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MILITARY LAW REVIEW

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PLAYING THE NUMBERS: COURT-MARTIAL PANEL SIZE AND THE MILITARY DEATH PENALTY

DWIGHT H. SULLIVAN[1]

I. Introduction

On 1 April 1998, 3387 inmates were under death sentences in the United States.[2] More than three-fourths of these inmates were entitled to have their sentences determined by twelve-member juries.[3] While several hundred were tried in systems where judges decide whether to impose a death sentence,[4] only six were convicted and sentenced to death by a panel of fewer than twelve lay members. All six of those death row inmates[5] were tried in the military justice system, which allows as few as five lay members to impose a death sentence.[6]

Merely because the military's death penalty system is unique, however, does not necessarily mean it is unconstitutional. The Supreme Court has upheld aspects of the military justice system that would be unconstitutional in any civilian criminal justice system.[7] The Court of Appeals for the Armed Forces (CAAF)[8] has expressly rejected a challenge to capital courts-martial panels with fewer than twelve members,[9] and the Supreme Court has shown little interest in the issue.[10]

This article concludes that the judiciary is unlikely to invalidate capital courts-martial with fewer than twelve members. The unanimity requirement for military death penalty cases, however, suggests that the

1. Managing Attorney, American Civil Liberties Union of Maryland, Baltimore office. The author is grateful to Professor J. Robert Lilly, without whose inspiration this article would not have been written, and to Captain Timothy C. Young, Judge Advocate General's Corps, U.S. Navy, Commander Philip D. Cave, Judge Advocate General's Corps, U.S. Navy, and Lieutenant Commander James R. Crisfield, Jr., Judge Advocate General's Corps, U.S. Navy, who reviewed an earlier draft of the article and provided valuable criticisms and suggestions.

2. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 1 (Spring 1998).

lack of a fixed number of members is a far more significant systemic defect than the lack of twelve-member panels. Because members who are removed from a court-martial panel are usually not replaced when a quorum remains, the defense in a capital case faces a dilemma: whether to remove biased members, which carries the heavy price of reducing the statistical chance of finding the one vote necessary to avoid a death sentence. In cases where the defense chooses not to pay that price, the larger panel size can be preserved only by declining to challenge the biased member, thereby compromising the system's impartiality and reliability. Additionally, allowing the variable court-martial panel size to influence the outcome of capital cases introduces an arbitrary and irrational factor into the military death penalty sentencing scheme.

This article reviews the historical development of the current court-martial-panel size rules, followed by an examination of the law governing jury size in civilian criminal justice systems. This article then presents an overview of military death penalty procedures and examines the constitutionality of trying capital courts-martial before panels with fewer than twelve members. After analyzing the constitutionality of trying capital courts-martial before panels with no fixed size, this article concludes with

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3. In 29 states and in federal Article III courts, capital defendants have the right to have their sentence determined by juries. ARK. CODE ANN. § 5-4-602 (Michie 1997); CAL. PENAL CODE § 190.4(2) (West 1988); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1998); GA. CODE ANN. § 17-10-2(c) (1997); 720 ILL. COMP. STAT. ANN. 5/9-1(d) (West Supp. 1998); KAN. STAT. ANN. § 21-4624(e) (1995); KY. REV. STAT. ANN. § 532.025 (Banks-Baldwin 1998); LA. CODE CRIM. PRO. ANN. § 905.1 (West 1997); MD. ANN. CODE OF 1957 art. 27 § 413(b) (1996); MISS. CODE ANN. § 99-19-101 (1994); MO. ANN. STAT. §§ 565.006, 565.030 (West Supp. 1998); NEV. REV. STAT. ANN. § 175.552 (Michie 1997); N.H. REV. STAT. ANN. § 630.5(II) (1996); N.J. STAT. ANN. 2C:11-3 (West Supp. 1998); N.M. STAT. ANN. § 31-20-A-1 (Michie 1994); N.Y. CRIM. PRO. LAW § 400.27 (McKinney 1996); N.C. GEN. STAT. § 15A-2000 (1997); OHIO REV. CODE ANN. § 2929.022 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1998); OR. REV. STAT. § 163.150 (1997); PA. STAT. ANN. tit. 42 § 9711 (West 1982); S.C. CODE ANN. § 16-30-20 (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 23A-27A-2 (Michie Supp. 1997); TENN. CODE ANN. § 40-35-203(c) (1997); TEX. CRIM. P. CODE ANN. § 37.071 (West Supp. 1998); UTAH CODE ANN. § 76-3-207 (Supp. 1997); VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998); WASH. REV. CODE ANN. § 10.95.050(2) (West 1990); WYO. STAT. ANN. § 6-2-102 (Michie 1997); 18 U.S.C.A. § 3593(b) (West Supp. 1998). States with jury sentencing and the federal government account for 2625 of the inmates on death row. *See generally* DEATH ROW, U.S.A., *supra* note 2. "[E]very state that delegates capital sentencing decisions to juries uses twelve person juries for this purpose and allows the return of death verdicts only with the jurors' unanimous consent." Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 644 (1989). Federal criminal juries also consist of twelve members and require unanimity for a verdict. FED. R. CRIM. P. 23(b), 31.

a discussion of potential means to bring the military's death penalty system into closer alignment with its civilian counterparts.

II. Court-Martial Panel Size: An Overview

Supreme Court case law indicates that history is a key factor in evaluating the constitutionality of military justice procedures.[11] Accordingly, a legal analysis of capital court-martial panel size should begin with a historical review.

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4. In Alabama, Delaware, Florida, and Indiana, the jury makes a recommendation, but the judge decides whether to impose a death sentence. ALA. CODE § 13A-5-46 (1994); DEL. CODE ANN. tit. 11, § 4209(d) (1998); FLA. STAT. ANN. § 921.141 (West 1998); IND. CODE ANN. § 35-50-2-9(e)-(g) (Michie Supp. 1998). In Arizona, Idaho, Montana, and Nebraska, once a defendant is convicted of a capital offense, the judge determines whether to impose a death sentence without any jury input. ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 1997); IDAHO CODE § 19-2515 (1997); MONTANA CODE ANN. § 46-18-301 (1997); NEB. REV. STAT. ANN. § 29-2520 (1995). In Colorado, the death penalty sentencing power is given to three-judge panels. COLO. REV. STAT. ANN. § 16-11-103 (West 1998). The nine jurisdictions where only judges possess the authority to impose death sentences account for 754 of the United States' death row inmates. *See generally* DEATH ROW, U.S.A., *supra* note 2. The Supreme Court has held that the "Constitution permits the trial judge, acting alone, to impose a capital sentence." Harris v. Alabama, 513 U.S. 504, 515 (1995). The Court has even upheld the constitutionality of a judge imposing a death sentence against the jury's recommendation. *Id.*; Spaziano v. Florida, 468 U.S. 447 (1984). *See generally* Michael Mello & Ruthann Robson, *Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 21 (1985). Even in these systems that allow judges to impose a death sentence, however, capital defendants are entitled to have their guilt or innocence decided by unanimous twelve-member juries. ALA. CONST. art. I, § 11 (12-member juries); ALA. R. CRIM. P. 23.1 (unanimity requirement); ARIZ. REV. STAT. ANN. § 21-102A (12-member juries in capital cases; unanimity requirement); COLO. CONST. art. 2, § 23 (12-member juries); COLO. REV. STAT. ANN. § 16-10-108 (unanimity requirement); DEL. CT. CRIM. R. 223(b) (12-member juries); DEL. CT. CRIM. R. 31(a) (unanimity requirement); FLA. STAT. ANN. § 913.10 (12-member juries in capital cases); FLA. R. CRIM. PRO. 3.440 (unanimity requirement); IND. CONST. art. I, § 7; State v. Scheminisky, 174 P. 611 (Ind. 1918) (interpreting the state constitution to require 12-member juries reaching a unanimous verdict in felony cases); IND. CODE ANN. § 35-37-1-1 (1998) (12-member juries); Brown v. State, 457 N.E.2d 179, 180 (Ind. 1983) (unanimity requirement); MONT. CODE ANN. § 3-15-106 (12-member juries); MONT. CONST. art. II, § 26 (unanimity requirement); NEB. CONST. art. I, § 6 (12-member juries and unanimity requirement for felony cases).

