people can attempt to plan their careers in refining their experiences and skills along the way to prepare them for the next position of leadership. But I think that taken together desire and confidence lead to one of the single most important parts of being an effective leader—good decision making. Decision making is difficult. Sometimes decisions are very tough. Because your decisions often can affect thousands of people, you must have a real desire to be put in this position of authority. You also must possess the confidence that, all things being equal, you are as competent to make that decision and as confident in yourself and your abilities to do it as anyone else. Sometimes, it boils down to some really tough decisions. For example, what do you do to the officer who has been arrested for driving under the influence? Or, what action do you take concerning that officer who is inept and has got to be relieved for cause? These are tough decisions and you have got to have great confidence in your ability to make those kinds of decisions.

I will never forget that time as a battalion commander when there was a company commander on Thanksgiving Day who had a big Thanksgiving meal for his company at the company dining facility. Right after the meal, the company commander invited the executive officer and the first sergeant to go over to the Officers' Club, because the Officers' Club was sponsoring a reception. They went to the Club and they got back rather late in the afternoon. The company commander was concerned that his car did not have quite enough gas in it to get back home and because it was Thanksgiving Day there were no gas stations open. So he told the noncommissioned officer on duty to have one of the troops go out and get him about two coke cans full of gas out of a jeep to pour into his car so that he could get home. Well, the noncommissioned officer volunteered to drive him home, realizing that he probably had a couple of beers—I do not know whether that is true or not, but that was the allegation. At any rate, the troop finally goes out and gets the gas, the noncommissioned officer could not talk him out of it. About a week later that captain was standing in front of another young sergeant who had violated an Army regulation. As he was reading him his rights and telling him what he planned to do, the sergeant spoke up and said, "You know what I did may be bad, but it is not as bad as steal-

ing gas from the government. I want to see the battalion commander." And, there we are. We have an example of a tough decision. The company commander exercised poor judgment. But aside from that, he had violated the law. In addition to extremely poor judgment, he had made it tough for me because he had been such a superb commander. He had about a year in command, but it was obvious that he left me with no choice. And after I examined all the facts, I knew that he had compromised his position and had to go. But you must have the confidence to know that you have got others coming along and that you can make those tough decisions. You will be backed along the way because you are doing what is right for the Army in the process. So, I would say, it is competence, character, desire, and confidence.

Now I would tell you that this is not an exhaustive list and certainly not original. You might be asking yourself, "Well, how does that relate to being a legal advisor?" I would tell you, first of all, that if you are to be successful—and each of you have been and are certainly headed in that direction—then each of these responsibilities and attributes have got to be a part of your make up as well. Because first and foremost, you are a leader, you are a soldier. You are an airman or a marine or a sailor.

What do you expect from me as a commander when you come in as a staff judge advocate? First of all, I expect you to be a soldier, if you are in the Army, and to exhibit those qualities: look like one and act like one. I want you fit, sharp, and motivated. Now I can attest that you have two great examples sitting right here in the audience, General Mike Nardotti and General John Altenburg. These two are great soldiers who have a strong and positive reputation which goes throughout the Army. They have sound reputations not because they are great lawyers—which they are—but first and foremost when people talk about either one of them they mention their soldierly qualities. And so, in my mind, each of us owes that to our service and to our soldiers—to be first of all, like them, great soldiers. Of course, you must have technical expertise and competence. You have to be the master of the core competence in your chosen profession. For judge advocates that means military justice, legal assistance, claims, administrative law, civil law, operational law, and tax law. There is a great deal to each of these disciplines and you know that better than I do. I expect you to know these and if you do not know, I expect you to say, "I have got to check with one of the individuals that works for me and I will get you an answer right back." Do not shoot from the hip because in the business that we are in this approach gets us in trouble about as quickly as anything.

I have had the chance to work with Army lawyers throughout

my career in the various command assignments, more so recently as a division and corps commander. In the early days, I had a chance, believe it or not, to even serve as a counsel. In fact, I served as a defense counsel. In those days—which probably was before many of you were born—they appointed us, and I was appointed as defense counsel and I went to court three times— three special courts-martial—and I won all three cases, three verdicts of not guilty. I got called in by the battalion executive officer who happened to be the president of the special court-martial and got the worse butt chewing I have ever had in my life. He claimed that I knew that they were guilty and that I defended three convicts and got them off. And so he said, "Let me tell you right now, from now on you are the trial counsel and you better not ever lose." So, talk about command influence. But we survived those days and now we have a great system in which we have an abundance of lawyers—an abundance of great soldiers that are lawyers and soldiers—and we are far better off for it. But you better know your job better than I do. I have dabbled in your business. I know something about your business, but compared to what you know, I know absolutely nothing, so I depend on you every day in many ways. You just have got to know what you are doing. I do not expect you to be an expert in all areas, but I expect you to know where to go to get the information and do not tell me something that turns out to be wrong.

Precision and accuracy are something else that I expect from the lawyer. I expect you to be deadly accurate. You are the only one, in fact, talking about zero defects. You are the only one that I really look at being accurate and with precision 100% of the time. If you cannot do it, then tell me you need to go back and check or whatever.

Outstanding writing. I sign twenty to thirty legal documents per week. You know there are not many fly speckers between me and thee, so I expect yours to be right and not infrequently you are going to find that you will be responding on my behalf and providing me with a copy after the fact. So again we need to make sure that we do it right.

Common Sense. You know being legal is not the end of the story. You also need to exercise good common sense. There are times when you know we can do it but we should not. The acid test for all of us is, "Can it withstand the scrutiny of the headlines of *The Washington Post?*" If it cannot, legal is not good enough.

I understand integrity. Do not bring any hidden agendas with you. Keep everything above board. There is only one right side and that's doing what is right.

Absolute trust. I need to be able to trust that you will be fair

and square and give me the best recommendation that you possibly can.

I expect you to lead from the front. You know that in leading soldiers, or leading your section, or whatever or whoever you are in charge of, that you are the up-front leader. Do not wait for the problems to come to you, go out and find the problem. Be very proactive in the process. When things are going well, my staff judge advocate and, in some cases, my Criminal Investigation Division commander, know about it. Once I know that you are in, then I feel better about it. I know that you'll get involved.

Understand priorities. Know that you have access to me whenever you need because I realize that sometimes the nature of the matters that we deal with requires you to be able to see me for guidance, a signature, or whatever is necessary to get things moving and so you will get it. However, I do not expect you to spin me up needlessly. There are some things worth spinning into the roof over, there are others that we need to be more calm, cool, and collected about. You need to use good judgment. You know which ones to bring in quickly and let me spin on. And of course, tell me, in your opinion, whether we are dealing with a critical issue or noncritical issue at the same time. When you are working on a corps, division, or even if you are that brigade trial counsel, you need to be able to work with the rest of the staff. They need to consider you a partner. They need to make sure that you know that they are concerned about what you would think about their actions. By staying informed you are more likely to know everything that is going on and you can provide advice on issues that might keep your commander out of trouble in the process. You need to be a team player and add to the expertise of the other staff members. You should always be concerned about protecting the command's and the Army's interest.

Probably one of the more important things that you can do, however, is to mentor. Mentor those who work for you. Mentor those around you to make them better soldiers and at the same time possibly better lawyers. Finally, keep a good sense of humor. You are in a great institution. You are in a great profession. You do great work for the United States Army and a lot of times the things that we deal in are not things that you normally look at as "fun." But keep your chin up and keep looking and keep that sense of humor that is so important to us all. If you are not having fun, something is wrong. I would tell you that both Jim Hatten and John Altenburg are just two great examples of positive temperment that I have worked with just recently. They are serious as a heart attack when it is time to be serious, but they also have a great sense of humor. This will help both commanders and staff judge advocates get through the tough times.

Now, what should you expect from me? First of all, let me say you can expect support. I have found that if the commanding general asks the lawyer then everyone else will ask. My staff knows better than to try to run something through that they knew that they should have a staff judge advocate "chop" on because it is going to come back faster than it came in and normally with an ugly note written on it—as I think Jim and John will confirm. You know, sometimes you may say, "Well maybe this is not important," but my position on that is—and most commanders I have known will agree—it is better to ask up front and let the commander tell you that it is not important than to have the commander get the action later and say, "God, if you'd only run that by me. I could have saved you all this heartburn and heartache." So you can expect support.

Access. If you need it, you got it. I think John Altenburg and Jim Hatten will attest that if you need to get in to see the boss, he will find time, he will make room for you to get in there. It may mean that the commander will have to clear something or wedge something in, but you will get access.

Integration. I found out that when you ask in a public forum, "Well what did the lawyer say about that, what did the staff judge advocate say?", the other staff members are more interested in what the staff judge advocate might say about the particular issue than you would find otherwise. Because they know that if they try to "run it in," and it turns out that it was a dumb action, they will look bad. In the same vein, if the staff knows that the staff judge advocate is part of the team, they will integrate the staff judge advocate into their actions and the commander will end up with a much better staff. I say all actions have an staff judge advocate chop on it. Although I do not insist that 100% of the actions go through the staff judge advocate, it needs to be a real exception for an action not to have a JAG chop on the bottom of it.

Thoughtfulness. I think you have a right to expect from me as a commander that, when you come in, I will listen to you. I will understand what you are saying. I will take it all on board and even though I may question your actions—and, of course, I have the right to do that and then you can explain the answer or whatever—but, the two things you do not need out of me, nor should you expect, is a real knee-jerk reaction nor an "auto pen." I do not do either.

Fairness. You know you've got a right to expect from me fairness across the board. There is a lot at stake in the business that you and I as commander and staff judge advocate will do together. Accordingly, we need to make sure that it is all fair. I have already commented on a sense of humor, but you should not expect me to

hang out the "mourning cloth" everytime that I see you coming. You will bring some bad news, but, then again, I get bad news all day long. When I do not want bad news, I get up and go out and talk to soldiers and they make me feel great. Fortunately, at a place like Bragg or in the XVIIIth Corps, I can do that. At a lot of installations, when the lawyer is coming, commanders might think, "Here he comes and he's carrying this big pile of stuff with him—bad news is en route." But I have a sense of humor and I think that you will find that most commanders do as well.

Integration. The other day, I was out on a jump with the Germans. We had German aircraft there and the jumpmasters were there and we were conducting a joint United States and German event and I looked over and there was Jim Hatten and I knew he was manifested for that jump and one of the colonels said, "What's the lawyer doing out here?" And I said, "Because he's a member of the staff and he jumps just like you do, what's the problem?" You know, I think that guy was sorry that he asked that question. But the truth is, judge advocates are one of the gang, so to speak. If you are involved in everything that is going on, an integral part of the team, then that makes for a better working relationship with all the members of the staff.

Three final things that I will comment on. You should expect me to mentor. I have been around a long time, even longer than the senior colonels who came to work for me. You know I have been through the wickets. Just as I mentor those colonels, I may mentor you a little bit myself in terms of what I think is important, what the priorities are, and so on. The other thing to expect is that I will make speeches at the JAG School and I will do that for you occasionally. And the final point that you should expect me not to do is to be one of the examples used at the JAG School concerning things that commanding generals should not do. Now, each of you could add other things to the list. No doubt about it.

We have got some really great individuals seated in this room representing all services and I would say that you could probably add a lot of other things you think are more important in leadership attributes. You could talk about other things that I should expect from you. But I just thought I would touch on some of the ones today that I think are important. In closing, I would tell you that lawyers are a very, very, critical part of today's armed forces. Commanders find themselves involved in increasingly complex environments that require increased reliance on legal advice in almost every aspect. A deployment today in the XVIIIth Airborne Corps or any other segment of the Army is almost unheard of without an attorney being present. We deployed one to the Sinai on Saturday from Fort Bragg

and even as I speak we have got others that are en route to Haiti. When you look at the battle staffs and targeting boards in the XVIIIth Airborne Corps, you will find lawyers as integral parts. When we kick off the warfighter exercise for the 82d Airborne Division at Bragg, there will be a minimum of four lawyers involved at all times. It is tied in to warfighting and operational law. I am pleased to see that you have now got a lawyer assigned to the training center at Hohenfels. I understand that we are going to soon have one assigned to the Joint Readiness Training Center at Fort Polk.

So, what am I saying? Basically, that as a profession, you as a group enjoy a tremendous professional reputation. And I think that the leadership in today's Army know that your reputation is well deserved. You are smart, you are dedicated, and you are competent. You have got great character and you are a tremendous asset. I would tell you from my perspective, having worked with you and your contemporaries and individuals out of your branch for a long time, that positive reputation is well deserved. I would tell you that in your branch you have got a tremendous future and I thank you for the fine work that you do day in and day out. I encourage you to keep it up. General Nardotti, Mike; General Clausen, I really appreciate the invitation to talk to this great group today and now I will be happy to entertain any questions that you have, no holds barred. Airborne. Thank you.

THE TRAIL OF THE FOX*

REVIEWED BY MAJOR CHARLES PEDE**

"Angreifen!" or "Attack!" is the explosive battle cry of Field Marshal Erwin Rommel. In his definitive biography, *The Trail of the Fox,* author David Irving examines this almost mythic figure and the impact of his battle maxim in riveting detail. Equally remarkable is the authoritative and irresistible gift for storytelling evident in Irving's biography of this accomplished German military figure. Every facet of Rommel's life—personal and professional—is exposed, ending with a startling revelation regarding Rommel's actual involvement in the Hitler assassination plot. In addition to the excellent historical value of the book, Irving provides an endless supply of invaluable lessons in leadership, joint operations, duty, and family.

Irving's most notable achievement is his extensive and painstaking research, which took him literally around the world. He uncovered Rommel's military file containing performance appraisals as far back as his days as a cadet when Rommel was referred to simply as a "useful soldier."[1] Irving's search uncovered "lost" war diaries of individuals and units. Most interesting are Irving's interviews with so many of the participants in Rommel's life. His narrative is punctuated by first-person progressive accounts from Rommel's personal secretaries throughout World War II, to subordinate generals, to his driver who watched Rommel sobbing in the back seat of his sedan as he swallowed a cyanide pill. This technique is effective and tantalizing. Complemented by excellent maps and illuminating photographs, Irving's effort is near perfect.

Irving begins his study with Rommel's World War I exploits. A frail and slight youth, Rommel was hardened by his life and death struggles on the bloody battle fields of France and Italy. An increasingly accomplished leader and, greedy for recognition, he ultimately won Prussia's highest award for valor in 1917, the Pour le Merite, for gallantry in action in Italy. Leaders will note that these two character traits, leadership and desire for recognition, appear early in Rommel's life.

---

* DAVID IRVING, THE TRAIL OF THE FOX (Avon Books, New York 1977); 583 pages, $12.95 (softcover).

** Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] IRVING, *supra* note *, at 13.

Continuing chronologically, timeless lessons in leadership become evident beginning with Rommel's blitz through Belgium and France in 1940 and shortly thereafter in Africa. In April 1940, Rommel commanded the Seventh Panzer Division. On May 10, 1940, the German offensive began and Rommel, in his first demonstration of aggressive and inventive tactics and leadership, struck lightning-fast debilitating blows to the enemy. Rommel's technique was to boldly push forward, ignoring vulnerable flanks and rear echelons assuming the shock to the enemy would counter his own vulnerability. It worked. His dagger-like advance was as magnificent in results as it was innovatively daring. Racing through Belgium and through the Maginot Line into France, always miles ahead of sister commands and his tenuously connected supply lines, Rommel remained at the tip of his spear. In a specially fashioned Panzer III tank, he barked orders and fought shoulder to shoulder with his front line columns. As a result, morale was exceptionally high and compensated for his substandard equipment.

Rommel's blitzkrieg ended with the capture of Cherbourg in late June 1940. Rommel's fame quickly grew and so did his addiction to it. Worse yet, many in the German High Command viewed him as dangerously impulsive and unabashedly thirsty for public adulation. Indeed, Rommel was roundly criticized later by his superiors for fundamental and patent inaccuracies in his published unit histories, which, of course, praised the Seventh often at the expense of other units.

Irving adeptly shows that in Rommel's first campaigns his strengths were also his greatest weaknesses. An aggressive leader loved by his troops, Rommel invariably "got results." In so doing, however, he alienated peers and superiors. For example, in crossing certain rivers in Belguim and France, he "stole" neighbor divisions' bridge crossing equipment to speed his own advance and then complained of the other divisions slow progress.

Such acts earned him mortal enemies, even in victory, and coupled with his search for glory caused his corps commander to suggest that Rommel would only qualify for higher command if he gained "greater experience and a better sense of judgment."[2] These penchants for excess, combined with his own revisionist history, quickly made this gifted combat commander, who was now revered by the German public, a target of intense hatred among fellow German commanders and leaders. When Rommel successfully nurtured a close relationship with Hitler, even members of the High Command began to resent him. As Irving shows, this had terrible consequences for Rommel in his later campaigns.

---

[2] *Id.* at 68.

With increasing fame and some "baggage," Irving follows Rommel to Africa in February 1941. As the British beat back the bungling Italians in Libya and seized Tobruk, Hitler appointed Rommel as the Africa Korps Commander, largely because he was viewed as a commander who could "inspire" the troops.

Rommel's desert campaigns are well documented elsewhere. Irving's picture, however, is unique in many ways because it shows not only the genius of Rommel, but his weaknesses. What emerges is a man supremely motivated by victory, albeit rendered almost useless by defeat. Rommel's early desert campaigns are characterized once again by daring and sheer will power. Rommel had three equally potent enemies in Africa: the British, the Allied "Ultra" decipher machine, and in his own mind at least the Italians. Outnumbered, outgunned, and outequipped, Rommel's vigor in combat not only earned him unexpected victories at Michili, Bir Hacheim, Bardia, and ultimately Tobruk, but staved off immediate defeat in 1943 as he retreated from El Alamein.