A. The Historical Development of Court-Martial Panel Size

1. The U.S. Army's Original Practice

Before Congress adopted the Uniform Code of Military Justice (UCMJ) in 1950, separate laws governed Army and Navy courts-martial.[12]

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5. Lance Corporal Wade Walker was sentenced to death by a ten-member panel. Record, United States v. Walker (No. 95-01607) (on file with Navy-Marine Corps Appellate Defense Division, Washington, D.C.). Private Dwight Loving, Lance Corporal Kenneth Parker, and Senior Airman Simoy were sentenced to death by eight-member panels. United States v. Loving, 41 M.J. 213, 310 (1994) (Sullivan, C.J., concurring), *aff'd*, 517 U.S. 748 (1996); Record, United States v. Parker (No. 95-01500) (on file with Navy-Marine Corps Court of Criminal Appeals, Washington, D.C.); United States v. Simoy, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd*, ___ M.J. ___, No. 97-7001/AF (Oct. 20, 1998) (setting aside the death sentence and authorizing a rehearing on the sentence). Sergeant James Murphy and Specialist Ronald Gray were sentenced to death by six-member panels. Record, United States v. Murphy, (No. ACMR 8702873) (on file with Army Defense Appellate Division, Falls Church, Va.); Record, United States v. Gray (No. ACMR 8800807) (on file with Army Defense Appellate Division, Falls Church, Va.). The two most recent courts-martial to impose death sentences, those trying Army Sergeant William Kreutzer and Marine Sergeant Jessie Quintanilla, both had twelve-member panels. Record, United States v. Kreutzer (No. ARMY 9601044) (on file with Army Court of Criminal Appeals, Falls Church, Va.); Darlene Himmelspach, *Marine Sergeant Is Sentenced to Death*, SAN DIEGO UNION-TRIBUNE, Dec. 6, 1996.

6. *See* UCMJ art. 18, art. 16(1) (West 1998).

7. *See*, *e.g.*, Weiss v. United States, 510 U.S. 163 (1994) (upholding the lack of fixed terms of office for military trial and appellate judges); Parker v. Levy, 417 U.S. 733 (1974) (holding that military criminal statutes need not be as precise as civilian criminal statutes). *See also Spaziano*, 426 U.S. at 464 (noting that the "Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws").

8. In 1994, the Court of Military Appeals was renamed the CAAF, and the four Courts of Military Review were renamed Courts of Criminal Appeals. Nat'l Defense Authorization Act for 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831. This article will refer to the courts by their names at the time of their relevant decisions.

9. United States v. Loving, 41 M.J. 213, 287 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996); United States v. Curtis, 32 M.J. 252, 267-68 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991).

10. *See infra* note 154 and accompanying text.

11. Weiss v. United States, 510 U.S. 163, 177-78 (1994). The Supreme Court indicated, "We do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today." *Id.* at 177. Nevertheless, history "is a factor that must be weighed" in considering the constitutionality of a challenged military justice practice. *Id.* at 177-78.

12. *See* WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 4-5 (1973) ("Up until the beginning of the Korean War, the United States had always operated two distinct court-martial systems, the Army's and the Navy's.").

The 1775 Articles of War that governed the Continental Army required that general courts-martial consist of thirteen officers.[13] While the 1775 Articles of War did not set out the vote necessary to adjudge a death sentence,[14] in 1776 the Articles of War were amended to require a two-thirds vote for capital sentences.[15]

In the wake of the Revolutionary War, the Army retained a small force of less than one thousand soldiers.[16] The scarcity of officers in the post-war Army[17] made convening thirteen-member courts-martial impossible, leading Congress to revise the court-martial panel size requirement in 1786.[18] Congress authorized general courts-martial with as few as five members, though the legislation required that thirteen-member courts-martial be convened where that many officers could be assembled "without manifest injury to the service."[19] Following the Constitution's adoption, Congress reenacted the 1786 requirements.[20]

The "manifest injury" standard initially proved significant in capital cases. In 1819, Attorney General William Wirt delivered an opinion to Secretary of War John C. Calhoun concerning a five-member court-martial

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13. Articles of War of June 30, 1775, art. 33, 2 J. CONT. CONG. 111, 117 (1775). Colonel Wiener notes that the requirement for 13-member courts-martial "went back at least to 1666, it was inferentially retained in the First Mutiny Act, and it was specifically set forth in every later set of Articles of War, both English and American." Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 8 (1989).

14. *See generally* Articles of War of June 30, 1775, *supra* note 13; *see also* Howard C. Cohen, *The Two-Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 CAL. W.L. REV. 9, 30 (1983).

15. Articles of War of Sept. 20, 1776, § 14, art. 5, 5 J. CONT. CONG. 788-89 (1776). The 1776 revision included a total of fourteen capital offenses. Keith J. Allred, Comment, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 NAV. L. REV. 153, 158 (1986). General Washington's view that the 1775 Articles of War were insufficient to maintain discipline led to the 1776 revision. Articles of War of Sept. 20, 1776, *supra*, at 670-71 n.2 (1776). John Adams, the principal author of the 1776 Articles of War, modeled them after the British Articles of War. *Id.; see also* GEORGE B. DAVIS, MILITARY LAW OF THE UNITED STATES 340-41 (3d ed. 1913) (concluding that the American Articles of War were based on the 1774 version of the British Articles of War). *See* Allred, *supra*, at 158-59 (discussing 18th Century British court-martial procedures).

16. In 1789, the U.S. Army numbered 672 soldiers. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 9 (1958). By 1794, however, the Army had expanded to 3692 soldiers. *Id.*

17. One historian reports that in 1786, the Army contained fewer than 40 officers. RICHARD KOHN, EAGLE AND SWORD 70 (1975).

that had imposed a death sentence for desertion.[21] In an early application of the "death is different" principle,[22] Attorney General Wirt wrote:

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18. Articles of May 31, 1786, 30 J. CONT. CONG. 316 (1786). The legislation's preamble noted:

> [C]rimes may be committed by officers and soldiers, serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and Articles of War, in consequence of which Criminals may escape punishment, to the great injury of the discipline of the troops and the public service.

Id.

Ironically, the Continental Congress's motivation for adopting the reduction in court-martial size appears to be a case in which two death sentences were imposed in violation of the existing size requirement. Despite the requirement for thirteen-member general courts-martial, a five-member court sitting at Fort McIntosh in Western Pennsylvania convicted two soldiers of desertion and sentenced them to death. Articles of War of Sept. 20, 1776, *supra* note 15, at 119, 123. The two prisoners were held in irons while the fort's commanding officer, Major John Palsgrave Wyllys, awaited permission from the War Office to carry out the executions. *Id.* at 119. The death sentences proved to be a poor deterrent. Shortly after the sentences were adjudged, three additional soldiers deserted. *Id.* at 119-20. When these three soldiers were recaptured, Major Wyllys ordered their immediate execution. *Id.* at 120. Secretary at War Henry Knox found the five-member general court-martial to be illegal and ordered the two initial deserters' release. *Id.* at 123. Nevertheless, upon informing the Continental Congress of this episode, Secretary Knox contended that "the small number of troops at present in the service of the United States, and their dispersed situation, render it difficult, and almost impossible to form a general court-martial, of the numbers required by the Articles of War; therefore desertion and other capital crimes may be committed without its being practicable to inflict legally the highest degree of punishment provided by the laws." *Id.* at 120. On 27 March 1786, the Continental Congress adopted a resolution ratifying Secretary Knox's finding that the initial court-martial was illegal; the Continental Congress also ordered the arrest of Major Wyllys. *Id.* at 136-37. Four days later, the Continental Congress adopted legislation authorizing general courts-martial consisting of five to thirteen members. *Id.* at 316. The Continental Congress later agreed to Secretary Knox's recommendation that Major Wyllys be released from arrest because his conduct arose from an urgent need to stop desertions that made his actions "justifiable on military and political principles." Articles of May 31, 1786, *supra* note 18, at 433-35. Secretary Knox noted, however, the possibility that the state of Pennsylvania might take action against Major Wyllys. *Id.* at 435. In 1790, Major Wyllys was killed in battle. Wiener, *supra* note 13, at 8 n.39.

19. Articles of May 31, 1786, *supra* note 18, at 316.

20. Act of May 31, 1789, § 4, 1 Stat. 95, 96. *See also* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96; Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121; Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432; Act of May 30, 1796, ch. 39, § 22, 1 Stat. 486; Act of March 2, 1799, ch. 31, § 4, 1 Stat. 725-26.

> This being a case . . . of life and death, I beg leave to recall to your recollection, sir, that, by the 64th article of the Rules and Articles of War, it is required that general courts-martial shall not consist of less than thirteen, where that number can be convened *without manifest injury to the service*. The court in the case of Williamson having consisted of *five* commissioned officers only, was not a legal court if *thirteen* could have been convened without manifest injury to the service. The phrase, you will observe, is not "where that number (thirteen) can be *conveniently* convened," but where they can be convened *at all*, not only without *probable* injury, but without *manifest* injury to the service. It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service*. And if a smaller number act without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder.[23]

During the early 1800s, convening authorities regularly appointed supernumaries to thirteen-member courts.[24] These supernumaries would take the place of members who were absent or who were removed by successful challenges for cause.[25] Thus, as a matter of practice, during this era court-martial panels in capital cases would consist of thirteen members, with nine votes necessary to impose a death sentence.