Rommel's Africa campaigns illustrate well the timeless problems of joint operations. Blended with Italian forces, Rommel's Africa Korps was the center of gravity for desert operations. However, he distrusted the Italians. Rommel blamed his daily loss of shipping and resupply to Italian "leaks" when it was the indescribable success of Allied code breakers using the "Ultra" machine. Rommel's race across Libya to Egypt in 1942 was brilliant and limited only by equipment and poor logistics. After advancing so far in such a short time, he had irreparably exhausted his own forces and overextended his supply line; the inexorable retreat and slaughter to Tunisia began.

Rommel's retreat contains further valuable lessons for the military reader in leadership. His desperate innovation in the face of horrendous resupply problems is most significant. It virtually saved his army from annihilation. Without gas he was helpless. His resupply was almost nonexistent. Every time he ordered fuel, he was told which ships were leaving Italy, when arriving and at what port. "Ultra" would then go to work and the ships were sunk. What is most remarkable is that Rommel survived as long as he did, which is a testament to his abilities.

Not used to defeat, however, Rommel's debilitating defeatist character flaw quickly emerged. Hitler and the High Command constantly urged Rommel to hold his lines across the Libyan desert. By 1943, Rommel's communications with Berlin quickly left Hitler and the High Command with the impression that Rommel was defeated psychologically and "burned out." Typically blaming others for his

problems, Rommel quickly adopted a defeatist attitude and infrequently uttered his battle maxim. As Irving shows, when Rommel lost the initiative, he could not psychologically force himself to try and regain it. Because of his previous grandstanding, many in the German Army welcomed Rommel's misfortune.

Interlaced throughout his narrative are "windows into the soul" of Rommel. His extensive, almost daily correspondence with his wife, Lucie, and son, Manfred, show Rommel's deep hatred and distrust of the Italians, his abiding respect and affection for Hitler, and his thorough dislike for many in the High Command. These personal letters also show his devotion to family and the sanity and perspective it brought him. His letters are poignant and informative.

Montgomery's battering through Rommel's defenses at El Alamein and Rommel's retreat across North Africa also show the true heroism under horrendous conditions of both Germans and Allies alike. Most memorable was a failed British commando raid on Rommel's headquarters designed to kill him. The commando leader was accidentally shot and killed by one of his own men. The next day, Rommel, always the professional soldier, buried the British officer with his own German dead with full military honors.

In late 1943, Rommel ended his retreat in Tunisia and turned his attention west to the more vulnerable Americans. His success in defeating the Americans at Kasserine Pass was short lived. Irving asserts that due to his loss of confidence and energy, he failed to exploit this victory and push forward. Indeed, Rommel was very ill and, at that time, a physician recommended that he have an extended "cure" (convalescent leave). Hitler and the High Command wanted him out but did not want to relieve him. Rommel finally departed Africa for his cure shortly after Kasserine, of his own volition. The British and American forces quickly ended the German effort in Africa.

In entertaining detail, Irving describes Rommel's next move to Hitler's side in Berlin. Out of command, Rommel first thought his career over. However, he was placed in command of German troops entering Italy from the north to prevent Italy from leaving the Axis alliance. Initially successful, Rommel again alienated the High Command by his lack of political judgment in comments about not only the Italians, but also the High Command and his counterpart in southern Italy, General Kesselring. Rommel's defeatist attitude in response to Allied invasions in Sicily and Italy caught up with him and disappointed Hitler. As a result, he did not get supreme command in Italy. Instead, and surprisingly, Rommel was posted to his

last and ultimately his most important command, the defense of the Atlantic Wall.

As with all of his commands, Rommel assumed his new duties with passion and quickly set the mood by announcing that any invasion must be defeated on the beaches. He realized that with a foothold the Allies' might and materiel were unstoppable. Irving continues to paint a fascinating picture of Rommel spending day after day on the coast, with his troops and commanders and engineers, designing every form of obstacle imaginable. Meanwhile, anti-Hitler plotters had finally organized and many were on Rommel's staff, most notably his Chief of Staff, Hans Speidel.

As Rommel focused on his final and greatest battle, the anti-Hitler conspirators were plotting the assassination of Hitler and the installation of a successor—Rommel. Irving posits that Rommel never knew of the assassination plot. Only later, after the invasion appeared successful and his defeatism returned, did Rommel's attitude become manifest. In dialogues with many of his commanders, including his superior in the west, General Von Kluge, he viewed the West as lost and an unjustifiable waste of life. Rommel's plan was an overture to the west for a truce, thereafter joining forces to defeat the Bolshevik Russians in the east. He apparently had a prepared letter in Von Kluge's hands ready for delivery to Hitler with this ultimatum.

According to Irving, Rommel's plan went no further. As the Allies advanced on Saint Lo and Caen, Rommel's sedan was strafed and he was seriously wounded with multiple skull fractures. About the same time, Colonel Stauffenburg, a conspirator, planted a bomb at Hitler's feet. While recuperating in Herrlingen with his family, the assassination failed and the conspirators were quickly rounded up by the Gestapo. Most were tried, convicted, and executed. Two critical conspirators implicated Rommel as a willing participant and Hitler's successor.

General Speidel, in particular, said Rommel was aware of the assassination plot and had agreed to step into power later. Although Speidel was miraculously acquitted and emerged successfully after the war, Rommel became the focus of the investigation. His own plan to exact peace in the West only lent credence to Speidel's accusations. Hitler and the High Command believed Rommel was indeed involved.

Irving, however, makes a persuasive case for Rommel's lack of knowledge and involvement in the assassination plot. In any event, Rommel was visited by Hitler's representatives in October 1944 while still recuperating from the strafing. Confronted with the state-

ments of some of the coconspirators and his own truce efforts, Rommel elected suicide to public trial. He explained the situation to Lucie and Manfred, left his home with the representatives, and drove into a nearby forest. There, in the back seat, Field Marshal Erwin Rommel, the desert fox, swallowed poison.

The truth about his death was only revealed after the war and, according to Irving, inaccurate to the extent that it implicated him in the assassination plot. Nonetheless, he was buried with full military honors as a German war hero. Thus ended the life and career of one of Germany's most dashing military figures.

Irving's book is remarkable in both content and scope. The many lessons in aggressive leadership, professionalism, the consequences of "taking counsel of one's fears," the pitfalls of joint operations, the cost of fame and its pursuit, and the virtues of thorough devotion to duty and family render this highly entertaining book a "must read."

SERVING IN SILENCE*

REVIEWED BY MAJOR JACKIE SCOTT**

With four words she ended her career: "I am a lesbian." Those words, spoken during a routine security clearance interview, were the first public acknowledgement of what had taken Margarethe Cammermeyer her whole life to recognize. By being truthful to herself and the Army, she began an ordeal that continues to this day—fighting the United States military's homosexual policy. *Serving in Silence* is more than the autobiography of the highest ranking military member discharged for homosexuality and her fight to stay on active duty. This book also is the story of a woman's discovery and acceptance of herself.

Although labeled an autobiography, *Serving in Silence* is Margarethe Cammermeyer's story written with Chris Fisher, a professional writer. Their collaboration produced an extremely well-written book, almost conversational in tone, that draws the reader into a personal account of Cammermeyer's struggle to accept her identity and the resulting struggle to keep her Army career. Accompanying the text are thirty photographs adding visual detail to the written account of the significant events in her life such as her childhood, her wedding, her tour in Vietnam, and her family years.

The first chapter opens in 1989 with her Defense Investigative Service (DIS) interview. Colonel Cammermeyer, Chief Nurse of the Washington State National Guard, had applied for admission to the Army War College, hoping it that would lead to a future promotion to general and selection to serve as the Chief Nurse of the National Guard. To attend, she needed to upgrade her security clearance to top secret. After a morning of examining and evaluating patients, she met with the DIS agent. Midway through his routine questioning, he read from his list a question about homosexuality. "I took a breath; a little moment passed. Up to a few years before, I wouldn't have been hesitant. I would have affirmed my heterosexuality and the interview would have proceeded without a hitch. But I had

* MARGARETHE CAMMERMEYER & CHRIS FISHER, SERVING IN SILENCE (New York: Viking 1994); 308 pages, $22.95 (hardcover).

** Judge Advocate General's Corps, United States Army. Currently assigned as the Deputy Staff Judge Advocate, Fort Meade, Maryland. Written when assigned as a Student, 43d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

changed, had painfully and slowly come to terms with my identity." Asked directly, Colonel Cammermeyer felt obligated to tell the truth "even though it was a truth I'd given a name to less than a year before." After she replied, "I am a lesbian," the interview turned into an interrogation. The agent wrote a statement that Colonel Cammermeyer corrected and signed—a statement which became the basis for her administrative discharge proceedings.

A fundamental question that most readers of this book will ask is why did Colonel Cammermeyer answer the investigator the way she did, especially when she had only recently confirmed her sexual preference? Through the years of investigations that followed, she was asked numerous times if she had just been confused by the questioning or stressed out at the time she made her statement. Given multiple opportunities to recant or explain away her statement, she refused: "I'd rather sacrifice my uniform than my integrity." She chose and the Army agreed.

The book attempts to anticipate and answer other questions the typical reader will have. Some questions, such as why she spoke truthfully to the DIS agent, are answered by the author's portrayal of Colonel Cammermeyer's character. The reader can find answers to other questions by carefully examining pivotal moments and repeating themes in her life. However, some of the author's answers are not so convincing.

One such question is why did Colonel Cammermeyer not understand the significance of her admission of homosexuality to the military? The author attempts to make the reader believe that a highly-educated, savvy colonel with over twenty years in service would not know that saying "I am a lesbian" could possibly result in her discharge. Her explanation that she thought commanders had discretion to retain gay service members does not seem plausible, even though the policy did change several times during her career. For a woman who had spent much of her life clinically analyzing courses of action, it is incredible to believe that Colonel Cammermeyer, after coming to terms with her homosexuality, did not carefully research the Army policy before she publicly acknowledged her status.

Another fundamental question that the reader will undoubtedly pose is how could Colonel Cammermeyer not have known that she was homosexual until she was in her forties? Answering this question requires an examination of her entire life. After setting the stage for her legal battle to stay in the military, the book begins chronologically with her childhood in Norway. She participated in her first "military operation" when her mother smuggled guns past

Nazi headquarters to Norwegian resistance fighters by hiding the weapons in Grethe's baby carriage. Throughout her childhood, she was enthralled by the stories of courageous resistance fighters. Her doctor father moved their family to America in 1951 to work at the Armed Forces Institute of Pathology. Tall for her age, she was placed in the fifth grade although she could barely speak English. Her memories of her schoolgirl years were that she always felt different from everyone else, attributing those feelings to being foreign-born and raised in a traditional Norwegian home where emotions were not expressed and where women were considered inferior.

The book recounts several instances during her life when she pondered her sense of self without the ability to put a name on the source of her difficulty. The most dramatic occurred while in college. Despondent and struggling to find direction in her life, she developed physical illnesses, including abdominal pains. Drinking to excess, she began intentionally inflicting wounds on herself: "I was trying to get rid of some of the inside pain by putting it on the outside." When even a trip to the school psychiatrist did not help, she decided to suppress her feelings and concentrate on her schoolwork. This technique successfully suppressed her feelings of "being different" for many years.

Her desire to make her father proud led her to enter college as a premedical student. After one semester of difficulties, she changed her career path to nursing, what she had previously considered as "the crummiest job in the world." Because her father refused to pay for her college, she enrolled in the Army Student Nurse Program to cover her last two years of college tuition in return for three years of active duty. Her childhood war experiences had fostered her desire to repay America for giving her family a stable home. The new wave of patriotism swelling in the early 1960s confirmed her pride as a new American citizen and her willingness to serve in the military.

After training at Fort Sam Houston, Texas, and Fort Benning, Georgia, she was posted to Nuremburg, Germany. She had asked for a tour in Germany, hoping to rid herself of her anti-German prejudice. After making German friends and visiting some German relatives, she discovered that "getting over my dislike of a group of people required I educate myself and be open to changing my views," a reference to the prejudice she would encounter later in her career.

While working one night at the hospital, her first direct confrontation with authority occurred. With an alert called while she was the only nurse on the intensive-care ward, she refused her supervisor's order to report to the chief nurse's office four floors away. Even after explaining that she could not leave the critically ill

patients without a nurse, her supervisor reiterated the order. Holding her ground, Lieutenant Cammermeyer decided her patients came first. To her surprise, her supervisor later apologized for not understanding the severity of her patients' conditions. The point of this lesson foreshadows her future career crisis: "It was an almost unbearable feeling to realize that in doing the right thing, I was facing consequences that could destroy my career."

On two other occasions in Germany, Lieutenant Cammermeyer defied military authority and won. After her name had been erroneously omitted from the local promotion orders, she challenged the personnel office, winning a back-dated promotion to captain. Her next victory occurred after her marriage to a quartermaster officer in Germany. When they married, the local finance office stopped her housing allowance, reasoning that she had become her husband's dependent. Again, she challenged the system and kept her housing allowance. By including these stories, the reader begins to understand the basis of Colonel Cammermeyer's belief that she could challenge the Army's homosexual exclusion policy successfully.

Volunteering for Vietnam after her husband's unit was alerted for deployment, she served in Long Bihn as chief of the intensive-care ward. A quartermaster officer, her husband was able to scrounge enough scrap materials to build a set of married officers' quarters, to their disapproving superiors' chagrin. She spent fourteen months in Vietnam, over the intense fighting of the Tet Offensive, earning the Bronze Star for her service. Even years later, Colonel Cammermeyer struggled with remorse that she was not able to save more patients during the war and with guilt for healing soldiers who would later return to combat to die. To her, the list of names inscribed on the Vietnam Memorial "represents all our failures."

When she became pregnant with her first son, the regulations in effect in 1968 forbade women with children under sixteen from serving in the military and she was discharged. When the regulations changed, she joined the Army Reserves in 1972, achieving the rank of lieutenant colonel by 1979.

Seemingly, she had it all—marriage, a beautiful home, four sons, a civilian career in nursing, and success in the military—all while working toward her goal of a Ph.D. in nursing. Still, her perfect world did not give her perfect peace. Realizing that she and her husband had different goals, she distanced herself from him. Just as in college, her suicidal feelings returned. During counseling, she began exploring the source of her unhappiness and discovered it was her life with her husband. Despite having been married fifteen years and having four sons, she claimed that she had always felt

"uncomfortable in intimacy with a man," an assertion that most readers undoubtedly will view with skepticism. She decided to end her marriage, and in the process, lost custody of her sons.

Not until approximately eight years later did Colonel Cammermeyer acknowledge that she was homosexual. Despite her disinterest in men, she had felt no attraction to women either, afraid of "being a member of a despised and stigmatized minority." These feelings changed after she met the woman that she would later call her "life partner." Their friendship slowly evolved from "an emotional connectedness" into love: "the rightness of being with her made me realize I am a lesbian." Her discovery came less than a year before the fated DIS interview.

Judge advocates will find the part of the book covering her administrative discharge proceedings and lawsuit against the Army to be the most interesting, detailing the behind-the-scenes legal strategy of her lawyers.

The author's underlying thesis is that her distinguished career of service effectively rebuts the military's assertion that the presence of homosexuals prejudices good order and discipline. As she wryly notes, the only disruption to the good order and discipline of her National Guard unit after her "coming out" was the Army's unflagging efforts to discharge her. Regardless of the reader's opinion on the military 's homosexual policy, *Serving in Silence* stands as an example of one homosexual soldier who served her country with honor and distinction.

GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING*

REVIEWED BY MAJOR ANDY K. HUGHES**

There is no question that federal procurement law is one of the most rapidly changing areas in all the law. Steven Feldman's three-volume work, *Government Contract Awards: Negotiation and Sealed Bidding*, is a Herculean effort to bring together the many nuances of the federal acquisition process into a single reference for contract law practitioners. Although the author does an excellent job of writing the work in terms that practitioners may easily grasp, recent statutory and decisional law changes[1] have reduced the value from a possible "one-source" reference to a good "starting point" reference for practitioners to launch additional research.

Mr. Feldman divides the three volumes into six major parts, plus appendices and a series of cross-reference indices called "finding aids." The author denominates the six major parts as: (1) presolicitation rules and procedures (consisting of five chapters); (2) solicitation processes (consisting of four chapters); (3) evaluation processes (consisting of nine chapters); (4) award processes (consisting of two chapters); (5) special categories of negotiated acquisition (consisting of six chapters); and (6) sealed bidding essentials, consisting of the work's final chapter. Although the name of the work suggests roughly equal treatment of both negotiated and sealed bidding procurements, the author's focus is clearly on the former.

Part 1, Presolicitation Rules and Procedures, discusses authority to contract, the history of the federal acquisition system, competition requirements, and types of contracts. Chapter 1, which discusses the key concepts of the federal acquisition process, demonstrates two of the weaknesses of the entire work. First, Mr. Feldman has

---

* Steven W. Feldman, Government Contract Awards: Negotiation and Sealed Bidding (New York, Clark Boardman Callaghan 1994).

** Currently assigned as a Professor, Contract Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

1 The author has been hit with the misfortune of not only attempting to chronicle an area where decisional law changes rapidly but also an area that has been the subject of three recent major congressional changes: (1) The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (FASA); (2) The Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 642-679, (FARA); and (3) The Information Technology Management Reform Act of 1996, Pub. L. No. 104-106, §§ 5001-5703, 110 Stat. 186, 679-703 (ITMRA).

elected to use older materials and cases to illustrate key points.[2] Second, there are passages in which the author, in his attempt to make the work more understandable for new contract practitioners, may have oversimplified some concepts.[3]

In chapter 3, Mr. Feldman introduces the reader to the competition requirements of federal contracting. In doing so, the author uses a very effective technique in illustrating his concepts—a bulletized case summary. Particularly for new contract attorneys, this is an effective method of concisely illustrating the desired teaching point. For example, the author uses the case list to illustrate his discussion on the rules concerning commercial activities contracts. However, this chapter also lacks the recent statutory and decisional law available and could mislead a novice contract attorney.[4]

---

[2] For example, the author refers to Nash and Cibinic's *Federal Procurement Law* (which is no longer published) as authority in a footnote reference (*see* FELDMAN, *supra* note *, § 1:02 n.4) and later uses older court cases in footnote references (*see* FELDMAN, *supra* note *, § 1:02 n.12 (referring to Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969)). Although this reviewer is not suggesting that the references are inaccurate, there is some concern that new contract practitioners may take these cases and references as the latest material on the subject, when more recent cases and references may exist.

[3] For example, on page five of chapter 1, the author writes: "Indeed, some statutes will sometimes subordinate federal acquisition to state law," with a footnote reference to 10 U.S.C. § 2237 (now 10 U.S.C. § 18237). However, a close reading of 10 U.S.C. § 18237 shows that the statute refers to situations where the Secretary of Defense makes "contributions" of federal funds to states to build Reserve Component facilities, such as National Guard armories. Hence, the states, not federal contracting officers, actually conduct the acquisitions. Therefore, the referenced scenarios are not "federal acquisitions" in that sense.

Another example occurs on pages 74 and 75 where the author writes, "Notwithstanding this Supreme Court doctrine [*Office of Personnel Management v. Richmond*], a few lower court cases still cling to the view that equitable estoppel might be the basis for monetary recovery against the government." This reference uses a footnote referring to *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993), where the Court of Appeals for the Federal Circuit held that *Richmond* eliminated equitable estoppel against the government in only cases involving statutory (not contractual) provisions. Because the Federal Circuit is the controlling appellate authority for the Court of Federal Claims and the boards of contract appeals, this reviewer suggests that the author might be unduly minimizing the impact of the Federal Circuit's ruling.

Finally, in the author's discussion of the General Accounting Office's (GAO) comparative prejudice doctrine (page 59), the author suggests in a footnote that GAO protesters should argue that a contract is void based on *CACI, Inc. v. Stone*, 990 F.2d 1233 (Fed. Cir. 1993). However, *CACI, Inc. v. Stone* was an appeal from the GSBCA concerning the lack of a delegation of procurement authority for ADPE purchases under the Brooks Automatic Data Processing Act (40 U.S.C. § 759). This reviewer does not understand the author's connection between *CACI, Inc. v. Stone* and GAO protests.

[4] Two examples illustrate this point. First, in the author's discussion of "unusual and compelling urgency" on pages 85 and 86, the discussion does not account for the Comptroller General decisions in Magnavox, Inc., B-248501, Aug. 31, 1992, 92-2 CPD ¶ 143, and K-Whit Tools, Inc., B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382. Under these decisions, the GAO seems to concern itself with whether the circumstances causing

Chapter 4 discusses the various types of government contracts. For the most part, the author does a good job. However, once again the author appears to have oversimplified his explanation of particular concepts.[5]

The author uses chapter 5 to introduce the reader to special contract methods, such as multiyear contracts, option contracts, and leader company contracting (a topic covered by few other sources). Although some of the footnote citations appear to be from older decisions, Mr. Feldman does a good job in explaining the various special methods.

Part 2 of this treatise, Solicitation Processes, extensively explores the solicitation preparation process. In this part, Mr. Feldman discusses preparing requests for proposals (RFPs) (chapter 6), amending and cancelling RFPs (chapter 7), receiving late proposals or proposal modifications (chapter 8), and handling unsolicited proposals (chapter 9). The author does an outstanding job explaining the preparation process, and enhances his discussion by using bulletized lists of case summaries to make key points. Although recent regulatory reforms may have changed a few of the referenced citations, this section is extremely current. This reviewer could find only one small section in which recent developments could impact on the author's analysis.[6]

---

the agency to invoke the urgency exception were under agency control. Therefore, in the author's example concerning the medical center's failure to procure sufficient heart monitoring machines due to negligent planning and later facing an emergency need for additional machines, the unanswered question is whether the "emergency" was caused by the failure to plan or by a sudden rash of cardiac cases. In light of these more recent cases, the discussion may be slightly simplistic.

Another area concerns the discussion on page 103 concerning the time for acceptance of sole-source proposals. Under the current version of the statutes cited by the author, the 30-day period is measured from the date *that the solicitation is issued*, not the date of CBD publication. *See also* GEN. SERVS. ADMIN., ET. AL., FEDERAL ACQUISITION REG. 5.203(c) (1 Apr. 1984) [hereinafter FAR].

[5] On page 29, the author equates the concept of "fee" in cost-reimbursement contracts to "profit." Those concepts, however, are not synonymous because the government only reimburses contractors for their reasonable, allocable, and allowable costs of performance. FAR, *supra* note 4, 31.202-1. Therefore, the amount of the contractor's fee always will exceed the contractor's profit, because the fee must absorb the unallowed costs.

On page 46, the author cites a case for the proposition that a variation of estimated quantity clause will not protect the government from negligent estimating in a requirements contract. The case cited in the footnote, however, did not involve a requirements contract, but a firm-fixed-price contract based upon erroneous estimates.

[6] The one section is found in chapter 8, page 31, concerning partially late delivery of proposals. The author's analysis of the *Moisture Protection Construction* case (in which he opines that the decision was wrong "in principle") seems to conflict with recent GAO decisions concerning facsimile transmission of offers. These recent decisions state that the entire transmission must be completed by the stated time to be considered.

Mr. Feldman does his best work in part 3, Evaluation Processes, and part 4, Award Processes. In part 3, which is the largest section of the work, the author discusses technical evaluation of proposals (chapter 10), cost and price evaluation of proposals (chapter 11), source selection procedures (chapter 12), qualification of agency evaluators (chapter 13), procedures for awarding on initial proposals (chapter 14), procedures for establishing the competitive range (chapter 15), procedures for conducting discussions with offerors (chapter 16), preparing and evaluating best and final offers (BAFOs) (chapter 17), and determining eligibility of offerors for award (chapter 18). Part 4 continues the chronological sequence of the contract formation process by exploring procedures for making contract award (chapter 19) and for solving postaward procedural problems (chapter 20). The author does a fantastic job of explaining the complicated procedures for evaluating and awarding negotiated procurements, again using bulletized case summaries to highlight key points. In this area, as discussed above, the one glaring weakness is the need to update the material to include more recent statutory and decisional law changes.[7]

Part 5 (Special Categories of Negotiated Acquisitions), unlike parts 3 and 4, needs significant amendment. In the author's defense, most of the needed changes arise due to Congress's recent procurement reform actions.[8] For example, chapter 21's discussion of "small purchases" is now significantly changed due to the FASA and FARA. Chapter 24's discussion of the Brooks ADP Act and the Federal Information Resources Management Regulation[9] are now largely irrelevant due to ITMRA's repeal of the Brooks ADP Act.

Chapter 25's discussion of the Miller Act,[10] the Davis-Bacon Act,[11] and the Walsh-Healey Act[12] also need significant amendment—again largely due to recent statutory changes. Particularly in the area of the Davis-Bacon Act, Mr. Feldman should carefully reexamine his discussion concerning the issues of what is the "site of

---

[7] There are three significant areas that need updating based on the following: (1) FASA changes increasing the simplified acquisition threshold from $25,000 to $100,000; (2) other statutory changes repealing the Department of Defenses's authority to declare small businesses nonresponsible; and (3) FARA changes allowing contracting officers broader discretion in setting the competitive range in negotiated procurements. Additionally, this reviewer might suggest that the author discuss the changes in the Small Business Administration's 8(a) and other "set-aside" programs in light of the Supreme Court decision in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

[8] *See supra* note 1.

[9] GEN. SERVS. ADMIN., FEDERAL INFORMATION RESOURCES MGMT. REG. (1 Oct. 1990) [hereinafter FIRMR].

[10] 40 U.S.C. § 270a.

[11] *Id.* §§ 276a-276a-7.

[12] 41 U.S.C. § 35(b).

work" for Davis-Bacon Act purposes, the issue of when the Department of Labor issues general wage determinations, and the impact of collective bargaining agreements.[13]

Concerning his discussion of reprocurement contracts in chapter 26, Mr. Feldman does a commendable job in explaining the procedures for replacement contracts. Readers would benefit, however, from an elaboration of the fiscal law concerns that might arise when agencies attempt to purchase a greater number of items than included in the original contract.[14]

Finally, the author concludes his work in part 6, which consists of chapter 27, the only chapter that the author devotes exclusively to sealed bidding procurements. Overall, this chapter appears very current although the most recent statutory changes will have an impact on the contractor's certification requirements.[15]

In conclusion, Mr. Feldman has done a commendable job of creating a very readable reference that attorneys may use to unravel the nuances of contract formation. This reviewer understands that

---

[13] The "site of work" issue arises from the Federal Circuit's decision in *Ball, Ball, and Brossamer, Inc. v. Reich*, 24 F.3d 1447 (Fed. Cir. 1994), which limited the "site of work" for Davis-Bacon Act purposes to the geographical confines of the construction site. As to the general wage determinations, the author's discussion on page 39 of chapter 24 suggests that agencies must request general wage determinations. Although FAR 22.404-1 suggests that agencies may request general wage determinations, an agency normally would request a project wage determination only in the event that no general wage determination existed for the laborers involved in the particular project. Also, the author's discussion on page 61 of chapter 25 suggests that the Fair Labor Standards Act (FLSA) minimum wage provisions are based on the Walsh-Healey Act. Because the Department of Labor has not exercised its authority to make wage determinations under the Walsh-Healey Act, the Walsh-Healey minimum wage is based on the FLSA. Finally, the author's discussion on pages 62 to 64 concerning the impact of collective bargaining agreements on successor contractors may be slightly overbroad in light of the changed requirements of FAR 22.1008-3.

[14] The problem arises from the GAO's interpretation of what constitutes a "replacement contract" based on the *Funding of Replacement Contracts* decision cited in footnote 3 of chapter 26. Under that interpretation, the GAO held that agencies could use the funds used to award the original contract to fund a replacement contract if the replacement contract was of the "same size and scope" as the original contract. Therefore, if a contracting officer awarded a replacement contract with a significantly greater quantity than the original contract, not only would the contracting officer, as the author suggests, be required to treat the acquisition as a new contract for competition purposes, but could possibly lose the right to use the original funds to fund the contract (*i.e.*, the agency must fund the contract with funds currently available at the time of the award of the replacement contract). As a result, a contracting officer could be very correct from a contract law standpoint in ordering an increased quantity, but arguably could be violating the "bona fide needs rule" (31 U.S.C. § 1552(a)) if they tried to use original year money (which could be "expired") to fund the reprocurement contract.

[15] Under the FARA, the government will require contractors to make certifications only when specifically required by statute. Additionally, the FARA amended the Procurement Integrity Act (41 U.S.C. § 423) by removing most contractor certification requirements. As a result, the author's discussion of certifications in § 27:05 of his work will become largely moot.

the author is presently working on revisions to his work that will address many of the concerns that this review has addressed. If the author's revisions are as comprehensive as his original project, there is no doubt in this reviewer's mind that this work can become the true reference tool that contract attorneys need on their shelves.

KEN BURNS'S THE CIVIL WAR*

REVIEWED BY H. WAYNE ELLIOTT,
LIEUTENANT COLONEL, U.S. ARMY (RETIRED)**

In September 1990, a milestone in television history occurred. Approximately fourteen million Americans tuned into their local public television station and watched the first episode of *The Civil War*. The entire series consumed eleven hours spread over a full week. During that time, some forty million people watched all, or part, of the series. When it ended, its producer, thirty-seven-year-old Ken Burns, was a national celebrity. The two main commentators, Shelby Foote and Barbara Fields, had become household names.[1] The series was the talk of the nation.

But with all that attention came praise and criticism. Experts quickly spotted historical errors in the production, although some of these should really fall within the protective umbrella of artistic license. For instance, the series showed a photo of Confederate dead from the second day's fighting at Gettysburg and attributed them to the first day, but, as a practical matter, there were no photographs of the results of the fighting on the first day. Other experts found less-obvious aspects of the series worthy of critique. Many thought the series to be essentially anti-South, that it focused too much on slavery as the cause for the war, and ignored the genuine constitutional issues that framed the political debate in the years before the war. Others felt that the series concentrated too much on generals and battles ("the thrill of victory, the agony of defeat") and ignored the misery and despair of those on the home front. Others argued that the significant contributions of blacks to both sides were minimized. Some said the crucial role of women during the war should have been given greater attention. Some claimed that the war in the west should have been given more attention. Some saw the final episode's focus on a reunited and strengthened United States as too simplistic. Historians, as well as lay people, joined in the debate. The Civil War simply never seems to lose its topicality and relevance.

---

* KEN BURNS'S THE CIVIL WAR (Robert Brent Toplin ed., New York; Oxford University Press 1996); 1997 pages; $24.00 (hardcover).

** Former Chief, International and Operational Law Division, The Judge Advocate General's School, United States Army. Currently an S.J.D. candidate, University of Virginia School of Law.

[1] Foote apparently also became wealthy. His three-volume work on the war had sold only 30,000 volumes in fifteen years. In the six months following the television series, more than 100,000 were sold. THE CIVIL WAR, *supra* note *, at xvi.

Ken Burns's The Civil War is a collection of essays by prominent historians. In it, historians are given an opportunity to point out defects in the series or to defend the series. When the film project was first proposed, the National Endowment for the Humanities, which subsidized the production, demanded that it be a cooperative effort between artists and scholars. Burns's production staff assembled a team of historians and began writing, and rewriting, the script.

One of the first historians brought to the project was C. Vann Woodward, a history professor at Yale University and the editor of one of the leading Southern memoirs of the war, *A Diary from Dixie*.[2] Fittingly, Woodward provides the first essay in this book and defends the scholarship of the series. While in production, the film and script were frequently presented to historians for their opinion and suggestions. At the time, many of these experts did not seem to appreciate that the end product was not intended for historians, but for a much larger, and much less informed, lay audience. When the final project was screened before an assemblage of historians, much of the criticism was muted. The cinematography of the final project was too impressive to warrant criticism over minor historical details.

The next essay is by the compiler of the volume, Robert Brent Toplin. Toplin argues that any film about a major event in history is strongly affected by the issues of the time in which it is filmed and *The Civil War* was no different. Thus, Burns, influenced by the debate over the Vietnam War and the politics of the 1960s and 1970s, saw the Civil War as a national tragedy brought about because of slavery and the consequent denial of fundamental human rights. That background is reflected in the series. However, the national unity of the 1980s also is reflected in the series. In the first episode, "1861: The Cause," Burns clearly attributes the war to slavery. In Toplin's opinion, this leads to an inconsistency in the film, "Burns concludes that the war was terribly bloody but, because it was about slavery and freedom, the fight was worthwhile." Toplin finds no anti-South bias in the film and cites the use of Shelby Foote in the series as an example. Yet, he also argues that the series "communicated slanted perspectives." He concludes that the bias in the film is simply a reflection of Ken Burns's ideas about the war and that those ideas are the result of his (and our) times.

The military aspects of the series are next discussed. Gary Gallagher finds particular fault with the film's treatment of General Robert E. Lee. For Gallagher, the treatment of Lee is too doctrinaire and uncritical. He points out that Burns repeats the myth that Lee always referred to the opposition as "those people" when even a cur-

[2] MARY CHESTNUT'S CIVIL WAR (C. Vann Woodward ed., 1981).

sory examination of the written records of his army reveals that he referred to Union soldiers as exactly what they were—the enemy. Gallagher also condemns Foote for elevating Confederate General Nathan Bedford Forrest to the status of an "authentic genius." Forrest may have been an excellent cavalry commander, but his command never exceeded a few thousand men and simply presented no opportunity to support a conclusion that he was some sort of military genius.

Catherine Clinton finds fault in the failure of the series to spend more time on the role of women and blacks during the war. She writes that she waited in vain for the series to move from "testosterone-laced legends" to women, blacks, and the home front. Unlike the other essayists in this book, Clinton is more critical of Burns than of the film. She almost condemns Burns's use of the Sullivan Ballou letter which was written to his wife, Sarah, just before his death on the battlefield as too sentimental, "More likely, women had Scarlett O'Hara's luck with her first husband—died of dysentery without ever seeing a battle." It is unclear what Clinton means here. Would Major Ballou's last letter had been less poignant and less moving had he been dying in a hospital bed of disease when he wrote it? In any event, as every *Gone with the Wind* aficionado knows, Scarlett's first husband, Charles Hamilton, died not of dysentery, but of pneumonia following the measles. Then again, Clinton may think "dysentery" has a less heroic ring to it than "measles." She condemns Burns for not mentioning the few women who served in both armies by concealing their sex. For her, Burns should be "consumed by guilt over his de-gendered and re-rendering of the war." She offers very relevant, and interesting, quotes from women who participated in the war. These quotes, she suggests, might have added the missing perspective; and she is probably right. However, when the reader turns to the footnotes to look for the source of the quotes, many of the citations are to earlier works by Clinton rather that to the original source in which they appeared. Her essay lacks focus, which is too bad. Although Burns certainly could have devoted more attention to day-to-day life on the home front, a part of the war too often neglected, Clinton's strident criticism goes too far.

Gabor S. Boritt writes of errors in the depiction of the fighting at Gettysburg and in the presentation of President Abraham Lincoln. In essence, he suggests that the film left too much out and some of what is in it is inaccurate. Several quotations were altered for the film (although to this reviewer none of great significance) and the narrators misread some of the script (*i.e.*, Taneytown Road was called Tarreytown Road). John Wilkes Booth is introduced with a picture of the Richmond Grays, but the person in the picture is not

Booth. Boritt writes that these gaffes might have been avoided by a team of graduate student fact checkers and a military historian. Yet, Boritt also concludes that the film is "touched by the fire of great gifts . . . and it challenges our understanding of what history is."

Eric Foner focuses on the aftermath of the war. He finds fault in Burns's failure to delve more deeply into the consequences and aftermath of the war. Reconstruction in the South is hardly discussed in the film. Instead, the series, at its end, fastforwards to the gathering of veterans, from both armies, at Gettysburg in 1913. Of the twenty-eight people whose postwar careers are mentioned only two are black (Frederick Douglass and Hiram Revels). This, Foner attributes to the film's focus on postwar unity and its failure to take into account the civil rights abuses that followed Reconstruction. In sum, Foner believes that the film did not go far enough in time.