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21. 1 Op. Att'y Gen. 296 (1819). The accused, Private Peter Williamson, pled guilty to desertion. The court-martial originally sentenced him to be confined at hard labor with a ball and chain attached to his leg for the remainder of his enlistment. The day after imposing this sentence, however, the court-martial reconsidered and condemned Private Williamson to death by firing squad. *Id.* at 297. Attorney General Wirt opined that the court-martial did not exceed its power when it altered the sentence. *Id.* at 297-99.

22. The Supreme Court has repeatedly emphasized that because "death is qualitatively different from a sentence of imprisonment, however long, . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). In recognition of this principle, the phrase "death is different" is frequently invoked to express the necessity for heightened procedural protections in death penalty cases. *See generally* Deborah W. Denno, *Death Is Different and Other Twists of Fate*, 83 J. CRIM L. & CRIMINOLOGY 437, 439-40 (1992).

23. 1 Op. Att'y Gen. at 299-300. "[A]s a matter of legal propriety," Attorney General Wirt recommended that "in every case of life and death at least, the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of thirteen before he gives his sanction to a sentence of death by a smaller number." *Id*. at 300.

The Supreme Court, however, soon removed the "manifest injury" requirement. In 1827, Justice Story wrote for a unanimous Court that this requirement "is merely directory to the officer appointing the court."[26] Justice Story concluded that the convening authority's "discretion as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive."[27] Thus, after 1827, the "manifest injury" standard had little practical effect.[28]

2. The U.S. Navy's Original Practice

The Rules for the Regulation of the Navy of the United Colonies of North America, adopted in 1775, required naval courts-martial to consist of at least six members.[29] That size requirement was reduced in 1782, when

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24. *See* ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW, AND COURTS-MARTIAL, AS PRACTICED IN THE UNITED STATES OF AMERICA 10-12 (1809); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 79-80 (2d ed. 1920); WILLIAM C. DEHART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL 88-89 (1859). Colonel Winthrop notes, "Supernumaries are constantly detailed with general courts in the early Orders of the War Department . . . especially from 1809 to 1836." WINTHROP, *supra*, at 80 n.58. Colonel Winthrop, however, denounced the detailing of supernumaries as a "contravention of the Articles of War." *Id.* at 80. Writing in 1896, he noted that the practice "has been disused in our service for some fifty years." *Id.* Colonel Winthrop did note, however, that in "[a] comparatively recent, though isolated case," a Civil War general court-martial included "a supernumary, who, upon a vacancy occurring on the trial of an officer, took a seat as a member." *Id.* at 80 n.59.

25. Peremptory challenges did not exist at the time. In fact, peremptory challenges were first adopted for Army courts-martial in 1920, and for naval courts-martial in 1951. *Hearings on H.R. 2498 Before Subcomm. of the House Armed Services Comm.*, 81st Cong., 1027 (1949). *See also* H.R. REP. NO. 81-491, at 22 (1949); WINTHROP, *supra* note 24, at 206 (noting that "in the American military code only challenges for legal cause have ever been permitted"); DEHART, *supra* note 24, at 118 ("[P]eremptory challenges are not allowable by courts-martial because the interests and circumstances of the military service will not at all times permit an equal facility of replacing a member, as exists in the case of a challenged juror in civil courts. And therefore it is incumbent upon courts-martial, to see that *frivolous* causes of challenge are not too readily admitted.").

26. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

27. *Id.* at 21.

28. Colonel Winthrop noted that *Martin v. Mott* "settled the law on this point, and the question as to the legality of a court of less than thirteen members is not now raised in practice." WINTHROP, *supra* note 24, at 79 (footnote omitted) (citing 2 Op. Att'y Gen. 534, 535 (1832); 6 Op. Att'y Gen. 506, 510-11 (1854)).

29. These Rules for the Regulation of the Navy provided, "A court-martial shall consist of at least three Captains and three first lieutenants, with three Captains and three first lieutenants of Marines, if there shall be so many of the Marines then present, and the eldest Captain shall preside." 3 J. CONT. CONG. 382-83 (1775).

the Continental Congress allowed three-member naval courts-martial, but required five-member courts for capital cases.[30] The Continental Congress, however, provided no express guidance regarding the percentage of votes needed to convict or to impose any particular punishment.

Following the Revolutionary War, the American Navy disbanded.[31] The Navy was reborn in 1798 when, in the midst of French attacks on American merchant vessels trading with Britain,[32] Congress established the Department of the Navy.[33] The following year, Congress adopted Articles for the Government of the Navy.[34] These Articles followed the existing Army practice of requiring that general courts-martial consist of five to thirteen officers.[35] In 1800, Congress repealed the 1799 Articles and adopted more specific naval court-martial procedures.[36] While the 1800 Articles for the Better Government of the Navy continued to provide that five to thirteen

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30. 7 J. CONT. CONG. 392 (1782) ("[A] marine court of enquiry or court-martial for enquiring into or trying of all capital cases, shall consist of at least five commissioned navy and marine officers, two of whom shall be captains, and in all cases not capital it shall consist of three such officers, one of whom shall be a captain in the navy of the United States.").

31. In 1785, the United States sold off the last of its Revolutionary War ships, the frigate ALLIANCE. 1 OFFICE OF NAVAL RECORDS, NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE v (1935).

32. *See generally* JAMES M. MORRIS, HISTORY OF THE U.S. NAVY 25 (1993 ed.).

33. Act of April 30, 1798, ch. 35, 1 Stat. 553. In addition to creating the Department of the Navy, Congress authorized the seizure of armed French vessels. Act of May 28, 1798, ch. 48, 1 Stat. 561. The resulting military conflict, the Quasi-War, lasted from 1798 to 1801. *See generally* MICHAEL A. PALMER, STODDERT'S WAR: NAVAL OPERATIONS DURING THE QUASI-WAR WITH FRANCE, 1798-1801 (1987). One naval historian concluded that the Quasi-War provided the "first real test for the Federalist navy – a test that it passed with flying colors. Cruising mainly in the Caribbean (where most of the American shipping losses had occurred), the navy defeated two French frigates, captured over a hundred privateers, and recovered more than seventy American merchant vessels." DONALD R. HICKEY, THE WAR OF 1812 at 6-7 (1990).

34. Act of March 2, 1799, ch. 24, 1 Stat. 709. In 1797, Congress adopted legislation that authorized the President, "should he deem it expedient, to cause the frigates United States, Constitution, and Constellation, to be manned and employed." Act of July 1, 1797, ch. 7, § 1, 1 Stat. 523, 523-24. That same act provided:

> [T]he officers, non-commissioned officers, seamen, and marines, belonging to the Navy of the United States, shall be governed by the rules for the regulation of the navy heretofore established by resolution of Congress of the twenty-eighth of November, one thousand seven hundred and seventy-five, as far as the same may be applicable to the constitution and laws of the United States, or by such rules and articles as may hereafter by established.

Id. § 8, 1 Stat. at 525.

officers must sit on general courts-martial, Congress added a requirement that "as many officers shall be summoned on every such court as can be convened without injury to the service, so as not to exceed thirteen."[37] Congress also provided that naval courts-martial, like those in the Army, could adjudge a capital sentence only upon a two-thirds vote.[38]

The House of Representatives debate on the 1800 Navy legislation suggests that a majority believed the Constitution's jury trial guarantee did not constrain Congress when carrying out its constitutional authority to make rules for the government and regulation of the land and naval forces.[39] During the debate, John Randolph of Virginia moved that the legislation be sent back to the Committee of the Whole.

> He said he did this from impressions that some of the provisions of it were unconstitutional, men being to be tried, and suffer by the decision of a court martial, when the Constitution says, article 3, section 2: "The trial of all crimes, except in cases of impeachment, shall be by jury." And the amendments to the Constitution, article 7 [sic], says: "No person shall be held to

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35. Article 47 provided:

> No court-martial, to be held or appointed by virtue of this act, shall consist of more than thirteen, nor less than five persons, to be composed of such commanders of squadrons, captains and sea lieutenants, as are then and there present, and as are next in seniority to the officer who presides; but no lieutenant shall sit on a court-martial, held on a captain, or a junior lieutenant on that of a senior.

1 Stat. at 713.

36. Act of April 23, 1800, ch. 33, 2 Stat. 45.

37. *Id.* at 50 (discussing art. 35). This requirement persisted until the UCMJ's adoption. The naval services' equivalent of the *Manual for Courts-Martial* (*MCM*) during the pre-UCMJ period specifically directed that "[w]hen less than thirteen members are detailed on a general court-martial, the precept [the naval services' equivalent of the convening order] should specifically state that 'no other officer can be detailed without injury to the service.'" NAVAL COURTS & BOARDS " 345 (1937). The convening authority's certification, however, was not subject to review. In the wake of *Martin v. Mott*, Attorney General Roger Taney opined that the "injury to the service" standard "is merely directory of the officer appointing the court; and his decision as to whether that number can be convened without manifest injury to the service, being a matter submitted to his sound discretion, must be conclusive." 2 Op. Att'y Gen. 534, 535 (1832). *See supra* notes 26-28 and accompanying text.

38. Article 41, 2 Stat. at 51.

39. U.S. CONST., art. I, § 2, cl. 14.

> answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger"; this, he conceived, prevented Congress ordering any court-martial.
>
> Mr. [RANDOLPH] said he had no kind of objection to the bill, but he wished his scruples on these articles to be cleared up to him, or he must vote against it on the ground of unconstitutionality.
>
> Mr. [Josiah] PARKER [of Virginia] said he considered it indispensable that persons in the Navy, as had been always the case in the Army, should be tried for offences by court martial. He believed the objections were fully answered by that part of the Constitution, article 1, section 8: "Congress shall have power to make rules for the government and regulation of the land and naval forces." The "rules and regulations," he supposed to be everything that related to subordination, which he thought was borne out by the exception in the amendment mentioned by the gentleman.
>
> The motion to recommit was lost by a large majority.[40]

Thus, at a very early date, Congress implicitly rejected the view that the Constitution's jury trial guarantee applies to courts-martial. Sixty-six years later, the Supreme Court echoed that conclusion.[41]

B. Court-Martial Reform

While the law governing the Army's court-martial panel size and voting requirements would evolve over time, the law governing the Navy remained static.[42] The Navy's rules for capital courts-martial had little prac-

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40. 10 ANNALS OF CONG. 655-56 (1800).

41. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 107 (1866).

42. Aside from an 1850 law abolishing flogging, the only substantial pre-UCMJ revision of the Articles for the Government of the Navy occurred in 1862. *See* Act of Sept. 28, 1850, ch. 80, 9 Stat. 513, 515; Act of July 17, 1862, ch. 204, 12 Stat. 600. The 1862 amendments, however, did not affect the court-martial size or capital sentencing provisions. *See also* REVISED STATUTES, § 1624, art. 39 (1878) (codifying Articles for the Government of the Navy).

tical effect; no more than seventeen sailors and marines[43] have been executed in the Department of the Navy's history–none since 1849.[44] Throughout the Army's history, on the other hand, death sentences have been carried out frequently during wartime and occasionally in times of peace.[45]

Partly as a result of controversy created by a 1917 court-martial that resulted in thirteen African-American soldiers' execution a mere twelve days after their trial ended,[46] the Army's justice system underwent a substantial revision in the wake of World War I. This revision, which Congress enacted in 1920, eliminated the earlier provision that a general court-martial

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43. Congress established the Marine Corps and provided that Marines were subject to the Articles of War when ashore, and subject to the laws of naval discipline when aboard ships. Act of July 11, 1798, ch. 72, 1 Stat. 594. *See* 1 Op. Att'y Gen. 187 (1816); WINTHROP, *supra* note 24, at 97 (noting that the Marine Corps was subject to the Articles of War when detached for service with the Army).

44. *See generally* JAMES E. VALLE, ROCKS & SHOALS 102-42 (1980). The Navy's last execution occurred on 23 October 1849. Five members of the schooner EWING's crew had been sentenced to death for throwing a midshipman in command of a shore boat overboard, then rowing away in an attempt to desert to California's gold fields. At the last moment, the Pacific Squadron's commodore commuted three of the death sentences to one hundred lashes, loss of pay, and confinement at hard labor for the remainder of the sailors' enlistments. The remaining two sailors were hanged from the fore yardarm of the squadron's flagship. *See generally id.* at 105-08.

45. The Department of Justice reports that since 1930, the U.S. Army and Air Force carried out 160 executions. BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1979 at 9 n.12 (1980). Three of those executions were Air Force cases. Gary D. Null, *Air Force Executions*, THE REPORTER, March 1996, at 33. The Army has executed 157 soldiers since 1930, the most recent in 1961. BUREAU OF JUSTICE STATISTICS, *supra*, at 9 n.12. The majority of these Army executions, 142, occurred during World War II. Fred Hiatt, *Army Tribunal Overturned on Death Penalty*, WASH. POST, Oct. 12, 1983, at A4. The Army also executed 35 soldiers during World War I. J. Robert Lilly & J. Michael Thomson, *Executing U.S. Soldiers in England, World War II*, 37 BRIT. J. CRIMINOLOGY. 262, 277 (1997). Army documents indicate that the Union Army carried out 267 executions during the Civil War. JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920 at 204 (1990). One study, however, has indicated that the actual number of executions was greater than this official figure. ROBERT I. ALOTTA, CIVIL WAR JUSTICE: UNION ARMY EXECUTIONS UNDER LINCOLN 187 (1989) ("We can determine without a shadow of a doubt that at least 275 men were executed. Beyond that, it is only conjecture."). Thus, the Army has carried out at least 459 executions since the last Navy execution in 1849.

46. LINDLEY, *supra* note 45, at 20 n.42. The 13 executed soldiers were among 56 tried for offenses including murder and mutiny as a result of a race riot in Houston, Texas. *See generally id.* at 7-21. The court-martial, which was held in Fort Sam Houston's chapel, was the largest murder trial in U.S. history. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 at 125 (1975). *See generally* ROBERT V. HAYNES, A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917 (1976).

should consist of thirteen members where that number could be assembled without "manifest injury to the service."[47] The 1920 legislation stated instead that a general court-martial could consist of "any number of members not less than five."[48] The same statute increased the vote required for a death sentence from two-thirds to unanimous.[49] For any term of imprisonment exceeding ten years, the voting requirement was increased from the mere majority that had been required since 1775 to "three-fourths of all the members present."[50] For "all other convictions and sentences," the long-standing simple majority requirement was increased to two-thirds.[51] The 1921 *Manual for Courts-Martial* (*MCM*) expressed a preference for small court-martial panels, recommending that general courts-martial consist of no more than nine members.[52]

In 1948, Congress adopted the short-lived Elston Act,[53] which governed Army and Air Force[54] courts-martial until the UCMJ took effect in 1951. The Elston Act's most significant departure from previous practice was to allow, for the first time in U.S. military history, enlisted personnel to serve on courts-martial.[55] The Elston Act gave enlisted accused the right to require that at least one-third of the court-martial's members also be enlisted.[56]

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47. 30 J. CONT. CONG. 316 (1786). *See supra* note 19 and accompanying text.

48. Articles of War of June 4, 1920, ch. 227, 41 Stat. 787, 788.

49. *Id.* art. 43, 41 Stat. at 795-96.

50. *Id.*

51. *Id.*

52. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 7(a) n.1 (1921 ed.). The 1921 *MCM* explained that "it is not expected that appointing authorities will usually detail on a general court-martial many more members than required by the statute." *Id.*

53. Ch. 625, §§ 201-47, 62 Stat. 604, 627-44 (1948) (repealed by the UCMJ); *see generally* GENEROUS, *supra* note 12, at 23-33.

54. Dr. Generous notes that initially some uncertainty existed concerning the Elston Act's applicability to the Air Force. GENEROUS, *supra* note 12, at 31. He explains that President Truman signed the Elston Act into law on June 24, 1948, with an effective date of February 1, 1949. The day after signing the Elston Act, President Truman "signed the Air Force Military Justice Act, which extended the Articles of War to the newly created air service. This statute, which took effect immediately, spoke of 'laws now in effect.' But the laws then 'in effect' were the 1920 Articles of War, not the Elston Act." *Id.* In 1950, the United States Court of Appeals for the Fourth Circuit held that the Elston Act rather than the previous Articles of War applied to the Air Force. Stock v. Dep't of Air Force, 186 F.2d 968, 970-72 (4th Cir. 1950).

55. GENEROUS, *supra* note 12, at 24.

56. Ch. 625, § 203, 62 Stat. 604, 628 (1948).

C. The Uniform Code of Military Justice

The 1920 Army procedures served as the basis for the UCMJ's court-martial size and voting requirements.[57] Under the UCMJ, general courts-martial can consist of any number of members greater than four.[58] With the exception of spying in time of war, for which the death penalty is mandatory,[59] a two-thirds vote is necessary to convict.[60] The members' unanimous concurrence is required[61] to convict a service member of an offense for which death is a mandatory sentence, or to impose a death sentence where the accused is convicted of an offense for which the death penalty is authorized but not mandatory.[62] The UCMJ also included the Elston Act's provision giving enlisted accused the right to have enlisted personnel constitute at least one-third of the court-martial panel.[63] Although the UCMJ has undergone several revisions since its initial adoption, this basic structure remains largely unchanged.[64]

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57. S. REP. NO. 486, 81st Cong., 2d Sess., at 16 (1950). In 1950, naval law still precluded courts-martial with more than 13 members. The Senate Report tersely stated, "The maximum limits of the number of members is believed unnecessary." *Id.* Thus, Congress chose to adopt the procedures under which the Army had been operating since 1920. *See supra* notes 48-51 and accompanying text.

58. UCMJ art. 16(1)(A) (West 1998).

59. UCMJ art. 106. The Supreme Court has held that in civilian systems, mandatory death penalties are unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion). This has led one commentator to opine that Article 106's mandatory death sentence for spying during time of war is unconstitutional. David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of its Mandatory Death Penalty*, 127 MIL. L. REV. 1 (1990).