Leon Litwack faults the film's treatment of blacks, slavery, and the civil rights struggle. He finds the film's treatment of history to be "conventional and sometimes suspect." He commends the film for its treatment of blacks who served in the Union Army (there was almost no mention of those who fought in gray), but argues that the film did not adequately convey their importance to ultimate Union victory. Litwack argues that it is not enough for a historian or film maker to simply impart facts to the audience, they have to make people feel those facts. One of those facts is that the struggle for civil rights did not end at Appomattox and the film should have made that clear.

Geoffrey Ward was the principle writer for the series and he provides the next essay. He claims to have been prepared for criticism from "unreconstructed southern viewers" who believed the war to be about states rights and not slavery, but was astonished when others attacked the series as "an exercise in racism." To Ward, "some of the criticism in this volume seems needlessly shrill." He points out that the film makers decided to present the war through photographs made during the war, rather than through reenactments. That decision had a direct effect on what could be covered. Most of the available photographs were of soldiers, generals, and battles. Blacks, women, and the western battles simply were not photographically documented at the time to the same extent as were events and people in the eastern theater of war.

Ken Burns completes the book and responds to the criticism. He points out that the production staff had no set agenda. They sought to condemn slavery and at the same time present the war as some sort of avoidable fratricidal conflict. The problem, of course, was that if slavery were evil, then how could a war to end it be other

than good? Reconciling those two points took five years of production and an assemblage of historians of all persuasions.

At a time when a majority of high school seniors do not know of the Emancipation Proclamation and cannot tell the correct half century during which the war took place, anything which promotes the study of the Civil War is to be commended. The Civil War was the defining event in our history. After the war, the country was forever changed. Not only were the horrors of slavery gone, but the constitutional framework of the nation was fundamentally altered. *The Civil War* increased our awareness of the conflict and, for that alone, it must be considered a success.

For the soldier, Napoleonic warfare took its last bow on the battlefields; the trench warfare which characterized World War I made its debut; strategic campaigns became as important as battlefield tactics; and civilians, their property, and the home front were all too often just targets of opportunity. For the lawyer, the modern law of war can be traced to the Civil War. Francis Lieber's draft code for the Union forces, which became General Order 100, led directly to the treaties governing the conduct of war today. In many years of teaching the law of war, this reviewer always stressed the importance of the lawyer/soldier acquiring a solid foundation in military history. For an American officer, a keystone of that foundation is the Civil War, and *Ken Burns's The Civil War* can be a useful starting point in that study. What this book does is raise some questions about the series. Generally, such intellectual challenges are useful. But, when the essayists move from legitimate questions to self-serving criticism, then, as *Forbes* magazine said of this book, "the fault-finders come up short."[3] The basic utility of the television series as a historical resource and as a training vehicle, however, simply cannot be diminished because some historians suggest that it might have been done differently.

The Civil War was a cinemagraphic masterpiece. But, beyond that, it rekindled an interest in the war. Sales of Civil War related books rose dramatically as a result of the series. This volume furthers our understanding not only of the war, but of the problems inherent in discussing it. Even after 130 years, the war reverberates though our daily lives—sometimes subtlety, sometimes openly. *The Civil War* brought it all to the forefront and for one week in September 1990 many of us were transfixed before the television set. That *The Civil War* generated as much discussion as it did, however, was not solely because of its artistry, but also because of its subject. Shelby Foote referred to the war as the "crossroads of our being." Perhaps, in some respects, we are still at that crossroads.

[3] Steve Forbes, *Uncivil Reaction*, FORBES, May 20, 1996, at 26.

HOW GREAT GENERALS WIN*

REVIEWED BY MAJOR PAMELA M. STAHL**

> I stood in a valley of the Taibaek Mountains of eastern Korea and watched American artillery pulverize Hill 983 about 1,000 yards in front of me. This mountain and the similar one just to the north had not then attained the names—Bloody Ridge and Heartbreak Ridge . . . [t]he attack was to be direct—straight up the steep slopes of the mountain . . . [it] was also to be without surprise. . . . It all worked out as programmed . . . [but] UN casualties, the vast bulk of them American, totaled 6,400 while Communist losses may have reached 40,000. Yet the UN command gained nothing . . . [t]he only thing achieved by the battles of Bloody and Heartbreak Ridges . . . was that the American command finally realized the futility of frontal attacks against prepared positions.[1]

As a young officer commanding the 5th Historical Detachment in the Korean War, Bevin Alexander witnessed the gruesome battle for Bloody Ridge. In his book, *How Great Generals Win*, Mr. Alexander writes that his understanding of how great generals win began with realizing how not-so-great generals do not win. This realization began with Bloody Ridge: a frontal assault against prepared defenses.

Mr. Alexander's purpose in writing *How Great Generals Win* is to show, by specific examples, how great generals have applied long-standing principles of war that have nearly always resulted in victory. According to Alexander, these main principles include: (1) operating on the line of least expectation and least resistance; (2) advancing in columns that are far enough apart to confuse the enemy as to the army's destination, but near enough to quickly reunite if necessary; (3) concentrating superior strength against a point of enemy weakness and maneuvering against the flank or rear of the enemy; (4) occupying the central position to block union of the foe's forces and to enable striking at divided wings; and (5) making convergent tactical blows on the actual battlefield.

---

* ALEXANDER BEVIN, HOW GREAT GENERALS WIN (New York: W.W. Norton & Co., Inc. 1993); 320 pages, $12.50 (softcover).

** Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

1 ALEXANDER, *supra* note *, at 19-20.

Alexander devotes his book to describing how thirteen generals applied many of these principles to their campaigns. Alexander's great generals include: Hannibal Barca, Scipio Africanus, Genghis Khan, Napoleon Bonaparte, Thomas "Stonewall" Jackson, William T. Sherman, T.E. Lawrence, Sir Edmund Allenby, Mao Zedong, Heinz Guderian, Erich Von Manstein, Erwin Rommel, and Douglas MacArthur.

For Hannibal, it was the Battle of Cannae in 216 B.C., where his army massacred nearly seventy thousand Romans. Hannibal struck the Romans in flank, enveloping them, while his heavy cavalry hit the Romans' rear. Hannibal was finally vanquished by Scipio, another great general, who employed Hannibal's own technique of using cavalry to provide mobility and shock force.

Alexander describes Ghengis Khan, the 13th century Mongol, as one of the greatest military leaders who ever lived. Genghis Khan's victory over the Shah of Khwarezm exemplifies his mastery of military strategy. To defeat the Shah of Khwarezm, Ghengis separated his own forces into three armies of over 100,000 men. He then took one column over 300 miles of supposedly impassable desert to advance on the Shah's rear. Alexander calls this movement one of the greatest strategic maneuvers on the rear in the history of warfare and perhaps the foremost example of strategic surprise ever attained.

Napoleon Bonaparte also distinguished himself as one of Alexander's great generals. According to Alexander, Bonaparte never made a frontal attack when he could do otherwise, and he always attempted to block the enemy's retreat. Alexander outlines three methods perfected by Bonaparte that almost always assured victory.

The first was the *manoeuvre sur les derrieres*. The strategy of this rear maneuver was to commit a strong force to hold the enemy army in place on his main line by attack or threat, and to send a column around the enemy's flank in his rear. Bonaparte would then establish a strategic barrier across the enemy's line of supply and retreat. This would force the enemy to withdraw from his main line and, if Napoleon could set the barrier in place in time to block the enemy, it could result in the enemy's total defeat.

Bonaparte's second method was the "strategic battle," that is pinning the enemy down with a frontal attack and sending a force around the flank onto his line of communications. Napoleon would win the battles with a breakthrough of a select artillery-infantry-cavalry force at the point in the enemy's line that he had partially stripped to counter the flanking movement.

Bonaparte's third tactic was the "central position," a movement between two or more enemy armies within supporting distance. Napoleon could defeat one army before turning on the other by concentrating superior numbers against each of the opposing armies.

The American Civil War produced two great generals. The first was Stonewall Jackson, who appears to be one of Alexander's favorite great generals. According to Alexander, Jackson stood out from among his peers as the only Civil War general to recognize the futility of direct attacks on positions manned by the newly developed long-range single-shot infantry rifle. Alexander writes that Jackson attempted to avoid frontal attacks wherever possible and to achieve victory by striking where he was least expected. For example, in his Shenandoah Valley Campaign of 1862, Jackson advanced directly on the main federal force along the principal approach, then secretly shifted across a high mountain to descend unexpectedly on the federal flank and rear.

What may come as a surprise to some, Alexander echoes his book *Lost Victories: The Military Genius of Stonewall Jackson*[2] in asserting that Robert E. Lee was not a great general. Alexander argues that in critical situations, Lee almost always chose the direct over the indirect approach. Perhaps the best known example is the battle at Gettysburg where Lee sent General George Pickett charging over nearly a mile of open, bullet-and-shell-torn ground.

General Sherman is the second Civil War general that Alexander considers great. In his march to Atlanta, Georgia, Sherman employed a version of Napoleon's *manoeuvre sur les derrieres*, going around General Johnston's entrenched army and causing Johnston to fall back. Marching in the same manner that Napoleon had advanced, Sherman spread out a wide waving net of columns that could swiftly concentrate against any enemy force. This maneuver put Johnston in danger of being surrounded by Sherman's ever-spreading columns and resulted in Johnston falling back to Atlanta.

The Palestinian Campaign of World War I also produced two of Alexander's great generals: T.E. Lawrence and Sir Edmund Allenby. The Palestinian Campaign ended in the destruction of three Turkish armies, the capture of Arabia, Palestine, Syria, and Mesopotamia, and the withdrawal of Turkey from the war. According to Alexander, Allenby frequently used ruses to keep the enemy off guard, making the enemy think that Allenby's forces would attack at points other than planned.

---

[2] BEVIN ALEXANDER, LOST VICTORIES: THE MILITARY GENIUS OF STONEWALL JACKSON (1986).

Fighting the Chinese Nationalists in the mid-1930s, Mao Zedong also distinguished himself as one of the author's great generals. According to Alexander, Mao employed unparalleled tactics of deception, speed of movement, and unexpected descent on enemy forces.

The World War II Campaign of the West in 1940 produced two great generals in the German Army: Heinz Guderian and Erich Von Manstein. Alexander finds this campaign as one of the most rapid and decisive in history. Germany—with fewer troops and tanks—defeated the armies of France and Britain in six weeks. Manstein proposed that the German's main thrust should be through the Ardennes, where the Allies did not expect it. Guderian's idea was to use offensive tank power in one surprise blow at one decisive point, driving a wedge so deep and wide that the German's need not worry about their flanks. The Germans could then exploit any successes gained without waiting for the infantry. According to Alexander, the French and the British did not understand the revolutionary nature of the "blitzkrieg" (lightning warfare) that Guderian introduced.

In Alexander's opinion, Erwin Rommel was one of the greatest generals of modern times. Alexander writes that in north Africa, Rommel conducted some of the most spectacular and successful military campaigns in history. Rommel continually used feints and ruses to keep the British off guard, guessing where Rommel would strike next and with what.

MacArthur is Alexander's last great general. He calls him, however, a military Dr. Jekyll and Mr. Hyde, capable of both brilliant strategic insights and desolate error. It was MacArthur, over the objections of the Joint Chiefs of Staff, who chose Inchon for the amphibious landing behind the advancing North Korean Army. According to Alexander, MacArthur's Inchon Plan was a version of Napoleon's *manoeuvre sur les derrieres*. By landing at Inchon, United Nations forces were able to establish a strategic barrier between the North Korean Army and its supply sources, and block its avenues of retreat.

As in his book, *Korea: The First War We Lost*,[3] Alexander argues that MacArthur's amphibious landing at Inchon was the obvious counterstroke. Moreover, in Alexander's opinion, MacArthur's subsequent plan to invade North Korea was "astonishingly bad and ill-though-out." According to Alexander, the combination of public adulation and personal arrogance after the Inchon victory brought on one of the most severe military defeats in United States history.

---

[3] BEVIN ALEXANDER, KOREA: THE FIRST WAR WE LOST (1992).

Therefore, Alexander concludes that MacArthur was not, like Napoleon, Jackson, and Rommel, a great military leader. Given this observation, the reader is left to puzzle over why MacArthur made Alexander's cut at all. Alexander appears to include MacArthur in his book only to explain that the Inchon Plan was a simple and obvious strategy that had been employed by great generals throughout history. His one-time use of this strategy did not, however, qualify MacArthur as a "great general."

In describing these great generals and their campaigns, Alexander's thesis is clear: the truly great generals are those who use tactics that disguise and hide their actions to catch the enemy off guard and vulnerable. Unlike Bloody Ridge, great generals do not send troops directly into a battle for which the enemy is prepared and waiting. Rather, they strike where they are least expected, against opposition that is weak and disorganized. The military commander must understand and practice the aim of Stonewall Jackson: to "mystify, mislead, and surprise" the enemy.

Alexander's use of campaigns are excellent examples of his thesis. *Great Generals* is not light reading and Alexander's detailed campaign descriptions may lose all but the true student of military tactics. Alexander valiantly attempts to keep the reader on track, however, by supplying helpful maps that describe the campaigns. He also provides excellent summaries of how each general's tactics exemplify Alexander's principles of war. Alexander also provides an extensive bibliography of the sources he used in writing about the campaigns, although most of his sources are secondary. Additionally, with very few footnotes in the book's text, determining the source of his detailed campaign descriptions is difficult.

The only true criticism of the book comes when Alexander ventures beyond his purpose of describing by specific examples how great generals used certain principles of war to attain victory. Alexander strays from this purpose when he attempts to explain *why* he believes unsuccessful generals throughout history have continued the failed strategy of conducting frontal attacks against prepared defenses. Alexander argues that the military profession, like society as a whole, applauds direct solutions and is suspicious of persons given to indirect or unfamiliar methods. The latter, according to Alexander, are considered deceptive, dishonest, or underhanded.

Alexander writes that the military contains very few persons with the ability to be great generals because the system tends to promote the direct person over the indirect. According to Alexander, this results in generals who are guileless, uncomplicated warriors who lead direct campaigns and order frontal assaults. Alexander's

opinion detracts from an otherwise excellent book for several reasons. First, it is unnecessary to make these observations in a book devoted to explaining the campaigns of great generals. Second, without providing historical support for his opinion, the reader is likely to remain unconvinced, which could lead the reader to question Alexander's opinion generally. Third, Alexander's theory of the guileless, uncomplicated general is not supported by the most recent example of a military leader in battle: General H. Norman Schwarzkopf. Alexander acknowledges that during the Gulf War, General Schwarzkopf applied Alexander's principles of war to defeat Iraq, however weak and incompetent Alexander believes Iraq may have been. During Operation Desert Storm, General Schwarzkopf fixed the main Iraqi force in Kuwait by threatening an amphibious invasion and launching two Marine divisions and other forces directly on Kuwait. At the same time, he sent two mobile corps nearly 200 miles westward into the Arabian Desert. These forces swept around behind the Iraqi army, cutting off its line of supply and retreat to Baghdad. Thus, the most recent example of a United States general's tactics are those of a military leader practicing the very principles of war Alexander describes as assuring victory.

Aside from this criticism, *How Great Generals Win* is superb reading. It is a well-organized, highly descriptive study of some of history's greatest military campaigns. Although some of the battles were fought in unfamiliar regions hundreds of years ago, Alexander is able to make the reader understand how his great generals used the same basic principles of war to win their battles. This book is a "must read" for all those interested in the history of warfare.

THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES*

REVIEWED BY MAJOR MICHAEL A. NEWTON**

The "just war tradition" has a debatable role in today's world. The world has changed dramatically since just war theories first began to coalesce in the Middle Ages. The art of warfare and military doctrine have likewise evolved in ways unimaginable to early just war theorists. Current deployments dictate that lawyers make soldiers understand the law of war. Judge advocates faced with conveying concrete rules of law almost always encounter American soldiers who view abstract legal theory with suspicion.

The judge advocate's task is to help soldiers grasp the concrete, practical utility of the laws of war. Successful law of war training convinces soldiers that the law of war is not composed of arcane, technical rules created by lawyers. Soldiers developed the law of war in response to operational necessity, and legal theory evolved in response to the military realities. Paul Christopher's book, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues,* should help any commander who must balance legal duties against difficult operational decisions. This book should be mandatory reading for any lawyer who has wondered whether just war theory is a medieval relic or a modern remedy to assist soldiers.

Paul Christopher is a West Point professor whose well-written book moves crisply though an array of important legal and operational issues. As the title implies, the work seeks to distill otherwise inaccessible legal theory into functional guidelines for soldiers faced with operational challenges. The dominant focus of this work is to convey that just war doctrine can be a valuable framework for commanders grappling with difficult moral and professional issues. Professor Christopher relates abstract, often philosophical, problems to the concrete issues soldiers must confront. This work helps show why commanders must understand the laws of war. More importantly, this work presents legal theory in a way which helps overcome

---

* PAUL CHRISTOPHER, THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES (Prentice Hall 1994); 244 pages, $19.00.

** Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

the perception that international laws impose idealistic, artificial constraints with little regard for operational reality.

Professor Christopher's book is not intended as a comprehensive compendium of legal codes and assorted rules. Presenting such a morass of rules would undoubtedly make this work of little use to soldiers. The genius of this work lies in its carefully crafted balance between theory and practical application. Professor Christopher presents just enough history to allow the reader to realize that just war theory was not simply a creation of idealistic intellectuals. By extension, the developed laws of war do not represent some archaic model with irrelevant modern applications. Some areas of the book thus sacrifice absolute, one might even say boring, completeness for the sake of well-structured argument. Each successive section builds on the arguments, examples, and analysis of its predecessors.