60. UCMJ art. 52(a)(2).

61. UCMJ art. 52(a)(1), (b)(1).

62. A total of 15 UCMJ offenses carry a death sentence. UCMJ art. 85 (desertion in time of war), UCMJ art. 90 (assaulting or willfully disobeying superior commissioned officer in time of war), UCMJ art. 94 (mutiny in time of war), UCMJ art. 99 (misbehavior before the enemy), UCMJ art. 100 (subordinate compelling surrender), UCMJ art. 101 (improper use of countersign), UCMJ art. 102 (forcing a safeguard), UCMJ art. 104 (aiding the enemy), UCMJ art. 106 (spying, for which the death penalty is mandatory), UCMJ art. 106a (espionage), UCMJ art. 110 (willful hazarding of a vessel), UCMJ art. 113 (misbehavior of sentinel in time of war), UCMJ art. 118(1) (premeditated murder), UCMJ art. 118(4) (felony murder), UCMJ art. 120 (rape).

63. UCMJ art. 25(c).

64. The only significant change to the military justice system's capital procedures as originally promulgated in 1984 is the addition of a requirement that the members unanimously convict the accused of a capital offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Rule for Courts-Martial 1004(a)(2) (1995) [hereinafter MCM]. Congress added this provision to the *MCM* in 1986. *See* MCM, *supra*, 1004(a)(2) analysis. Before this change, a court-martial could impose the death penalty only with the members' unanimous concurrence, but the initial conviction did not require unanimity.

Before 1968, all courts-martial were tried before a panel of members. The Military Justice Act of 1968, which established the position of military judge, allowed the accused the right to elect to be tried by a military judge alone.[65] The right to trial by military judge alone,[66] however, does not apply in capital cases; a military capital case may be tried only before a panel of members.[67]

No special provisions govern the selection of members in capital cases. As in any other general court-martial case, the convening authority[68] is free to detail any number of members greater than four.[69] Counsel for both the government and the defense may make an unlimited number of challenges for cause, and both the government and defense may also exercise one peremptory challenge.[70] If fewer than five members remain after counsel exercise their challenges, the convening authority must appoint additional members to the court-martial.[71]

Several UCMJ provisions affect a capital court-martial's panel size. First, the convening authority has the discretion to decide how many members to detail initially. Second, if an enlisted accused exercises his right to enlisted members, the convening authority must detail additional mem-

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65. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1355 (codified at UCMJ art. 16(1)(B), 2(C) (West 1998)). *See generally* JONATHAN LURIE, PURSUING MILITARY JUSTICE 197-99 (1998).

66. The Court of Military Appeals has characterized the accused's option of electing trial by a military judge alone as "a right." United States v. Sherrod, 26 M.J. 30, 32 (C.M.A. 1988).

67. UCMJ art. 18 (West 1998); MCM, *supra* note 64, R.C.M. 501(a)(1)(A); *Id.* R.C.M. 201(f)(1)(C). The Court of Military Appeals rejected a constitutional challenge to the requirement that capital courts-martial be tried before a panel of members. United States v. Matthews, 16 M.J. 354, 363 (C.M.A. 1983).

68. The convening authority's selection of court-martial members is one of the most frequently criticized aspects of the military justice system. Court-martial members are picked by the same officer who decided to refer the case to a court-martial, rather than being chosen on a random basis. For examples of criticism of the convening authority's selection of court-martial members, see United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring) (contending that the convening authority's selection of court-martial members "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack"); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 19-20 (1991); 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-31.00 (1991) ("Arguably, the most critical and least necessary vestige of the historical origins of the military criminal legal system is the personal appointment of the members by the convening authority."); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992); Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343 (1978).

bers, while perhaps removing some of the originally detailed officer members. Third, through challenges for cause and peremptory challenges, the trial counsel, defense counsel, and military judge also affect the panel size. Finally, if after challenges the total number of members falls below five or, if applicable, the proportion of enlisted members falls below one-third, the convening authority will appoint additional members to the court, and another round of challenges will follow. As a result, court-martial panel size can and does vary considerably from case to case.

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69. The European Court of Human Rights concluded that the British military justice system's similar practice of allowing the "convening officer" to hand-pick court-martial members violates the European Convention on Human Rights' requirement for "independent and impartial" criminal tribunals. Findlay v. United Kingdom, 1997 Eur. Ct. H.R. 263 ("In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court-martial which decided Mr. Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr. Findlay's doubts about the tribunal's independence and impartiality could be objectively justified."). The British Parliament has since adopted a substantial revision of the British court-martial system that gives a neutral "court administration officer" the power to select court-martial members. Armed Forces Act, 1996, ch. 46 (Eng.). Minister of Defence Nicholas Soames explained:

> The main features of the changes are as follows: there will be changes in the formal part played in court-martial proceedings by the military chain of command. Its functions, such as settling charges, responsibility for the prosecution and appointing court-martial members, will remain in the services but generally be independent of the chain of command; there will be an enhancement of the part played at court-martial by the judge advocate, who is similar in many ways to a judge in a civilian court; the right for defendants to choose to have their cases tried by court-martial, rather than dealt with summarily by the commanding officer, will be extended; access to the courts-martial appeal court, which is composed of senior civilian judges, will be extended, to enable it to hear appeals against sentence as well as against conviction.

268 PARL. DEB., H.C. (6th ser.) w344-45 (1995). Defence Minister Soames added, "The court-martial system has served the services very well over the years. We believe that the proposals represent a major improvement to the present system and will enable it to continue to fulfill its purpose for a long time to come." *Id.* at w345. *See* J. W. Rant, *The British Court-Martial System: It Ain't Broke, But It Needs Fixing*, 152 MIL. L. REV. 179 (1996) (commentary by the Judge Advocate General of the Armed Forces of the United Kingdom on the European Commission of Human Rights report on *Findlay v. United Kingdom* and the resulting changes in the British court-martial system).

70. MCM, *supra* note 64, R.C.M. 912. In a capital case tried in a United States district court, both the prosecution and the defense are entitled to 20 peremptory challenges. FED. R. CRIM. P. 24(b).

71. MCM, *supra* note 64, R.C.M. 505(c)(2)(B).

III. Jury Size and Voting Requirements

The Sixth Amendment provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[72] As originally drafted by James Madison and as originally passed by the House of Representatives, the Bill of Rights jury provision contained an express exemption for "cases arising in the land and naval forces."[73] While the House's original version of the Bill of Rights combined the petit and grand jury guarantees into one amendment, the Senate moved the grand jury provision to a different amendment and omitted the petit jury provisions altogether.[74] The exemption for cases arising in the land and naval forces moved, along with the grand jury provision, into the Senate's Seventh Article,[75] which ultimately became the Fifth Amendment.[76]

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72. U.S. CONST. amend. VI.

73. As originally proposed by Madison, what became the Bill of Rights included the following provision:

> The trial of all crimes (except in cases of impeachment, and cases arising in the land and naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all cases punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same state, as near as may be to the seat of the offense.
>
> In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

1 ANNALS OF CONG. 452-53 (Joseph Gales & William W. Seaton eds., 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS § 12.1.1.1.a (Neil H. Cogan ed. 1997) [hereinafter Cogan].

The version that ultimately emerged from the House of Representatives was almost identical to Madison's original. Cogan, *supra*, § 12.1.1.14; *see also* 1 ANNALS OF CONG. 808-09.

74. Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 312 (1957) (noting that "[a]s the amendments stood at this point, there was no petit-jury guarantee and no mention of military cases").

75. Cogan, *supra* note 73, § 7.1.1.14; *see* 1 ANNALS OF CONG. 80.

In order to resolve differences in the House of Representatives' and the Senate's competing drafts of the Bill of Rights,[77] the two chambers appointed a Conference Committee.[78] That Committee revised and adopted a version of the Eighth Article that included a right to an impartial jury but without any reference to courts-martial.[79] The House and Senate adopted this version, which was to become the Sixth Amendment.[80]

This history led one commentator to speculate that the Framers' omission of a military justice exemption to the Sixth Amendment right to trial by jury was "merely an oversight."[81] Another commentator, Colonel Frederick Wiener, on the other hand, maintains that the Framers did not intend any portion of the Sixth Amendment to apply to courts-martial,[82] thus making any specific exemption for the jury trial right unnecessary. Regardless of the correct historical explanation, the Supreme Court has repeatedly indicated that the constitutional right to trial by jury does not apply to courts-

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76. The difference in numbering resulted from the first two proposed amendments' failure to become part of the Bill of Rights. Congress never ratified the first proposed amendment, which dealt with the House of Representatives' size. Cogan, *supra* note 73, at 707 n.1. The second proposed amendment, which limited the manner by which congressional pay could be increased, was ratified as the twenty-seventh amendment in 1992, more than 200 years after it was originally proposed. *See generally* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORD. L. REV. 497 (1992).