Section I lays essential groundwork for understanding and applying the laws of war. The first block of text outlines the concepts of just war theory. The just war tradition evolved from a fusion of early Roman law and Judeo-Christian teachings. Professor Christopher outlines the contributions of key scholars who gradually transformed philosophical musings into emerging rules of international law. In the process, Marcus Tullius Cicero, Saint Ambrose, Saint Augustine, Saint Thomas Aquinas, and Francisco Vitorio become more than unreachable names from a distant past. The careful reader grows to appreciate the intellect and foresight of these men, as well as their human limitations. The early theorists worked within defined historical and social roles that help explain their theories. Professor Christopher presents enough background that the reader undoubtedly will begin to admire what the early theorists were able to accomplish for their time.

Section I also reveals the roots of ideas that soldiers and lawyers will recognize as developed rules of modern international law. While illuminating the roots of later legal developments, Professor Christopher does not overwhelm the reader in detailed discussions of deep philosophy. This approach seems to direct the reader towards the practical guidance waiting in later sections. However, the reader may find the early chapters difficult because many sections merely gloss over the surface of more weighty theory. Some material is vaguely frustrating because it only generally describes the weighty intellectual efforts by early theorists. Again, deciphering the meaning will be less daunting once the reader realizes that the primary aim of these early chapters is to establish a foundation for the later analysis and discussions.

After reviewing the contributions of the early just war theorists, Professor Christopher uses the three chapters of section II to

discuss the work of Hugo Grotius. Hugo Grotius's work represents the culmination of a thousand-year process of reducing moral principles to objective criteria. In essence, Grotius completed the transformation of just war theory from aspirational philosophy to positive international law. Grotius originated many concepts familiar to modern soldiers—such as the ideas of humanitarian intervention, unnecessary suffering, collateral damage, and proportionality.

Grotius articulated a set of rules designed to govern nations during both war and peace. Writing in the context of the Thirty Years War, he hoped to supplant weak, ecclesiastical authority with a binding, universal set of principles. Without a formal lawmaking body among nations, Grotius developed the first body of international laws based on reason and international custom. Describing the body of rules Grotius developed, Professor Christopher consistently uses current examples of their modern application. The reader becomes familiar with Grotius's ideas, and gains great insight by seeing their practical application nearly three hundred years later.

In one particularly relevant chapter, Professor Christopher analyzes the reasons why the laws of war represent binding legal obligations. Many commanders and soldiers debate the lack of an effective enforcement mechanism for international law. Soldiers intuitively understand that unenforceable obligations are not really laws, but merely voluntary proscriptions. Some soldiers retain a purely external view towards the laws of war which motivates them to follow rules based only on predictable punishment or group hostility.

On the other hand, judge advocates teaching the laws of war hope to train soldiers to comply with the laws of war based on an internal adoption of their validity and legal force. Professor Christopher quotes the Geneva Convention for the commander's duty to train soldiers on the laws of war, but reinforces the law by declaring that no one can adopt an internal view unless they are familiar with the rules. Every commander or soldier who recognizes the gap between understanding the laws of war and complying with those laws will benefit from this chapter. To help commanders create an internal sense of obligation in their soldiers, the text gives personal testimony of warriors who fought in Desert Storm, Vietnam, and World War II. The chapter frames the laws of war as being consistent with and complementary to the warrior ethos. Reinforcing the importance of obeying the laws of war, this chapter is the gateway to the final analytical sections.

Section III is the culmination of the work. Professor Christopher applies now familiar law to a series of specific military ethical dilemmas. The chapter on responsibility for war crimes is a

brilliant blend of theory and application. Every substantive prohibition of the laws of war contains an escape clause for "military necessity." Exploring the outer limits of legality, the chapter concludes with the familiar principle that soldiers have a duty to disobey illegal orders. Rather than simply stating the obvious principle, the author analyzes the historical and legal foundations of the rules in a way which makes the reader understand and assent to the rule. Professor Christopher also explores why soldiers cannot use superior orders as a shield to avoid personal liability for war crimes. Numerous historical examples help the reader to understand the holes in the "who is responsible" shell game. The historical examples support the legal analysis, and reinforce the impression that soldiers who violate the laws cannot shift their personal responsibility. This chapter provides excellent material for a unit's professional development program.

As a corollary to the superb section on individual criminal responsibility, the author recognizes that leaders need to understand the scope of command responsibility. Although this section is brief, Professor Christopher summarizes the doctrine of command responsibility quite well. This section also supplies key historical examples that allow the reader to apply legal theory to actual operational contexts.

This section continues with an incisive assessment of the idea of military necessity. Having shown that warriors cannot escape responsibility for war crimes by using military necessity as an automatic mantra, Professor Christopher critiques the requirements for a defense of military necessity. The section on military necessity is a structured articulation of his proposal for advancing the law of war. Professor Christopher constructs a series of alternate models for defining when a soldier could legally violate the laws of war on the basis of military necessity. After showing the flaws of current models, the author proposes a clear set of criteria for deciding when military necessity would allow violations of the law of war. Military necessity is a key concept for soldiers to grasp, but this is the only part of the book not supported by abundant historical examples. Whether or not the reader agrees with the conclusions, the debate is important and interesting.

The sections discussing the responsibility for war crimes and the doctrine of military necessity are the intellectual epicenter of the book. After completing these sections, the reader should feel finished with the book. Accordingly, the two remaining chapters may surprise the reader who does not pay close attention to the table of contents. The chapter on reprisals is interesting, brief, and definitely misplaced. Because the law of reprisals is so clear, and the examples

cited so interesting, this chapter should have been located at the beginning of section III. The chapter on nuclear, biological, and chemical weapons is unnecessary and counterproductive; it detracts from the intellectual and substantive impact of the outstanding discussions at the beginning of chapter III. Undoubtedly, the reader will turn to these last pages while mentally dwelling on arguments and examples from three previous chapters.

Despite the weak ending, this is a superb introduction for commanders and lawyers. The work is thought provoking and should stimulate lively debate among any group of soldiers or lawyers. The book benefits from its practical focus and it is a very useful tool. Every chapter ends with an incisive list of topics for further discussion which will generate additional deliberation. A very readable work, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, deserves a place in every judge advocate's library.

OPERATION ICEBERG*

REVIEWED BY MAJOR MICHAEL E. HOKENSON**

On Easter Sunday, April 1, 1945, the United States embarked on the largest amphibious invasion in the history of warfare. The invasion of Okinawa, code named "Operation Iceberg," was the bloodiest battle of World War II. This campaign sealed the fate of Japan and its horrible carnage all but ordained the use of atomic bombs several months later. Yet, fifty years after the conclusion of this three-month battle, it is largely uncelebrated and unknown.

Gerald Astor does not tell a story in *Operation Iceberg*—he lets the men who fought the battle tell it in their own words. The result is a fascinating and gripping account of men at war, which readers will find engrossing. The accounts are dramatic, emotionally draining, and tell a story of warfare at its worst. Battle-weary troops with little hope for relief fought a determined and fanatical enemy with immeasurable suffering on both sides. From April 1 through June 30, the United States forces suffered 12,520 dead and more than 36,000 battle casualties. The Japanese dead totalled 110,071 with only 7401 taken as prisoners of war. The number of Okinawan civilian dead range from 75,000 to 140,000.

Okinawa lays only 350 miles from Kyushu, the southernmost home island of Japan. Iwo Jima, the closest island to Japan held by American forces, was about 1200 miles away and too remote for many air operations. Seizing Okinawa would give the Allied forces an important staging area for the planned invasion of Japan. Okinawa's 485 square miles contained areas suitable for airfields that would permit aircraft to pound the Japanese mainland in preparation for the invasion. Its many protected anchorages would also provide safe harbors for the fleet of invasion ships. Okinawa would become the equivalent of England for the Normandy invasion.

Mr. Astor, a World War II veteran, devotes little space to the overall battle campaign. *Operation Iceberg* is not a conventional military history. Although he prefaces the book with an overall strategic analysis of the Okinawan campaign, it is a collection of experiences of individuals who told their own stories and the stories of their fall-

---

* GERALD ASTOR, OPERATION ICEBERG (Donald I. Fine, 1995); 462 pages (hardcover).

** Judge Advocate General's Corps, United States Army. Currently assigned as a student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

en comrades. Numerous pictures provide added insights to the battles and living conditions.

Operation Iceberg was a complex military operation involving significant air, sea, and land battles. Numerous personal accounts from the soldiers, sailors, airman and Marines who participated in the campaign provide added richness to the overall story. While Mr. Astor recognizes each service member's point of view, he also provides additional historical detail to balance the story. For example, intense rivalry existed between the Marines and the United States Army, whose members often found themselves fighting along side each other. That rivalry, today as fifty years ago, was due to different tactics and operational experiences and the high degree of *esprit de corps* possessed by each. The author allows the soldiers and Marines to tell their story and then puts the rivalries into perspective, demonstrating his exhaustive background research of the battle.

The Okinawa campaign saw the first major use of kamikazes in the pacific theater. Approximately 2000 kamikaze planes wreaked havoc on the Navy. The Japanese sunk thirty-six United States ships, damaged another 368 ships and killed 4907 United States sailors. A previously decimated Japanese Navy suffered only sixteen ships sunk and four damaged. However, the largest battleship afloat, Japan's *Yamato,* along with about 3000 members of its crew, was one of the Japanese ships destroyed and sunk.

While the Navy had experienced limited kamikaze attacks at Iwo Jima, they made their impact felt during this campaign. Official recognition of the kamikazes did not occur until April 12, 1945 (coincidentally the date of President Roosevelt's death, which muted the impact of the deadly Japanese tactic). The kamikazes damaged or destroyed battleships, destroyers, aircraft carriers and other ships and accounted for most of the Navy dead. The damage caused by kamikazes resulted in altering bombing missions from the Japanese mainland to suspected kamikaze bases. Tactics against kamikaze attacks developed slowly and by happenstance. An admiral who did not believe he could issue "doctrine" without his superior's unlikely approval tried to stop junior Naval officers from distributing a list of tactics against the kamikaze threat. In violation of direct orders, the subordinates continued to disseminate the list of tactics because of the intense demand for it.

The Okinawa campaign also saw the death of the most senior United States commander to die in action in World War II. Enemy artillery fire killed Lieutenant General Simon Bolivar Buckner on June 18 as he observed elements of the 8th Marine Regiment at a forward post. Furthermore, the Japanese commander, Lieutenant

General Mitsura Ushijima, and his chief of staff, Lieutenant General Isamu Cho, committed ritualistic suicide together on June 22 rather than surrender to the American forces. Okinawa was the only battle in World War II in which both commanding generals died.

Ernie Pyle, the nation's most popular and distinguished war correspondent also died on Okinawa. Pyle was a man who risked and sought combat to cover those Americans fighting for their nation. Both the troops and a nation mourned Pyle's death. An inscription was quickly erected near the road junction where Pyle died: "At this spot the 77th Infantry Division lost a buddy, Ernie Pyle, 18 April 1945."

Operation Iceberg is an absorbing book because it portrays the horrors of war through the eyes of the men in the trenches. The pain and suffering of our soldiers, airman, sailors, and Marines become all too real. Those who dismiss combat fatigue as nothing more than fear and malingering will reexamine their beliefs. There were those, of course, too frightened to face combat and both Astor and service member accounts show these men little compassion. It was the battle-weary troop, however, who had spent many a night in combat and who had killed his share of enemy who all too often suffered battle fatigue. Buddies being killed, artillery barrages, and a fanatical enemy all took their toll on the toughest of men. Accounts of combat veterans screaming in terror with tears running down their cheeks are all too common in this book. Tough guys never cry in the B-movies, but they did often on Okinawa.

Mr. Astor presents an unabashedly American point of view in his book. While there are some accounts by Japanese veterans, they are rather limited. This restricts the book in some respects because we never come to understand the psyche of the Japanese soldier who was all too willing to die for the emperor. Still, this is a minor detraction at best.

This book makes an important contribution by examining why law of war violations occur on the battlefield. Most Americans had great difficulty understanding the fanaticism of their enemy and their apparent willingness to virtually commit suicide on the battlefield. Many Americans dehumanized the Japanese soldier because it was then easier to kill them and, in some ways, explained their fanaticism. Many also thought that the Japanese, particularly the kamikaze pilots, had to be on drugs or were drunk with sake, which was rarely the case. Interestingly, most Americans admitted that they had received no instructions on how to handle Japanese prisoners or civilians. Military intelligence became so desperate for

Japanese prisoners that some American general officers offered beer or hard liquor to American service members, and the time to drink it, in exchange for capturing Japanese prisoners.

Japanese atrocities did little to improve the chances of captured Japanese soldiers. In one incident, a kamikaze dove into the unprotected hospital ship *Comfort,* which was identified in accordance with the Geneva Convention. Extensive loss of life resulted when the kamikaze struck. More telling, however, was an incident concerning an American five-man patrol sent out through the front lines to capture a prisoner for interrogation purposes. After a fierce battle, the missing men of the patrol were found with "legs bound with wire, hands behind their backs tied to bend them over, with a bullet hole in the backs of their heads." A "take no prisoners" stance quickly filtered through out the battalion and upper echelons of the United States command. While division officers tried to enforce the voluntary surrender code, the experience demonized the enemy.

Many veterans spoke of treachery on the part of the Japanese who did surrender. Many surrendering Japanese would come armed with a grenade or a satchel of explosives behind their backs on a suicide mission to take out a few Americans. Cautious soldiers made surrendering Japanese strip to prevent them from hiding grenades. So unlikely did the surrenders turn out to be legitimate and so often did "surrendering" Japanese have grenades that soldiers were ordered not to accept prisoners who were surrendering without any apparent reason. United States soldiers interpreted this guidance as a direction to shoot those offering surrender. In one instance, a lieutenant ordered a soldier to kill a Japanese prisoner. When the soldier refused the order, two other soldiers volunteered to do the job.

Distinguishing friend from foe in combat can be difficult, even today. On Okinawa, Americans were under strict orders not to leave their foxholes at night for any reason. Tired, battle-weary soldiers were constantly fearful of night attacks from the Japanese and many soldiers and Marines died from such attacks. A number of American soldiers and Marines, who made the error of leaving their foxholes, died of fratricide. In one instance, the Japanese used this fear of night attacks with particularly gruesome results. The Japanese soldiers, all the while screaming in the background, herded a group of Okinawan civilians towards the men of the 1st Marine Division. One Marine fired steadily into the group of dark figures running towards him. One of the figures fell before his foxhole leaving a hand dangling in front of his face. The Marine continued:

> The rising sun brought to light the enormity of the shooting. I stood tears streaking my cheeks, looking out on the

> night's work. The hand that dangled in front of me belonged to an old man, his thin arm disappearing into a Japanese soldier's jacket. Three or four feet away lay an old woman beside a little girl of five, their hands clenched together.

One of the men in the next foxhole was vomiting convulsively, one stared vacantly into space, another just cried. The Marines were devastated by what they had done, their morale shattered.

While most American soldiers and Marines did not agonize over the deaths of Japanese soldiers, deaths of civilians, particularly children, was another matter. Most Americans were very troubled by the number of Okinawan civilians who committed suicide rather than surrender. Later in the campaign when civilian surrenders were becoming more common, the Americans seemed to take delight in feeding the civilians and tending to their wounded. It almost seemed as if they were trying to reestablish their own humanity by helping those desperate civilians. While numerous incidents of mistreatment or murder of Japanese prisoners and Okinawan civilians are recounted, only two soldiers were reported to have faced courts-martial for their actions. They had shot a Japanese commando, a major, who had participated in an assault on an American held airfield. The soldiers found the major sleeping, next to his briefcase of maps, and shot him in the head. Apparently, the loss of intelligence was a greater concern to the leadership than the major's actual death.

Americans on the homefront criticized the slow and costly Okinawan campaign. When news of the atomic bombing of Hiroshima broke, most of the furor over the high casualty rate dissipated. On Okinawa, news of the atomic blasts over Hiroshima and Nagasaki received the "unmitigated approval of the GIs and leathernecks." News of Japan's surrender triggered wild celebration by men who very likely would have suffered grievous casualties in any invasion attempt of the Japanese homeland.

In the concluding chapter of *Operation Iceberg,* the author summarized some of the feelings about the Okinawa campaign and some thoughts on the use of nuclear bombs to end World War II. There can be little question that any attempted invasion of Japan, which was much more heavily fortified than Okinawa, would have resulted in horrific casualties for both sides. Astor does not try to resolve this nuclear debate, as if anyone could, but he attempts to put it into the perspective of those who fought the battle at Okinawa.

Operation Iceberg is an outstanding book for any student of military history. Astor is an accomplished oral historian who conveys the

heartfelt feelings of those whose stories he tells. The book would be particularly useful for military leaders who want to better understand the pressures placed on battle-weary troops and to gain greater insights into military leadership. Any examination of the use of atomic bombs to end World War II should also begin with those whose lives hung in the balance. The American soldiers, sailors, airman, and Marines who fought on Okinawa were ordinary men who performed extraordinary acts of courage day after day, month after month.

WE WERE SOLDIER'S ONCE, AND YOUNG: THE BATTLE OF THE IA DRANG VALLEY*

REVIEWED BY MAJOR THOMAS STRUNCK**

Written in the graphic and often moving language of the combat soldier, *We Were Soldiers Once, and Young,* recounts a ferocious 1965 Battle in South Vietnam's Ia Drang Valley. Authored by retired Lieutenant General Harold Moore and UPI Vietnam War correspondent Joey Galloway, the book documents four terrible days of battle and five important firsts that were critical to America's war effort in Vietnam.

Set among the high expectations and idealism of the American public, political class, and Army regarding Vietnam in 1965, the book brings to life five firsts of American involvement in Southeast Asia. They are: the first significant test of the Army's airmobile tactics; the first time that the North Vietnamese came across the Cambodian border and attacked the Americans in division strength; the first battle with heavy American casualties; the first time that the American political class and public encountered the high cost of America's involvement in Southeast Asia; and finally, the first development of the "war of attrition" doctrine. Under that doctrine held that United States Armed Forces would inflict so many casualties that North Vietnam would choose not to continue the war; a theory perfectly prescient in its irony.

One of the most significant battles of the Vietnam War, the Battle of the Ia Drang Valley, was the first large-scale test of the Army's newly developed airmobile tactics. The battle took place in November 1965, shortly after the Army's first airmobile division, the 1st United States Cavalry, was sent to Vietnam. On November 14, 1965, the Division's 1st Battalion, 7th Cavalry Regiment, air assaulted into the Ia (or River) Drang Valley, a North Vietnamese stronghold along the Cambodian border. Their mission was to make contact with the enemy. The enemy was waiting.

---

* HAROLD G. MOORE & JOSEPH L. GALLOWAY, WE WERE SOLDIER'S ONCE, AND YOUNG: THE BATTLE OF THE IA DRANG VALLEY (New York: Random House 1992); 412 pages, $24.50 (hardcover).

** Judge Advocate General's Corps, United States Army. Currently assigned as an Instructor, United States Army Command and General Staff College, Fort Leavenworth, Kansas. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

The 1st Battalion dropped into Landing Zone (LZ) X-Ray, a clearing in the jungle, not far from a ridge line. The author, then Lieutenant Colonel Moore, was the battalion commander. Before he had two full companies on the ground, the 33d Regiment of the North Vietnamese Army (NVA) launched a furious attack. Using graphic personal accounts, the book makes the battle come alive. It is both exciting and horrifying. While the fighting was often hand to hand, the American's use of precision artillery and air firepower proved overwhelming.

At the end of two days of fighting, Lieutenant Colonel Moore's Battalion had estimated 834 total enemy casualties, with 79 Americans killed and 121 wounded (none missing). However, the battle was not over. After the 1st Battalion airlifted out of X-Ray, they were replaced by the 2d Battalion, 5th Cavalry, and the 2d Battalion, 7th Cavalry. On November 16, the 2d Battalion, 7th Cavalry, headed in the direction of a new landing zone, LZ Albany, and directly into disaster.

The NVA had been watching the new United States units from atop the ridge line not far from LZ X-Ray. Two fresh NVA battalions attacked the 2d Battalion shortly before it reached Albany. Surprised and unprepared, the 2d Battalion suffered some of the heaviest casualties the American Army would take during the entire Vietnam War. At the end of several days of intense fighting, 553 Vietnamese lay dead or wounded, while the 2d Battalion lost 151 killed, 121 wounded, and 4 missing. Because the battle was so fierce and so much of the fighting at close quarters, the American edge in artillery and air firepower was rendered largely useless.

The book does not discuss any more of the month-long Ia Drang campaign, but total figures included a 10 to 1 or 12 to 1 kill ratio favoring the Americans. General William Westmoreland, commander of American troops in Vietnam, studied these figures and thought America could win the war by attrition. He believed that the casualties would become too heavy and North Vietnam would choose not to continue the war. The opposite proved true.

The battles at X-Ray and Albany were unusually bloody for that point in the war. The American Army and public were not prepared for so many casualties. At that time, the Army notified the families of those killed in Vietnam by a most impersonal method: a telegram delivered by yellow taxicab. In a piece of Army trivia, the yellow cab became a symbol of death for the families of soldiers engaged in the early battles of Vietnam. Just the sight of one driving down the street could terrify a soldier's family.

The battle's largest impact fell on America's political class. Defense Secretary Robert MacNamara went to Vietnam to be briefed on the fighting after the battles at X-Ray and Albany. While previously predicting a quick and easy victory, he left Vietnam telling the press that the war would be long and difficult. In a top secret communication, he advised President Johnson that the war would certainly escalate and could cost 1000 American lives a month.

Before concluding, the book explores the effect that the deaths had on the families of the soldiers in the 1st Cavalry Division. These personal family accounts, which describe the devastating effects that the war had on those at home, were some of the most powerful of the book.

Much like the war in which it was fought, the Battle of the Ia Drang Valley was a military victory for America, but a propaganda victory for North Vietnam. The book explores, perhaps too little, the thoughts of some who participated in the Ia Drang campaign as to why America did not win the war. Its strength is in laying out the importance that this early battle had in shaping the way the war was fought. The book is must reading for anyone seeking to understand the horrors and cost of war and the elusive saga of Vietnam.

ALEXANDER OF MACEDON, 356-323 B.C.: A HISTORICAL BIOGRAPHY*

REVIEWED BY MAJOR STEWART A. MONEYMAKER**

Is it not passing brave to be a king
and ride in triumph through Persepolis.
—Marlowe

Peter Green's historical biography could easily be the one and only book the military professional ever need read about Alexander "the Great." From Alexander's birth in Pella, the Macedonian royal capital, to his death in Babylon half way around the world, this learned author tells the story of a man who was arguably the greatest field commander in history. Peter Green, the Dougherty Centennial Professor of Classics at the University of Texas, is a translator as well as scholar and novelist and makes use of all the primary sources and basic texts available to the classicist; such as Arrian, Putarch, Diodorus, and Justin. Where there is significant disagreement between experts concerning a fact or episode of the great king's life, he takes care to inform the reader of the conflict. Despite this professorial attention to detail, Green has woven such a lusty tail of romance, warfare, and political intrigue that the reader devours a learned treatise on a scholarly subject almost without realizing it.

Even if marketed as fiction, Professor Green's story of Alexander would be almost beyond belief, but Professor Green documents each step in his journey with many reliable historical references. Where myth and legend have overwhelmed history, Professor Green takes pains to separate supportable fact from fable. This is not always an easy, or even sustainable, task given the gilded patina of Alexander's ancient glory. The author also details the unrelenting propaganda campaign waged by Alexander, throughout his short life, by which he attempted to foster the belief in his divine origins. Alexander's manipulation of the ancient "media" and his use of well-paid propagandists rivals the most calculating modern politicians. Centuries later, it requires a keenly discerning scholar to cull the

---

* PETER GREEN, ALEXANDER OF MACEDON, 356-323 B.C.: A HISTORICAL BIOGRAPHY (University of California Press 1991); 617 pages (hardcover).

** Judge Advocate General's Corps, United States Army. Currently assigned as a Professor, The Judge Advocate General's School, Charlottesville, Virginia.

professional shill from the honest historian, and Peter Green is cynically, and often humorously, equal to the task.

For the first one hundred pages, Alexander shares the spotlight with his father, King Philip II of Macedon. This period of Alexander's story lays the foundation for his life-long obsession with ambition and personal achievement. Raised amidst the intrigue of the Macedonian Court witnessing at an early age the political machinations that routinely set blood relatives against each other in deadly earnest, young Alexander learned early that only the strong survive. However, the author relates that Alexander maintained a life-long devotion for his mother, Queen Olympias, and the Queen, for her part, never faltered in her support of her son's dreams and ambitions.

It is during this section that Green relates one of the most famous stories concerning Alexander, that of the war horse, Bucephalas. The dramatic moment where the eight-year-old prince controls the huge stallion by simply facing him into the sun and thereby eliminating the animal's perception of his own threatening shadow is invariably told in every edition of the great king's life story. Green provides additional insight by relating that Bucephalas carried Alexander into almost every major battle and that the horse died at the ripe old age of thirty, soon after his master's last great victory over the Indian rajah Porus on the Jhelum River. "Bucephalas had died at last, of old age and wounds: Alexander gave his faithful charger a state funeral, leading the procession himself. One of the two new cities he founded on the actual site of the battle, was named Bucephala, as a memorial tribute (Alexander called another settlement Perita, after his favorite dog)." The simple relation of homely details such as these makes Green's biography of the ancient icon crackle with as much vitality as a similar work about Patton or some other modern personality. This is no stodgy tome about a dusty character from antiquity. This is a vibrant story about a general whose mastery of combined arms operations and combat engineering enabled him to conquer most of the known world. In these first hundred pages we learn that Alexander did not develop his military acumen in a vacuum; his father, King Philip, was an excellent role model.

The battle of Chaeronea fought on 4 August 338 B.C. between Philip's Macedonians and the Athenians is the first of various battles and sieges that the author relates in exceptional tactical detail. The book contains fourteen maps and battle plans. Green describes the military actions with a tactical clarity and a historical perspective that makes them educational for the modern military reader. His technical descriptions of the formations, weapons, and equip-

ment of the period provide insight into the gritty realities of fourth century B.C. warfare. The author describes the battle of Cheronea as "one of the most decisive encounters of all Greek history." It also is the last engagement where Alexander plays a subordinate role. Green excels at exploring the political, social, and strict military realities of all the important campaigns. He highlights the shifting paradigms that ensured that Macedonia (long maligned by Athenian gentlemen as a boorish barbarian backwater) would see its rough frontier virtues and disciplined military professionalism overwhelm the decaying and undermined city states of the south. Green states:

> [D]espite the endless costly lessons of the Peloponnesian War, Athenian statesmen were still, in moments of national crisis, bedazzled by the conservative legend of the Marathonian hoplite. They neglected the fact that for over a century Athens had ceased to be a land power, and that her once formidable citizen-hoplites were now largely replaced by mercenaries.

At Chaeronea, Philip's disciplined professionals tricked the Athenians into a headlong pursuit by feigning a retreat. Once a gap in the Athenian line opened, the withdrawing Macedonian phalanx halted on a slight rise and presented the over-eager Athenians with a bristling wall of their famous sarissa. The main weapon of the phalanx, the sarissa, was a spear approximately fourteen feet long, heavily tapered from butt to tip, and much resembling a medieval Swiss pike. Because a normal infantry thrusting spear was only half the length of the sarissa, the Macedonians could always rely on making the first strike. While the now-advancing Phalanx pressed the disorganized Athenians back, the crown prince Alexander led the finest Macedonian cavalry divisions into the gap in their flank. A rout of the allied army followed.

Time and again, from Asia minor, through Persia, to the far reaches of the Hindu Kush, Alexander would use the same combination of parade-ground discipline and superior tactics to win, every major engagement of his military career. Peter Green's descriptions of Alexander's campaigns alone would make worthwhile reading. But the author gives us much more than just a military history. He brings into modern perspective the psychological and emotional realities of Alexander's personality, and carefully develops them; from the Homeric romanticism of the king as school boy through his decline into paranoid megalomaniac.

Two years after Chaeronea, Philip is murdered and Alexander ascends the throne of Macedonia. The young king is flush with the prospect of leading the armies of Macedonia and his now-chastened

Greek allies in a glorious Pan-Hellenic crusade against Persia; in retaliation for the wrongs which Xerses had done Greece a century and a half before. Thirteen years later, he was at the edge of the known world. His officers are near mutiny with the desire to return home. His army is now composed mostly of native oriental levees; almost all of his Macedonian veterans are dead or retired. He has liberated the Greek cities of Asia minor, been crowned and deified as Pharaoh at Memphis, Egypt, made himself lord of all Asia, and subjugated the rajahs of India. Still, he could think of nothing except moving forward, planning the next campaign. His health was wracked by constant campaigning and heavy drinking; and he complained that he was "at an utter loss to know what he should do during the rest of his life." The author skillfully paints a progressive portrait of the man who accomplished everything he set out to achieve and yet was never satisfied. Tragically, Green reveals, the great conqueror cared nothing for the dull routine of administering his empire and made no provisions for an orderly transfer of power. So when his friends, gathered around his deathbed, pressed him as to whom he bequeathed his kingdom, Alexander, romantic to the last, could only whisper, "To the strongest."

Peter Green's biography provides a solid historical understanding of the world of Alexander of Macedon: its politics, its social and religious structures; and the military developments of the period. Most importantly, it removes Alexander from the fantasy realm of King Arthur-like figures and provides a contoured and vividly human picture of the most successful commander in the history of war.

BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT*

REVIEWED BY LIEUTENANT COMMANDER MICHAEL EDWARDS**

An old lawyer gave me some advice. "Know how to do wills and get your friends out of jail," he said, as he nodded sagely, "If you can't do this, they'll doubt you are a lawyer at all." Later, I learned a corollary: society expects legal professionals to understand the Constitution on at least a cocktail party level. Failing that, we risk at least behind-the-back whispers—and perhaps even self-doubts—that come from professional ignorance.

Do not think that you can escape. Lurking in every group is the NRA member who wants to discuss the Second Amendment and his right to bear arms, the pro-lifer, who insists on getting your perspective on the perplexing—if not incomprehensible—*Roe v. Wade* and the patriot who cannot understand why the United States Supreme Court will not let us punish flag burners. The list goes on. If you secretly doubt your competence in constitutional law or want to understand how the opinions of Supreme Court Justices—instead of the Constitution—have become the supreme law of the land, *Benchmarks* should be on your reading list.

Do you remember Constitutional Law, the course where you never studied the Constitution, just what judges said about it? The professor started with *Marbury v. Madison*—where the Supreme Court first claimed the right to use the Constitution to invalidate legislative acts. Many more cases followed: *The Slaughterhouse Cases, Plessy v. Ferguson, Patterson v. Colorado, Adair v. United States,* and *Griswald v. Connecticut,* just to name a few. These cases contain the great constitutional ideas, such as natural law versus the written constitutional text, the right of privacy, and incorporation and reverse incorporation. Perhaps over the months and years, these ideas have become less distinct, or perhaps they were never really that clear to begin with. *Benchmarks* examines these cases and theories fit with current Supreme Court decisions.

---

* TERRY EASTLAND, BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT (1995); 161 pages, $17.99 (hardcover).

** Judge Advocate General's Corps, United States Navy. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

Despite the book's relatively short length, it is not a quick read—the underlying concepts are too difficult. This is a book where I found myself—ordinarily a member of the pristine book club—with pen in hand, underlining and making notes in the margins. However, *Benchmarks* is well worth the effort. Reading the book's seven essays will dramatically increase your understanding of the underpinnings of today's American legal system and, specifically, how Supreme Court Justices interpret laws and decide their constitutionality.

In the first essay, Walter Berns, author and professor emeritus of government at Georgetown, discusses how the Supreme Court interpreted the Constitution in the Court's first decade. He introduces a constant theme that runs throughout the book: the tension between what the Justices *think* is right and what the Constitution actually says. During the Court's early years, the Justices argued over whether to interpret the Constitution in the light of natural law. This approach appeared in early cases under aliases such as "one of the natural, inherent, and inalienable rights of men," "an object of the social compact," or "general principles." One may question whether any real danger exists for Justices to use natural rights, the social compact, general principles, or even their sense of right and wrong, when interpreting the Constitution? Berns response is that it is incompatible with the Framer's intent and leads to uncertainty in interpretation. In his dissent in the 1798 case of *Calder v. Bull,* Justice Iredell questioned who is to decide whether natural law was violated and what standard would the decider use for the analysis? Indeed, one Justice's view of what constitutes a natural right will not necessarily be the same as another Justice. Compound the differences over the centuries and the constitutional foundation for our nation's laws has crumbled into shifting sands. Berns sketches, and later essayists shade in, the result: the Supreme Court functions solely to identify and protect what it considers to be fundamental rights. It matters little what "constitutional peg" the Justices use to hang them on.

Professor Berns illustrates this point by examining *Griswald v. Connecticut* and *Roe v. Wade.* Justice Harry Blackmun invented a fundamental right of privacy and it mattered little to him whether it came from the Fourteenth Amendment's concept of personal liberty or the Ninth Amendment's reservation of rights to the people. Constitutional law became unhinged from the Constitution. Berns's essay explains how and why.

In the second essay, author Charles Lofgren of Claremont McKenna College considers two early cases which interpret the Fourteenth Amendment: *The Slaughterhouse Cases* and *Plessy v.*

Ferguson. Slaughterhouse, despite its gory title, is not part two of the cult film *Texas Chainsaw Massacre,* but a case where the city of New Orleans legislated that all livestock slaughtering must occur within a specified area leased to a privately owned company. Independent butchers challenged the law as violating the Fourteenth Amendment. The Supreme Court disagreed, holding that while the right to pursue a livelihood exists, it is a state right and not protected by the privileges and immunities clause. Privileges and immunities as a viable constitutional peg for rights never recovered. Professor Lofgren describes how later Justices would give rights to others under the remaining two branches of the Fourteenth Amendment—substantive due process and equal protection.

Professor Lofgren agrees with the minority opinion, which argued that Congress designed the Fourteenth Amendment (and specifically the privileges and immunities clause) to give federal support to a broad range of rights that had previously only applied against the federal government. Who but the Judiciary, can enforce these rights against the states?

The case of *Plessy v. Ferguson* follows. In 1892, two octoroons (one-eighth Negroes), Daniel Desdunes and Homer Plessy, rode the white railway cars—sixty years before Rosa Parks—to challenge the state of Louisiana's "separate but equal" railway system. The majority held that a state's "police power" encompasses such reasonable restrictions on liberty.

Justice Harlan's lone dissent became famous. He explained that if a legislature was outside their proper sphere of legislation, for example in making distinctions based on race, "reasonableness" did not matter. "Our Constitution is color blind and neither knows nor tolerates classes among citizens."

In the third essay, Professor Akhil Reed Amar of Yale Law School discusses the principle of incorporation: Did the Fourteenth Amendment mean to apply the Bill of Rights against the states? At first the answer may seem obvious, "Doesn't the First Amendment state that '*Congress* shall make no law . . .'" Perhaps you may not think that this matters, but this was a critical question for those litigants involved in *Patterson v. Colorado.* Patterson printed articles and a cartoon critical of the Colorado Supreme Court and that court held him in contempt, without the inconvenience of a jury. When the case reached the United States Supreme Court, Patterson lost again. Justice Harlan said that assuming the Fourteenth Amendment applied the First Amendment's right of free speech to the states, the Amendment would only apply to prior restraint, not other interferences with speech. However, Professor Amar avoids

"assuming" anything and resoundingly proclaims that the First Amendment applies to the states, especially in the areas of freedom of speech and the press.

Professor Amar does not let the federal government off the hook either. The Fourteenth Amendment provides (among other protections) that no state shall deprive persons of life, liberty, or property without due process of law, nor deny to any person the equal protection of the law. Does this state prohibition apply against the federal government? The principle is called "reverse incorporation" and Professor Amar marshals considerable evidence to show that it does.