77. Among the primary differences between the House and the Senate was the House's desire for a petit jury guarantee and the Senate's objection to the House proposal's limitations on the geographic area from which the jury could be drawn. Eugene M. Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 409 (1972).

78. Cogan, *supra* note 73, §§ 12.1.1.21, 12.1.1.22; *see* 1 ANNALS OF CONG. 85-86.

79. Cogan, *supra* note 73, § 12.1.1.23.

80. *Id.* §§ 12.1.1.24, 12.1.1.27; *see* 1 ANNALS OF CONG. 948, 90.

81. Van Loan, *supra* note 77, at 411. Van Loan explains:

> By the time the conference committee had been appointed on September 21, 1789, the members of Congress had become weary of their labors and were anxious to return home. Passage of amendments to the Constitution was a major obstacle to adjournment. . . . Perhaps in its haste Congress neglected to notice the ambiguity it had left in regard to the jury and the military.

Id. See Henderson, *supra* note 74, at 305 (opining that the Framers' "failure specifically to write the [court-martial] exception into the sixth amendment was the result of oversight or poor draftsmanship"); *id.* at 301 (opining that "[t]he most logical explanation for the failure to mention courts-martial in [Article III's jury] clause is that it was the result of oversight").

82. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 280-84 (1958).

martial.[83] The military justice system's exemption from the Sixth Amendment right to trial by jury is significant because if the right did apply, the current statutory scheme under which general courts-martial operate would be unconstitutional.

The Burger Court paid several visits to the question of panel size and voting requirements. The Court's first foray into this area came in its 1970 *Williams v. Florida* decision,[84] which upheld Florida's[85] use of six-member juries in non-capital felony cases. The Court appeared to base its holding on its view of how juries function, reasoning:

> To be sure, the number [of jurors] should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve, particularly if the requirement of unanimity is retained.[86]

The *Williams* decision provoked an onslaught of criticism from the academic community, as several professors methodically attacked the empirical judgments and the empirical studies underlying the decision.[87]

In 1972, the Supreme Court started down a parallel track when it held that Oregon's system of allowing a conviction upon a twelve-member

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83. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 261 (1969); Solorio v. United States, 483 U.S. 435 (1987); Reid v. Covert, 354 U.S. 1, 37 n.68 (1957) (plurality opinion); Welchel v. McDonald, 340 U.S. 122, 127 (1950); *Ex parte* Quirin, 317 U.S. 1, 39-43 (1942); Kahn v. Anderson, 255 U.S. 1, 8 (1921); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 107 (1866). Commentators have observed, however, that all of the Supreme Court's pronouncements on this issue have been dicta. Comment, Frank J. Chmelik, *The Military Justice System and the Right to Trial by Jury: Size and Voting Requirements of the General Courts-Martial for Service Connected Civilian Offenses*, 8 HASTINGS CONST. L.Q. 617, 639 (1981); Lamb, *supra* note 68, at 132. *See also* United States v. Kemp, 46 C.M.R. 152, 154 (1973) ("[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial.").

84. 399 U.S. 78 (1970).

85. The Sixth Amendment jury trial guarantee is a fundamental right that applies to the states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

86. *Williams*, 399 U.S. at 100. *Williams* overruled several previous cases holding that the Constitution compels 12 member juries. *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 349 (1898); Maxwell v. Dow, 176 U.S. 581 (1900).

jury's ten-to-two vote was constitutionally permissible.[88] The Court also upheld Louisiana's system of allowing a twelve-member jury to convict in a felony case upon a nine-to-three vote.[89]

Finally, in 1978, the Supreme Court drew a line that states could not cross. *Ballew v. Georgia*[90] held that Georgia's use of five-member juries in criminal cases violated the Sixth Amendment. The following year, in *Burch v. Louisiana*,[91] the Supreme Court held that Louisiana also violated the Sixth Amendment by allowing a six-member jury to reach a verdict by a five-to-one vote.

While the *Ballew*/*Burch* line of cases allowed departure from the traditional twelve-member jury deciding guilt or innocence by a unanimous vote, none of the Supreme Court's jury size cases involved a capital trial. The Supreme Court has never had occasion to consider the constitutionality of fewer than twelve jurors imposing a death sentence because, in fact, no state has adopted such a system.[92] The only jurisdiction in the United States where fewer than twelve lay members can impose a death sentence is the military justice system.

Surprisingly, the CAAF has never discussed the *Ballew*/*Burch* line of cases' applicability to courts-martial.[93] The Tenth Circuit Court of Appeals[94] and two of the military justice system's intermediate appellate courts,[95] on the other hand, have held that these cases do not apply to the military justice system.

Shortly after Congress provided the Supreme Court with direct certiorari jurisdiction over military justice cases,[96] the Court showed some interest in this issue. *Hutchinson v. United States*, the first case in which a writ of certiorari was sought under the authority created by the Military Justice Act of 1983,[97] was a capital case until the Court of Military Appeals set aside the death penalty.[98] Lance Corporal Hutchinson's certiorari petition asked

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87. *See, e.g.*, Peter W. Sperlich, . . . *And Then There Were Six: The Decline of the American Jury*, 63 JUDICATURE 262 (Dec.-Jan. 1980); Michael Saks, *Ignorance of Science Is No Excuse*, 10 TRIAL 18 (1974); Hans Zeisel, . . . *And Then There Were None: Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1974).

88. Apodaca v. Oregon, 406 U.S. 404 (1972).

89. Johnson v. Louisiana, 406 U.S. 356 (1972).

90. 435 U.S. 223 (1978).

91. 441 U.S. 130 (1979).

92. *See* Williams v. Florida, 399 U.S. 78, 103 (1970) (noting that "no state provides for less than 12 jurors" in capital cases).

the Supreme Court to review whether the Fifth Amendment Due Process Clause prohibited convictions for "capital offenses by a two-thirds vote of a court-martial composed of only six members."[99] At Justice Brennan's

93. The CAAF exercises discretionary review except in death penalty cases, where it must review any case in which a Court of Criminal Appeals has affirmed a death sentence, and cases where one of the judge advocates general certifies an issue to the court. UCMJ art. 67 (West 1998). In 1978, the Court of Military Appeals exercised its discretionary jurisdiction to grant review of the court-martial panel size/voting requirement issue. United States v. Lamela, 6 M.J. 11 (C.M.A. 1978). However, before resolving the issue, the court vacated the grant. 6 M.J. 32 (C.M.A. 1978).

In a 1984 death penalty opinion, the court implicitly rejected the *Ballew*/*Burch* issue. United States v. Hutchinson, 18 M.J. 281 (C.M.A. 1984) (summary disposition). In *Hutchinson*, the defense argued that "the appellant was denied due process and equal protection when he was convicted by a nonunanimous vote of a panel composed of only six members." United States v. Hutchinson, Mandatory Brief on Behalf of Accused at 50 (capitalization omitted). Because death penalty cases fall within the Court's mandatory jurisdiction, Lance Corporal Hutchinson could raise the issue without the court granting review. *See* UCMJ art. 67(a)(1). While setting aside Lance Corporal Hutchinson's death sentence on another ground, the court indicated that it found the remaining issues raised in the brief to be "without merit." *Hutchinson*, 18 M.J. at 281.

In a 1976 decision, the court cited *Apodaca v. Oregon*, 406 U.S. 404 (1972), and suggested that "the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process." United States v. McCarthy, 2 M.J. 26, 29 n.3 (C.M.A. 1976). In a 1982 concurring opinion, however, Chief Judge Everett stated, without explanation, that "I am satisfied that [the denial of a motion based on *Burch* and *Ballew* does] not require reversal of appellant's conviction." United States v. Brown, 13 M.J. 381, 381 (C.M.A. 1982) (summary disposition) (Everett, C.J., concurring in the result). *See also* 1 GILLIGAN & LEDERER, *supra* note 68, § 15-40.00 (discussing *Ballew v. Georgia*'s applicability to the military justice system).

94. Mendrano v. Smith, 797 F.2d 1538, 1546-47 (10th Cir. 1986); Dodson v. Zelez, 917 F.2d 1250, 1261 (10th Cir. 1990) (indicating that *Ballew* and *Burch* "are not applicable to military courts-martial").