Two of the book's essays diverge on the right to privacy. Hadley Arkes of Amherst College discredits many arguments heard today about the Bill of Rights. Earnest commentators claim that anyone fired or discriminated against because of their opinions has a First Amendment free speech claim. However, freedom of speech only restrains the government and not private associations.

It is private associations that Professor Arkes wants to discuss. He examines the right of association in two early 20th- century cases: *Adair v. United States* and *Coppage v. Kansas*. He traces the right of private association to its illegitimate descendent, the right to privacy. Professor Arkes explains that private association is an important right, but not an excuse to do evil. According to Arkes, murder in private is as much a crime as murder in public. Professor Arkes manages to find a controversial target for his philosophical arrows: the issue of abortion. He argues that if abortion can be shown to be an unjustified homicide, then it cannot be part of a right of privacy. But, alternatively, if people claim that no one has the right to impose their view of this personal decision on others, then there is no government right to favor abortion as a "public good" by requiring hospitals and medical schools to provide abortions and training. If abortion is morally neutral, there must be no public compulsion or public funds spent requiring it to be available.

Nadine Strossen, President of the American Civil Liberties Union (ACLU), predictably has a different perspective on privacy. Her essay discusses three cases on privacy, all involving the ACLU on behalf of the individuals: *Griswald v. Connecticut, Roe v. Wade,* and *Bowers v. Hardwick*. She does not hide her bias. Her approval of striking down laws against contraception in *Griswald* and abortion in *Roe* is as evident as her pique at the Court's upholding the Georgia sodomy law in *Bowers*.

Her approach to constitutional interpretation begins with an understanding that the Bill of Rights is designed to protect unpopular beliefs and citizens from an intolerant majority. As the point of

attack by the majority changes, she argues that the Constitution must remain flexible enough to withstand whatever the current intrusion into citizens' rights. She turns a jaundiced eye toward societal and majority interests. Carried to its conclusion, her view would allow no convictions for so-called "victimless" vice offenses.

Those suspicious of the Supreme Court will find an understanding ally in Gerard Bradley, professor of law at Notre Dame. His essay, "Shall We Ratify the New Constitution?" sounds the alarm on the current judicial activism. How is it that the Supreme Court can outlaw state abortion controls in *Planned Parenthood v. Casey* and outlaw graduation prayers in *Lee v. Weisman*? Bradley explains that the Supreme Court's use of the right of personhood dangling from the Ninth and Fourteenth Amendments—he calls it the "megaright." This megaright does not originate from the 1789 Constitution and bears no relation to it. The Court's actions could arguably be called establishing a "new" constitution—hence the name of the essay.

Not surprisingly, Professor Bradley argues two dangerous aspects of the Supreme Court's power. First, Justices serve for life and, consequently, are unresponsive to the electorate. Second, the Court no longer is restrained by a definite written Constitution and follows only an amorphous concept—the megaright.

According to Professor Bradly, the megaright forbids a state from legislating morality. He might analogize that if the Supreme Court Justices were casting for a crime show, the robber would be a state legislature, the helpless victim would be an "immoral" individual, the police officer would be the Court, and the police officer's weapon would be the megaright. The Supreme Court wields the megaright to protect an individual's liberty rights (even "immoral" ones) from state legislatures and their laws. It is a natural step for the Court to conclude that state laws, which uphold traditional moral values, effectively rob a protected "immoral" individual of his or her right to choose and thus violate the *new* constitution. Bradley's gloomy forecast reads like tomorrow's front page news: "Lesbians Adopting Children and Sons and Daughters Suing Their Parents."

The words "Shall We Ratify" in the title of his essay implies that the reader can take action to approve the new constitution (an alternate perspective would suggest that perhaps there is some action that should be taken to *disapprove* it). In any event, the reader who looks for a prescription for change in this essay will be disappointed. Bradley asks for no picketing of the Supreme Court, no letter-writing campaign to Congress, and no political organizing. Instead, he informs and persuades. Frustration that he gives no prescription for change is a measure of how effective that persuasion is.

In the seventh and last essay, Mary Ann Glendon of Harvard Law School argues for a structural approach to the Constitution. In a short span, she traces the problem of American lawyers in preferring to deal with case law and neglecting the European tradition of construing constitutions and statutes. She explains that American lawyers "tend to treat the various provisions of the Constitution as mere starting points for free-wheeling judicial elaboration—as if that document had not established a regime that places important limits on both judicial and legislative law making."

This tendency has pulled us loose from constitutional moorings. We no longer examine the Constitution's provisions in light of their history and purpose. Professor Glendon offers little hope for the present courts, but urges that law schools teach statutory construction to the next generation of lawyers.

The Constitution never tells us who shall interpret it or how that interpretation should be done. The essays in this book historically trace many of the principles and ideas used by earlier commentators and "interpreters." Ultimately, however, every one of us is in the legal profession is responsible for interpreting the Constitution. Failing this, society will doubt we are even lawyers at all.

THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR*

REVIEWED BY MAJOR MICHAEL J. BERRIGAN**

The only truth in the Yugoslav war is the lie.[1]

Misha Glenny has done a great service for all people in the English-speaking world who would like to improve their knowledge of the causes, courses, and effects of the fighting and atrocities that have savaged the former Yugoslavia over the past several years. His book, *The Fall of Yugoslavia,* is full of information, anecdotes, and analysis that will increase any reader's understanding of the complex issues involving the disintegration of the Former Yugoslavia.

Glenny is a radio correspondent for the BBC World Service. Perhaps his background as an on-the-scene journalist helps to explain why his book is very different from the works of many academics who have been rushing to get their books on the Former Yugoslavia to market. Glenny's does not follow the standard convention of articulating the purpose, scope, and thesis at the beginning of his book. Instead, the book begins true to Glenny's style and approach—in motion. The book begins, "Driving eastwards up steep spiraling roads. . . ." Glenny then proceeds to take the reader on a hectic journey, one that is as enjoyable as it is enlightening.

Glenny speaks English, German, Czech, and Serbo-Croat. He lives in northern Greece and has worked throughout central and south-eastern Europe. He studied in both Berlin and Prague. His book bears out the assertions in the biographical sketch that "he has developed an inside knowledge of Eastern Europe and the Balkans that few other journalists possess. In articles and broadcasts he frequently predicted the outbreak of war in both Croatia and Bosnia-Herzegovina." Although initially written in 1992, the book has been revised and updated, and includes an entirely new chapter on Bosnia-Herzegovina.

---

* MISHA GLENNY, THE FALL OF YUGOSLAVIA (New York: Penguin Books, 1994); 258 pages, $10.95 (softcover).

** Judge Advocate General's Corps, United States Army. Currently assigned as Senior Defense Counsel, United States Army Trial Defense Service, Fort Lewis, Washington.

[1] *Glenny*, supra note *, at 21.

One of the strengths of Glenny's book is his method of documentation. Glenny has traveled constantly in and around the Former Yugoslavia, both before and after the outbreak of the fighting. In large measure, Glenny's book is a collection of observations and interviews during these travels. Glenny has obtained personal interviews with such central Serb figures as General Ratko Mladic, the Krajina Serb political leader Milan Babic, and the Bosnian Serb political leader, Slobodan Milosevic. Additionally, and perhaps even more importantly, he has had innumerable interviews with leaders, fighters and common people on all three sides of the fighting (Croats, Moslems, and Serbs).

I found it particularly illuminating that Glenny frequently referred to his going "in search of a drink" or "a whisky" with various friends, interviewees, or fellow journalists. This seems to correspond well with the reputation of the inhabitants of the Former Yugoslavia as being particularly fond of alcoholic beverages—a journalist must go to where the information is. Glenny's account of being hung over, interviewing General Mladic and having to drink Mladic's homemade *rakija,* was particularly fascinating and amusing.

Perhaps the most notable strength of this book is its balance. The objectivity of the book is all the more striking given the three ethnic/religious parties to the various conflicts and the difficulty of avoiding even the unconscious shading of the facts towards a particular party. Glenny's handling of the various groupings of Serbs is noteworthy. He does not deny that many Serbs committed terrible atrocities. However, he points out that the Serbs had many understandable, and somewhat legitimate, reasons for fighting. These reasons often times included egregious diplomatic errors on the part of "the international community" in general and certain individual nations in particular (especially Germany and the United States). Additionally, Glenny convincingly catalogues some of the atrocities committed by both Croats and Moslems—undercutting the oftenheard argument that the Moslems are simply "innocent victims."

Glenny tells his story in a style that is entertaining, lively, descriptive, and persuasive. One device that Glenny employs is to reference movies and fantasy novels when describing various characters and places in the tragedy of the Former Yugoslavia. At one point, he describes Serbia as the "Land of Mordor" and Milosevic as "Emperor of the Night" (invoking the images of J.R.R. Tolkien's fantastic dark vision of a fallen kingdom). He describes one town in the Krajina in which the Serb residents had virtually overnight turned against their Croat neighbors as follows: "It was as though the whole town had suffered the fate of the American mid-west town

featured in Don Segal's film, *Invasion of the Body Snatchers:* some alien virus had consumed their minds and individual consciences." Glenny describes a drunken Serb reservist in a bar in Knin who was reprimanding him for being English as "this being who had just parachuted in from the set of *Night of the Living Dead.*" The first description of Branimir Glavas, a Croatian National Guard commander, is "the small commander with steel-blue eyes resembled a poor country cousin of Hannibal Lecter as portrayed by Anthony Hopkins in *The Silence of the Lambs* . . . a serial killer in fatigues."

Another favorable aspect of Glenny's style is his choice of words. Again, this may be related to his background as a radio journalist and traceable to a corresponding natural predilection for colorful and active words. Whatever the source, the effect on the printed page is highly entertaining. The following examples illustrate Glenny's ability to turn a phrase. "Belgrade has transformed Kosovo into a squalid outpost of putrefying colonialism." "But in Serbia, and in the Balkans as a whole, including Croatia, fascist scum does not simply surface occasionally before sinking again as it does in the democracies of the West." "Many Croats believed this influence was the bastard ideology spawned by the unholy union of two demons. Greater Serbian arrogance and Bolshevism."

Beyond Glenny's appealing style, the book contains a great deal of substance. Glenny goes well beyond mere journalistic recitations of the facts surrounding various political intrigues, battles and atrocities—he searches for causes and effects. Glenny addresses three sets of issues: (1) the underlying political problems in the former Yugoslavia (and, indeed, most all of the former Soviet bloc), (2) the failure of the Yugoslav local and national leadership to adequately address these political problems while at the same time coopting the mass media—resulting in censorship and the loss of what Glenny calls "rational politics," and (3) the failure of the international community to address the problems properly and in a timely manner.

Glenny argues the underlying problem that led to war in the former Yugoslavia was not ethnic, religious, or territorial aspirations. Rather, it was the failure to deal with the important issues involving majority and minority rights that gave rise to these other aspirations.

> The central conflict which destabilized Yugoslavia was between, on the one hand, the desire to create or consolidate (in the case of Serbia) a state in which one national group was dominant, and on the other, the perceived or

> demonstrable vulnerability of minority populations in these projected states.[2]

Glenny notes that "[t]he failure to solve the problems surrounding minorities, which by definition question territorial integrity, is behind the fighting. . . ."[3] Glenny bases this view on personal interaction with the local populations. "Even by 1990, it had become clear to me that in Croatia one's nationality was not important. The only fact of significance for individuals in Croatia was whether they were members of the local minority or not."[4] Glenny argues that

> Historically, the only way to keep these people apart once the fighting begins has been for an outside power to intervene and offer its protection to all citizens, in particular, from the imperial urges of Croatia and Serbia. History will judge whether the international community is able to rise to the mighty challenge posed by war in Bosnia-Herzegovina .[5]

This passage, written long before the negotiation and signing of the Dayton accords, remains the burning question hovering over the former Yugoslavia.

The distinction between concerns over minority rights as opposed to ethnic/religious rights may appear to be a fine one—particularly given that religion and ethnicity are the yardsticks by which minority or majority status are currently being measured in the Former Yugoslavia. Glenny argues the distinction is an important one because it explains how ethnic groups that have lived as neighbors in relative harmony for generations can suddenly explode in homicidal rage. Glenny attributes a large amount of responsibility to local and "national" leaders—people like Milosevic, Karadic, Tudjman, and Babic. The book makes abundantly clear that, for these leaders and others of their ilk, "success lay in the shameless exploitation of the most effective tools of Balkan politics: deception, corruption, blackmail, demagoguery and violence."[6] Glenny identifies the complete domination and use of the mass media, particularly radio and television, by these local leaders as being a primary tool by which they gained and maintained power and manipulated the various populations into a state of mind that could support war and even atrocities.

---

[2] *Id.* at 235.
[3] *Id.* at 100.
[4] *Id.* at 19.
[5] *Id.* at 173.
[6] *Id.* at 36.

Finally, Glenny makes a compelling case that "the international community" should shoulder a significant amount of blame for allowing the fighting and even for occasionally aggravating it. Germany is clearly singled out as being the worst culprit for its zealous advocacy in the cause of Croatian independence. The historical cultural, economic, and religious ties between Germany and the Croats should have counseled much more careful deliberation and planning with respect to the recognition issue, Glenny argues. This is particularly true given the thousands of murders committed against Serbs by the infamous Ustashas (Croatian fascists who sympathized with the Nazis during World War II). The United States also receives a healthy dose of blame in the book. In particular, he criticizes the United States for not paying attention to the former Yugoslavia until it was too late. Glenny contends that when the United States finally did start paying attention, its policy was both wrong headed and clumsily handled. Glenny sharply criticizes the United States ill-fated (and, Glenny argues, ill-conceived) attempt to lift the arms embargo against the Bosnian government.

The supplementary material which accompanies this book is helpful, but not particularly noteworthy. There are four maps and a four-page glossary of acronyms for various terms and political movements. Much better information is available in the press.

This book has garnered a great deal of critical praise. It received the Overseas Press Club Award for Best Book on Foreign Affairs. A Nexis search in January 1996 disclosed ninety-nine instances in the print, television, or radio media in which this book has been cited. Perhaps the review of this book in *The New Republic* said it best—"[v]igorous, passionate, humane, and extremely readable. . . . For an account of what has actually happened . . . Glenny's book so far stands unparalleled."

TO RENEW AMERICA*

REVIEWED BY MAJOR EDWARD J. O'BRIEN**

I. Introduction

> The Chinese word for *crisis* is a symbol that combines the pictographs that mean danger and opportunity. In a sense, that is where we find ourselves today. On the one hand, we have substantial dangers that could undermine our civilization, weaken our country, and bring misery into our lives. On the other hand, we have enormous opportunities in technology, in entrepreneurship, in the sheer level of human talent we can attract to the purpose of pursuing happiness and the American Dream.[1]

To Renew America is a great book, written by a thoughtful man. Newt Gingrich, the Speaker of the House of Representatives, wrote this book to introduce his vision to the national marketplace of ideas. "I wrote *To Renew America* because I believe that an aroused, informed, inspired American citizenry is the most powerful force on earth."[2] The Speaker is right and this book contains a lot about which to get excited. Readers may not agree with all of the author's premises or visions, but everyone concerned with the future of the country should be familiar with them. The success of the book suggests that a lot of people are.

The author's thesis is simple. American civilization is declining. Mr. Gingrich outlines six major changes which will stop the decline, revitalize American society, and reinvigorate the American economy. Using well-selected anecdotes, the book juxtaposes America's great accomplishments and America's problems. Part II of this review contains a summary of the six changes that the Speaker proposes.

---

* NEWT GINGRICH, TO RENEW AMERICA (Harper Collins 1995); 249 pages, $24.00 (hardcover).

** Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

1 GINGRICH, *supra* note *, at 247.

2 *Id.* at 248.

Although some have criticized the book's organization,[3] I found it helpful and easy to follow. The author uses a "reverse building block" model for organizing his ideas. The book starts with six changes; the author then divides each change into smaller components. The structure reflects the Speaker's intellectual discipline and focus, and gives perspective to the problems and prescriptions discussed.

Although dwarfed by its strengths, the book contains a couple of weaknesses. The first is the absence of a substantive review of the "Contract with America." The Contract with America was a successful political vehicle that won the Republicans control of the Congress during the 1994 congressional elections. Is the Contract with America the means to implement the Speaker's six major changes? We cannot tell by reading *To Renew America*. I will further discuss this failing in Part III of my review.

Another shortcoming is the apparent lack of follow through on the book's federalism theme. Five of the six changes have moorings in federalism.[4] However, the discussion of several current problems does not sort out the division of power between the federal and state governments.

Some have criticized the Speaker for the simplicity of his solutions to our current problems.[5] The significance of this book is not that the Speaker offers a specific legislative plan to cure America's problems; he does not. The most significant contribution of *To Renew America* is that it asks the question of who should have the authority to deal with each problem. The biggest disappointment of the book is that the Speaker does not use the federalist principles introduced early in the book to analyze some of the more difficult problems discussed later in the book. I will examine this shortcoming in more detail in Part IV.

---

[3] *See* James Bowman, *First Class Or Coach? Media Critics of Newt Gingrich's Book "To Renew America"*, NAT'L REV., Oct. 9, 1995, at 62 (evaluating the review of Joan Didion).

[4] Federalism is a "[t]erm which includes interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY 612 (6th ed. 1990). *See also* Joseph Sobran, *How Constitution Was Construed Away*, WASH. TIMES, Jan 16, 1996, at A12 ("federal powers under the Constitution would be 'few and defined,' while the states' powers would remain 'numerous and indefinite.'. . . [S]tate power would be the rule, and federal power the exception.") (quoting Thomas Jefferson and Alexis de Tocqueville).

[5] *See* Bowman, *supra* note 3, at 62.

II. The Six Major Changes

> On the one hand, America is the leading country on the planet, with the largest economy and providing the opportunity to pursue happiness to more different kinds of people from more backgrounds than any society in history. On the other hand, our civilization is decaying, with an underclass of poverty and violence growing in our midst and an economy hard pressed to compete with those of Germany, Japan, and China.[6]

America is at a crossroads. What steps are necessary to reinforce America's virtues while eliminating America's vices? Mr. Gingrich outlines six major changes that he believes are necessary to restore the greatness of America.

According to the Speaker, the central challenge is to reassert and renew American civilization. This means that we must study the history of our society and reassert the themes and values that run throughout our history. Mr. Gingrich asserts that American civilization has a spiritual dimension, believes in individual responsibility, and has a spirit of free enterprise, invention, and pragmatism. Renewal of our civilization is urgent because "by definition, any civilization goes only a generation deep. If the next generation fails to learn what makes America tick, then our country could change decisively overnight."[7]

The second change is to accelerate America's entry into the "Third Wave Information Age." The Information Age has enormous potential for improving intractable problems ranging from air pollution to health care to unemployment. The Information Age will make information so widely available to the public that the influence of professional guilds will decline. The Speaker asserts that the intellectual investment necessary to understand and capitalize on the Information Age will pay lasting dividends.

The third change is to become the most economically competitive country in the world. This requires reevaluating the things that reduce economic output, such as regulation, taxation, litigation, education, and welfare. For America to remain the predominant economy, American labor must add maximum value to raw materials. "Economic growth is the most important social policy objective a country can have other than keeping its people physically safe."[8]

---

[6] GINGRICH, *supra* note *, at 3.

[7] *Id.* at 29.

[8] *Id.* at 68.

An opportunistic society must replace the welfare state. Compassion administered by a central bureaucracy results not only in poverty but also a complete destruction of the work ethic. Unlike centralized bureaucracies, Local agencies and volunteers can acquire the detailed knowledge required to assess the needs of people and their families. Instead of maintaining people in poverty, local agencies can help the poor improve their lives. The system that the Speaker endorses would not penalize work, savings, and property ownership the way the current welfare state does.

According to the Speaker, we must balance the federal budget for three reasons. First, if the budget were balanced, interest rates would fall, stimulating the economy. When the federal government borrows money, it competes with business, industry, and individuals for available capital. Consequently, interest rates increase. Second, if the government continues to borrow money, the interest on the national debt will continue to increase. Eventually, the annual interest payment will be the largest portion of the federal budget. Finally, fiscal responsibility is necessary to save Social Security and Medicare.

The final change that the author champions is replacing our centralized, Washington-based government. "We simply must shift power and responsibility back to state governments, local governments, nonprofit institutions, and—most important of all—individual citizens. 'Closer is better' should be the rule of thumb."[9] This is by far the most profound change that the Speaker advocates. Decentralization could be the basis for implementing the other five changes and solving many of America's problems.

III. The Contract With America

We are at a unique time in our country's history. Achieving the Speaker's vision of a revitalized American society is possible because the Republican Party controls Congress. The Republican Party did well in the 1994 congressional elections, in great part, because of the Contract with America. To its detriment, *To Renew America* lacks a substantive discussion of the Contract. The Speaker's treatment of the Contract consists of twenty-seven pages of anecdotes about the 1994 congressional elections and the first one hundred days of the 104th Congress. The Speaker missed a great opportunity to explain the terms of the Contract with America and how it might affect the changes that he advocates.

---

[9] *Id.* at 9.

In one passage,[10] the Speaker projects the disturbing image that Republicans view popularity as the strength of the Contract with America. Reliance on popular opinion is unprincipled and dangerous.[11] Perhaps the Speaker took for granted that the Contract's provisions would become law because of their popularity. If so, he was wrong. Only three of the Contract's reforms have been signed into law.[12] The rest are stuck in legislative limbo.[13] The Contract's popularity has not inspired the United States Senate. *To Renew America* was a missed opportunity to explain the Contract with America, to muster genuine support for its reforms, and to put pressure on the Senate and the President to institute the Contract's provisions.

IV. The Ongoing (Federalist?) Revolution

The author labels Part IV of *To Renew America,* "The Ongoing Revolution." Mr. Gingrich discusses a number of current national issues. Some of these are clearly federal issues.[14] Others are federal issues only because over the last sixty years the federal government has gotten involved in matters traditionally left to state governments.[15]

Federalism is the balance of power between the federal and state governments. The Constitution is the fulcrum on which this balance teeters. Comparing the original Constitution (including the first ten amendments) to the Constitution as interpreted today reveals a huge transfer of power to the federal government. Understanding the shifts of power sheds light on the cause of many of the problems that Mr. Gingrich is trying to solve. Finding the best

---

[10] The first item in the Contract—applying all the laws of the nation to Congress itself—was viewed favorably by 90 percent of the American people. The balanced budget amendment, the line-item veto, welfare reform, term limits, the $500 tax credit for children, and an enforceable death penalty all had 80 percent support. The least recognized items—regulatory reform and litigation reform—still had 60 percent support. Which one of these items was President Clinton going to attack?

Id. at 118.

[11] *See* Brian Doherty, *So Who's Counting,* REASON, Dec. 1995, at 55 (discussing the theoretical and practical problems with public opinion polls and how they are subject to manipulation).

[12] Tom Curry, *The House Delivers, But Then What?,* TIME, Dec. 25, 1995/Jan. 1, 1996, at 75.

[13] *Id.*

[14] For example, immigration, English as the official language, the drug war, defense, exploring space, taxation, and term limits.

[15] Some of these traditional state matters include, for example, education, and welfare.

solutions to America's problems is possible only after we have identified the causes.

A. Spiritual and Moral Decline

When discussing the decline of the moral and spiritual dimensions of American civilization, the Speaker traces the decline back to 1965. What occurred around 1965 that could have affected the moral and spiritual aspects of American life? First, in *School District v. Schempp*,[16] the United States Supreme Court began the campaign to drive religion out of public schools in the name of the Establishment Clause.[17] Additionally, the Supreme Court "discovered" the "constitutional" right to privacy in *Griswold v. Connecticut*.[18] The United States Supreme Court shifted a huge amount of power from state legislatures to the federal judiciary by erroneously applying the Establishment Clause to the states through the Fourteenth Amendment[19] and by finding constitutional rights in the "penumbras, formed by emanations"[20] from other constitutional rights. Ever since, America has debated the role of spirituality in public life[21] and whether acts traditionally defined as crimes were actually rights hidden in a constitutional penumbra.[22] Politically unaccountable federal judges have decided these issues, not elected state legislators.

The Speaker offers no specific remedies to restore morality or spirituality to our society. Opponents and commentators often

---

[16] 374 U.S. 203 (1963) (reading the Bible at the beginning of each school day violates the Establishment Clause). *See also* Stone v. Graham, 449 U.S. 39 (1980), *rehearing denied*, 449 U.S. 1104 (1981) (law requiring the Ten Commandments be posted in public classrooms violated the Establishment Clause); Engel v. Vitale, 370 U.S. 421 (1962) (use of a nondenominational prayer written by government authorities violated the Establishment Clause).

[17] "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I.

[18] 381 U.S. 479 (1965).

[19] *See* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990) (arguing that the Establishment Clause should not be applied to the states even assuming the legitimacy of the selective incorporation doctrine); *see also* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949) (arguing that the Fourteenth Amendment was not intended to make the Bill of Rights applicable to the states). The Establishment Clause was made applicable to the states in Everson v. Board of Education, 330 U.S. 1 (1947).

[20] *Griswold*, 381 U.S. at 484.

[21] *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (unconstitutionality of nativity scenes on public property); Lee v. Weisman, 505 U.S. 577 (1992) (unconstitutionality of benediction at a high school graduation).

[22] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Bowers v. Hardwick, 478 U.S. 186 (1986) (sodomy).

describe Mr. Gingrich as extreme. However, he did not endorse any of the extreme solutions others have offered.[23] The Speaker merely states the need to restore morality and spirituality. That is the easy part; the solution is more difficult. The solution requires the decentralized government that Mr. Gingrich advocates. The original Constitution, which set up a federal government of limited power, left matters of morality to the states. A federal judicial "power grab" upset the federalist balance. Getting back will be hard; deciding that the states should exercise this power is the first step.

B. Federal Regulation

The Speaker identified federal regulation as a retarding force on American competitiveness. This really involves two problems: the federal government regulates in areas it should not and the federal government overregulates in areas it has authority to regulate. The first problem implicates federalism; the second implicates individual freedom.

The United States Constitution gives Congress the power to regulate interstate commerce.[24] The Supreme Court's reaction to President Roosevelt's court-packing plan—the switch in time that

---

[23] If he had wanted to present an extreme solution, Mr. Gingrich could have pushed the constitutional envelope by endorsing legislation attempting to overrule Supreme Court's decisions invoking the authority given Congress in section 5 of the Fourteenth Amendment. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5. *See generally* CHARLES E. RICE, BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE 102-03 (1979). *See also* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."); U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]"). The Free Exercise Clause was made applicable to the states via the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940). *See also* Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996) (making an originalist argument that some provisions of the Bill of Rights are incorporated against the states through the Privileges and Immunities Clause of the Fourteenth Amendment). Another aggressive solution is to restrict the subject matter jurisdiction of the federal courts so that they could not hear these cases. "The Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2. The Supreme Court's original jurisdiction is defined in Article III and cannot be expanded. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Congress creates the lower federal courts and can vest them with less than the full jurisdiction described in Article III. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). *See also* S. 158, 97th Cong., 1st Sess. (1981); H.R. 3225, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction in abortion cases); S. 481, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981) (restricting jurisdiction in voluntary school prayer cases). The Speaker could call for a repeal of the selective incorporation doctrine in general (*see* Fairman, *supra* note 19) or the incorporation of the Establishment Clause. *See* Lietzau, *supra* note 19.

[24] *See* U.S. CONST., art. I, § 8.

saved nine[25]—caused another huge shift of power from state capitals to Washington. The reaction to *United States v. Lopez*[26] illustrates the magnitude of this shift. One commentator hopes that *Lopez* means that the Supreme Court will limit Congress's power by preventing it from regulating *noncommercial intrastate* activity.[27] This seems reasonable given the clear language of Article I, section 8. Although the Speaker did not address this issue, the Supreme Court will.[28] At stake is the division of power between the federal and state governments.

Areas that are appropriate for federal regulation are in disarray. The excesses of environmental regulation, for example, are well known,[29] but the biggest abuse is the "taking" of private property

---

[25] Following the 1936 election, President Franklin D. Roosevelt proposed legislation where he could appoint a new Supreme Court Justice for each incumbent Justice who was seventy years old and had been on the Court for ten years. This plan was President Roosevelt's solution to the Court's decisions finding legislation designed to cope with the Great Depression unconstitutional. In 1937, the Court, to defuse the constitutional crisis, adopted a policy of extreme judicial deference to federal regulation of business activity. *See* NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 418 (2d ed. 1989). *See also* Earl M. Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy*, 19 HARV. J.L. & PUB. POL'Y 121 (1995); United States v. Carolene Products Co., 304 U.S. 144 (1938).

[26] 115 S. Ct. 1624 (1995). In *Lopez*, the Court found the Gun-Free School Zones Act violated the Commerce Clause because carrying weapons to school did not "substantially affect" interstate commerce. *Id.*

[27] John P. Frantz, *The Reemergence of the Commerce Clause as a Limit on Federal Power:* United States v. Lopez, 115 S. Ct. 1624 (1995), 19 HARV. J.L. & PUB. POL'Y 161, 174 (1995) ("Although the *Lopez* decision marked a necessary first step in the revitalization of federalism, the Court should further protect the values guaranteed by this division of political authority and establish a categorical bar against congressional regulation of noncommercial intrastate activities.").

[28] *But see* Pete DuPont, *Pleading the Tenth: With the Demise of Liberalism, Can Federalism be Brought Back to Life?*, NAT'L REV., Nov. 27, 1995, at 50-51 ("But is *Lopez* just a false dawn? In the past we have seen the High Court start down the road of federalism, only to retrace its steps to the path of expanded federal powers. . . . *'Lopez* is one time in twenty years that the Court will find a statute unconstitutional.'")

[29] *See, e.g.*, PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA, 7 (1994) ("in the words of EPA administrator Carol Browner, there are 'really serious problems' with environmental regulation in this country"). Environmental Protection Agency regulations required Amoco Oil Company to spend $31 million on equipment, in one refinery alone, to filter benzene in the refinery's smokestacks. However, the regulations failed to address the larger problem—benzene emitted from the loading docks. "The rule was perfect in its failure: It maximized the cost to Amoco while minimizing the benefit to the public. *Id.* A self-employed mechanic removed 7000 old tires from his urban junkyard. He was fined because the junkyard was a wetland. Murray Weidenbaum, *Regulatory Reform—Needed or Risky?: Costly Controls*, WASH. TIMES, Jan. 21, 1996, at B4. *Cf.* Charles Oliver, *Brickbats*, REASON, Feb. 1996, at 13 (a New Jersey resident spent thousands of dollars to create a sanctuary for the bog turtle, an endangered species. The New Jersey Department of Environmental Protection told him he needed a permit to raise the turtles. He spent five years and more money, but could not get a permit. The regulators have seized the turtles and threatened him with thousands of dollars in fines).

without compensation. The Speaker, to his credit, supports a decentralized, market-oriented approach to environmental regulation, as well as subjecting regulations to a cost-benefit analysis.[30] However, the Speaker fails to offer any protection for private property. Congress will not be able to avoid this issue for long thanks to the Supreme Court.[31] If the Speaker wants to restore the balance of power between citizens and the federal government,[32] protecting private property from governmental confiscation is a good way to start.[33]

C. Education and Welfare

Education and welfare are two other areas that the Speaker wants to reexamine to sharpen America's competitive edge. Although education and welfare traditionally have been state functions,[34] Mr. Gingrich simply wants to refocus the efforts of federal bureaucrats. This is hardly revolutionary. The federal government should stop regulating these areas all together.

V. Conclusion

Reviewing this book requires, to some extent, analyzing Mr. Gingrich's philosophical pedigree. Does he advocate decentralization because federalism and limited federal power are principles on which our forefathers founded our central government? Or does he advocate decentralization because of efficiency or convenience? Mr.

---

[30] GINGRICH, *supra* note *, at 198-99.

[31] *See* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147 (1995). Professor Kmiec argues that the Court's decision in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) establishes the common law of nuisance as the standard to define the limits of individual property rights and outlines the general scope of the government's police power. *Id.* at 148. Simply put, if the government could have prohibited a particular use of property under the law of nuisance at the time the owner acquired the property, a government regulation which similarly restricts the property owner is an exercise of the police power. On the other hand, if a regulation prohibits a use of property that did not constitute a nuisance at the time the owner acquired the property, it is a taking. It is hard to imagine that wetlands regulation under the Clean Water Act and some regulations under the Endangered Species Act are not takings under this standard.

[32] *See supra* note 9 and accompanying text.

[33] "[I]t's no fun regulating if it's not for 'free'." Douglas W. Kmiec, *Clarifying the Supreme Court's Taking Cases—An Irreverent but Otherwise Unassailable Draft Opinion in* Dolan v. City of Tigard, 71 DENV. U. L. REV. 325, 330 (1994).

[34] *See* Frantz, *supra* note 27, at 165; United States v. Lopez, 115 S. Ct. 1624, 1632-22 (1995). *See also* U.S. CONST. art. I, § 8 (education and welfare are not areas Congress was granted the power to regulate); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Stephen Moore, *The Nanny State Fights Back*, NAT'L REV., Dec. 25, 1995, at 20 ("[b]y today's standards, in the 1950s Washington did very little of domestic consequence").

Gingrich leaves us wondering. For the short term, the practical answer is, "It doesn't matter."

Returning our system of government to the federalist structure of the original Constitution is extreme and unrealistic. On the other hand, giving states more discretion and latitude in administering programs for which Washington retains authority and control is not revolutionary decentralization. Subsequent Congresses can repeal legislative changes relatively easily. Constitutional reform would be harder to repeal but harder to enact. Mr. Gingrich does not indicate which method he prefers.

One should view *To Renew America* as a book of ideas for which the Speaker is trying to gather support. The Speaker should have tried to gather additional support for the Contract with America. The extent of the ideas' popularity will determine the remedial plan. This book of ideas is an important work published at a critical juncture of American history.

CUMULATIVE INDEX, VOLS. 142-151

I. AUTHOR INDEX

II. SUBJECT INDEX

-A-

AFFIRMATIVE ACTION

AGREEMENTS

AIR EMISSION REDUCTION see also ENVIRONMENTAL LAW

ARMED FORCES

-C-

CHEMICAL WEAPONS see also WARFARE

CHILDREN

CIVILIANS see also JURISDICTION

CONTRACTORS

CONTRACTS

COURTS-MARTIAL

-D-

DEATH PENALTY

DNA see also EVIDENCE

-E-

EMPLOYMENT

ENDANGERED SPECIES ACT see also ENVIRONMENTAL LAW

ENVIRONMENTAL LAW

EVIDENCE see also MILITARY RULES OF EVIDENCE

EXCLUSIONARY RULE

-F-

FOURTH AMENDMENT

-G-

GERMANY see also ARMED FORCES

-H-

HABEAS CORPUS see also MILITARY JUSTICE

HUMANITARIAN LAW see also AGREEMENTS

-I-

INTERLOCUTORY APPEALS see also SUMMARY JUDGMENT

-J-

JURISDICTION

-L-

LAW OF WAR

LEADERSHIP

LECTURES

-M-

MANUAL FOR COURTS-MARTIAL

MILITARY JUSTICE

MILITARY RULES OF EVIDENCE see also EVIDENCE

MINORITY BUSINESS see also SMALL BUSINESS ADMINISTRATION

-N-

NUREMBERG CONFERENCE

-S-

-W-

WARFARE see also CHEMICAL WEAPONS

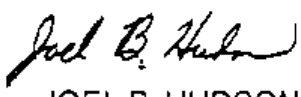
WRITING

UNIFORM CODE OF MILITARY JUSTICE

By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:



JOEL B. HUDSON
Acting Administrative Assistant to the
Secretary of the Army
01984

U.S. GOVERNMENT PRINTING OFFICE: 1994-300-757:00001

PIN: 074699-000