95. United States v. Hensler, 40 M.J. 892, 900 (N.M.C.M.R. 1994), *aff'd on other grounds*, 44 M.J. 184 (1996); United States v. Rojas, 15 M.J. 902, 919 (N.M.C.M.R. 1983), *set aside on other grounds*, 17 M.J. 154 (C.M.A. 1984) (death penalty case with seven-member panel); United States v. Seivers, 9 M.J. 612 (A.C.M.R. 1980), *aff'd on other grounds*, 9 M.J. 397 (C.M.A. 1980) (summary disposition); United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980), *aff'd*, 9 M.J. 417 (C.M.A. 1980) (summary disposition); United States v. Guilford, 8 M.J. 598, 601-02 (A.C.M.R. 1979); United States v. Corl, 6 M.J. 914, 915 (N.C.M.R. 1979), *aff'd on other grounds*, 8 M.J. 47 (C.M.A. 1979) (summary disposition); United States v. Meckler, 6 M.J. 779 (A.C.M.R. 1978); United States v. Wolff, 5 M.J. 923, 924-25 (N.C.M.R. 1978); United States v. Montgomery, 5 M.J. 832, 834 (A.C.M.R. 1978), *petition denied*, 6 M.J. 89 (C.M.A. 1978). One commentator has argued that the Supreme Court's jury size and voting cases should apply to courts-martial. Cohen, *supra* note 14, at 9; *see also* Rubson Ho, *A World that Has Walls: A Charter Analysis of Military Tribunals*, 54 U. TORONTO FAC. L. REV. 149, 177-79 (1996) (criticizing the trial of Canadian courts-martial before panels with fewer than 12 members).

request, the case was put on the Supreme Court's "discuss list."[100] The Court, however, denied certiorari.[101]

Lance Corporal Hutchinson's petition marked the high point of the Supreme Court's interest in the applicability of its jury size precedent to courts-martial. Two subsequent certiorari petitions that raised the issue were denied without being included on the Court's discuss list.[102] While no definitive case law from either the CAAF or the Supreme Court addresses the issue, *Ballew* and *Burch* are treated as inapplicable to the military justice system.

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96. *See* The Military Justice Act of 1983, Pub. L. No. 98-209, § 19, 97 Stat. 1393, 1405-06 (codified as amended at UCMJ art. 67a, 28 U.S.C. § 1259 (1994)) (expanding the Supreme Court's certiorari jurisdiction to include direct appeals in which the Court of Military Appeals had granted review, direct appeals falling within the Court of Military Appeals' mandatory jurisdiction, and cases in which the Court of Military Appeals granted extraordinary relief). Before 1983, military cases had sometimes come before the Supreme Court through collateral attacks, such as federal habeas corpus proceedings. *See generally* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5 (1985).

97. Petition for a Writ of Certiorari, Hutchinson v. United States, 469 U.S. 981 (1984) (84-254). Hutchinson filed his petition August 15, 1984. The Military Justice Act of 1983 had taken effect on August 1, 1984. Pub. L. No. 98-209 § 12(a)(1), 97 Stat. 1393, 1407 (1983).

98. United States v. Hutchinson, 18 M.J. 281 (C.M.A. 1984) (summary disposition). The court relied on United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), to set aside the death sentence.

99. *Hutchinson*, 469 U.S. at 981. Under a 1986 amendment to the R.C.M., a death sentence can no longer be imposed unless the members unanimously convict the accused of a death-eligible offense. MCM, *supra* note 64, R.C.M. 1004(a)(2).

100. Discuss List #2 (October 30, 1984) (available in Thurgood Marshall Papers, Library of Congress, Box 356, Folder 1). The discuss list, as the name suggests, determines which certiorari petitions will be discussed at the Court's conferences. The process begins with the Chief Justice circulating the initial list; any Justice may add a case to the list. "Approximately 30 percent of the filed cases reach the discuss list. The remaining requests for review are rejected, without further consideration." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 228 (Kermit L. Hall, ed. 1992); *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 6-7, 227-30 (7th ed. 1993).

101. *Hutchinson*, 469 U.S. at 981. Unfortunately, neither Justice Marshall's nor Justice Brennan's papers record the vote on Lance Corporal Hutchinson's petition. Four votes are required for a grant of certiorari. *See generally* STERN ET AL., *supra* note 100, at 230-33.

IV. The Military Death Penalty–A Procedural Overview

In 1983, the Court of Military Appeals decided the landmark case of *United States v. Matthews*,[103] which invalidated the existing military death penalty system because it did not adequately guide the sentencer's discretion. Shortly after the *Matthews* ruling, President Ronald Reagan promulgated a new military death penalty scheme, which is codified as amended in Rule for Courts-Martial (R.C.M.) 1004.

Rule for Courts-Martial 1004 provides that a court-martial can impose a death sentence only if the government pleads and proves at least one specified "aggravating factor."[104] Unless the members unanimously conclude that the government has proven an aggravating factor beyond a reasonable doubt, the court-martial cannot impose a death sentence.[105]

If the members unanimously find at least one aggravating factor, they must then balance the aggravating factor or factors and other aggravating circumstances against any mitigating circumstances. Unless the members unanimously conclude that all of the evidence in aggravation substantially

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102. The first question presented in the certiorari petition in *Garwood v. United States* was "[w]hether a military accused is denied his right to due process of law under the fifth amendment when he is convicted of non-petty offenses by a two-thirds vote of a general court-martial composed of only five members." Garwood v. United States, Petition for a Writ of Certiorari at i, 474 U.S. 1005 (1985) (No. 85-175). The case was not included on the discuss list and the Court denied certiorari. Thurgood Marshall Papers, Library of Congress, Box 543, Folder 5; 474 U.S. 1005 (1985) (order denying certiorari). In *Delacruz v. United States*, the second question presented in the certiorari petition was, "Does a defendant charged with common law murder have a constitutional right to be acquitted if only five members of a seven-member panel vote for a guilty verdict?" Delacruz v. United States, Petition for a Writ of Certiorari at 1, 481 U.S. 1052 (1987) (No. 86-1675). *Delacruz* was not included on the discuss list and the Court denied certiorari. Thurgood Marshall Papers, Library of Congress, Box 548, Folder 8; 481 U.S. 1052 (1987) (order denying certiorari).

103. 16 M.J. 354 (C.M.A. 1983).

104. MCM, *supra* note 64, R.C.M. 1004(c) (setting out 23 aggravating factors). The Department of Defense Joint Service Committee on Military Justice has proposed an additional aggravating factor in cases where a murder victim is 14-years-old or younger. 62 Fed. Reg. 24640, 24642 (1997) (to be codified at R.C.M. 1004(c)(7)(K)) (proposed April 29, 1997).

105. MCM, *supra* note 64, R.C.M. 1004(a)(4).

outweighs the mitigating circumstances,[106] the court-martial cannot impose a death sentence.[107]

In 1986, President Reagan revised R.C.M. 1004 and imposed a third prerequisite for a capital sentence: a court-martial can adjudge a death sentence only if the members unanimously find that the accused is guilty of a death-eligible offense.[108]

The CAAF has established a fourth prerequisite by holding that even if the members unanimously find an aggravating factor and determine that the aggravating circumstances substantially outweigh the mitigating circumstances, any member has the discretion to vote for life.[109] Thus, in essence, the members must unanimously conclude that death is an appropriate sentence in the case. At any one of these four stages, a single member has the ability to preclude the court-martial panel from imposing a death sentence.

Because of the unanimity requirement, a court-martial's decision whether to impose a death sentence may be greatly affected by the number of members. Common sense and elementary statistical analysis suggest that the larger the court-martial panel, the less likely it is to reach the four unanimous conclusions necessary to impose a death sentence.

V. The Lack of a Twelve Member Requirement

The Supreme Court has noted that "no state provides for less than [twelve] jurors [in capital cases]."[110] This suggests that the Court implicitly recognizes the value of the larger body as a means of legitimizing society's decision to impose the death penalty. Despite this uniform civilian practice to the contrary, capital courts-martial can be, and often are, tried

106. In *United States v. Loving*, the CAAF held that the "substantially outweigh" standard "merely requires court members to tip the balance against the death penalty in close cases." 41 M.J. 213, 278-79 (1994), *aff'd on other grounds*, 517 U.S. 758 (1996).

107. MCM, *supra* note 64, R.C.M. 1004(a)(4)(C).

108. Exec. Order No. 12,550 (Feb. 19, 1986) (codified at R.C.M. 1004(a)(2)). Before this change, unless an offense carried a mandatory death sentence, a conviction by a two-thirds majority was sufficient for the case to remain death-eligible.

109. *Loving*, 41 M.J. at 276-77 (stating, "We agree with defense counsel that the military death penalty procedures give the court-martial the absolute discretion to decline to impose the death penalty even if all the gates toward death-eligibility are passed").

110. Williams v. Florida, 399 U.S. 78, 103 (1970).

before panels with fewer than twelve members. In fact, five of the seven service members on death row today were tried before court-martial panels ranging in size from six to ten.[111] Worse yet, a five-member panel can try a capital court-martial, although a five-member jury would be impermissible for any civilian offense carrying a sentence greater than confinement for six months.[112] Nevertheless, the CAAF has rejected constitutional challenges to the military's departure from this universal civilian practice and the Supreme Court has yet to rule on the issue.[113]

Any challenge to panel size based on the Sixth Amendment right to jury trial is doomed by the considerable body of case law denying service members protection under that right.[114] Several alternative constitutional arguments could be advanced, including challenges based on the Eighth Amendment heightened reliability requirement, the Fifth Amendment Due

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111. *See supra* note 5. The military justice system may even prevent conscientious convening authorities from guaranteeing the protection of a twelve-member panel in capital courts-martial. In *United States v. Parker*, eight members remained following voir dire and challenges. The convening authority agreed to a defense request to appoint additional members to ensure that twelve members would ultimately hear the case. United States v. Parker, No. 95-1500, Record at 475 (on file with the Navy-Marine Corps Court of Criminal Appeals, Washington, D.C.). The military judge, however, refused to allow the appointment of additional members, ruling that R.C.M. 505(c)(2)(B) "prohibits the addition of new members after assembly unless the court is below quorum. Quorum is five. Such a procedure by the convening authority would be improper and in violation of the manual. I cannot permit it, or I would risk reversal." Record at 476. The military judge added:

> I would also state for the record for anyone who is concerned about the constitutionality of the death penalty with less than 12 members, I would suggest that they review the Florida statute. That scheme has been approved many times by the U.S. Supreme Court, and although there is a requirement to have a unanimous verdict of 12 members to convict, to adjudge death in Florida you only need 7 of 12; and that very low percentage is much less of a burden for the government than getting eight out of eight which is required in this case since we have eight members.

Id. at 476-77.

The military judge, however, misunderstood Florida death penalty procedures. In fact, the jury cannot "adjudge death" in Florida; rather, the jury makes a recommendation to the trial judge, who is the actual sentencing authority. *See supra* note 4.

112. Ballew v. Georgia, 435 U.S. 223 (1978); Baldwin v. New York, 399 U.S. 66 (1970) (plurality) (holding that the constitutional right to jury trial attaches to cases in which confinement for more than six months is an authorized punishment).

113. *See infra* note 154 and accompanying text.

114. *See supra* note 83 and accompanying text.

Process Clause, and the Fifth Amendment equal protection guarantee. No court, however, is likely to accept any of these arguments.

A. The Eighth Amendment Heightened Reliability Requirement

Although the Supreme Court has indicated that the twelve-member jury is "a historical accident,"[115] reasons exist to believe that such juries are superior to smaller ones. In his *Ballew* opinion,[116] Justice Blackmun wrote, "[R]ecent empirical data suggest that progressively smaller juries are less likely to foster effective deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts."[117] He also found that "[g]enerally, a positive correlation exists between group size and the quality of both group performance and group productivity."[118] Justice Blackmun ultimately concluded that

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115. *Williams*, 399 U.S. at 103. The Court explained:

> Some have suggested that the number 12 was fixed upon simply because that was the number of the presentment jury from the hundred, from which the petit jury developed. Other, less circular but more fanciful reasons for the number 12 have been given, but they were all brought forward after the number was fixed, and rest on little more than mystical or superstitious insights into the significance of "12." Lord Coke explained that the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.," is typical. In short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.

Id. at 87-90 (internal footnotes omitted).

116. The *Ballew* Court unanimously concluded that the Constitution does not permit five-member juries. But while Justice Blackmun delivered the judgment of the Court, Justice Stevens was the only other Justice to clearly join in that opinion. Ballew v. Georgia, 435 U.S. 223, 245 (1978) (Stevens, J., concurring). Justice White concurred in the judgment on the ground that "a jury of fewer than six persons would fail to represent the sense of community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments." *Id.* (White, J., concurring). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgment while criticizing Justice Blackmun's "heavy reliance on numerology derived from statistical studies." *Id.* at 246 (Powell, J., concurring). Justice Brennan, joined by Justices Stewart and Marshall, joined Justice Blackmun's opinion "insofar as it holds that the Sixth and Fourteenth Amendments require jurors in criminal trials to contain more than five persons." *Id.* (Brennan, J., concurring). It is unclear whether Justices Brennan, Stewart, and Marshall agreed with Justice Blackmun's reasoning.

117. *Ballew*, 435 U.S. at 232.

these studies suggest that juries with fewer than six members are impermissible. One analyst has opined, however, that Justice Blackmun did not follow the empirical evidence to its logical conclusion. Professor Kaye contends that the empirical findings upon which Justice Blackmun relied also "create grave doubts about the proper functioning of the six-member jury."[119] Indeed, Justice Blackmun cited studies that found twelve-member juries were superior to six-member juries.[120]

The CAAF has recognized that the Eighth Amendment requires "heightened . . . reliability in capital punishment cases."[121] The military justice system's departure from the twelve-member civilian standard may appear vulnerable under this heightened reliability requirement because, as Justice Blackmun suggested in *Ballew*, smaller panels may be less reliable than larger ones.[122]

Much of Justice Blackmun's reasoning in *Ballew*, however, is inapplicable to courts-martial. For example, Justice Blackmun's conclusion that "progressively smaller juries are less likely to foster effective group delib-

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118. *Id*. at 232-33.

119. David Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CALIF. L. REV. 1004, 1025 (1980). Professor Kaye disputes Justice Blackmun's suggestion that six-to-eight member juries may be optimal. *Id.* at 1025-32. Professor Kaye ultimately rejects as arbitrary any numerical line drawing as inherently arbitrary. *Id*. at 1033. Instead, he advocates a twelve-member jury based upon "the clear mandate of history." *Id.* at 1033. In the military context, however, history provides no such "clear mandate." *See supra* notes 12-40 and accompanying text.

120. *Ballew*, 435 U.S. at 234-35 (citing MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF SIZE AND SOCIAL DECISION RULE 86-87 (1977); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 460 (1966); Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 680 (1975)).

121. United States v. Loving, 41 M.J. 213, 278 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996). In *Loving*, the CAAF applied *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion), to find this heightened reliability requirement. The Supreme Court's review of *Loving*, however, casts some doubt over *Woodson*'s applicability to courts-martial. Justice Kennedy's majority opinion noted that "we shall assume that *Furman* and the case law resulting from it are applicable to the crime and sentence in question." 517 U.S. at 755; *see also id.* at 777-79 (Thomas, J., concurring) (opining that the Supreme Court's Eighth Amendment jurisprudence does not apply to capital courts-martial). Despite the Supreme Court's failure to indicate definitively that its Eighth Amendment capital precedent applies to the military justice system, the Court of Military Appeals resolved that question in *Matthews*. United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (holding that "a service member is entitled both by [Article 55] and under the Eighth Amendment to protection against 'cruel and unusual punishments,'" subject to the possibility of some limitations in the Eighth Amendment applicability resulting from military necessity).

122. *Supra* note 117 and accompanying text.

eration,"[123] relied in part on the importance of a large group to remember important details "[b]ecause most juries are not permitted to take notes."[124] This reasoning is simply inapplicable to courts-martial, where members generally may take notes.[125]

Two intermediate military appellate courts have noted other distinctions between court-martial panels and the juries at issue in *Ballew.* The Army Court of Military Review observed that unlike jurors, court-martial members "are drawn exclusively from the accused's own profession based on specialized qualifications (one of which is judicial temperament), with specialized knowledge of the profession."[126] Additionally, unlike most jurors, court-martial members are allowed to propose questions for witnesses.[127] The Navy Court of Military Review pointed to another distinction: while large juries increase the likelihood of obtaining minority representation through the random selection process, court-martial panels are not chosen randomly.[128] And while a military accused does not have a right to a panel consisting of "a representative cross-section of the military population,"[129] convening authorities may exercise their discretion in appointing members to provide for minority representation to obtain "a fair representation of a substantial part of the community."[130] Additionally, the military rank structure may have an effect on deliberations and voting with no counterpart on civilian juries. Absent the unlikely event of empirical research concerning how court-martial panels operate, no basis will exist for determining the extent to which *Ballew*'s reasoning applies to the military justice system.

Even more fundamentally, *Ballew* specifically held that six-member juries are constitutionally permissible.[131] While a capital court-martial panel with only five members may be vulnerable to attack through an Eighth

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123. *Ballew*, 435 U.S. at 232.

124. *Id.* at 233.

125. *See* MCM, *supra* note 64, R.C.M. 921(b) ("Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any . . . ."); *id.* R.C.M. 1006(b).

126. United States v. Guilford, 8 M.J. 598, 602 (A.C.M.R. 1979).

127. *Id.*

128. United States v. Wolff, 5 M.J. 923, 925 (N.C.M.R. 1978). *See Ballew*, 435 U.S. at 237 (noting that "the opportunity for meaningful and appropriate representation does decrease with the size of panels").

129. United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988).

130. United States v. Crawford, 35 C.M.R. 3, 13 (1964).

131. Ballew v. Georgia, 435 U.S. 223, 239 (1978) ("[W]e adhere to, and reaffirm our holding in *Williams v. Florida.*").

Amendment heightened reliability application of the *Ballew* rationale, larger panels are not. Thus, even if the Supreme Court viewed the *Ballew* rationale as applicable to courts-martial, only death sentences imposed by five-member panels would be invalidated.[132]

B. The Fifth Amendment Due Process Clause

A due process challenge to a capital court-martial with fewer than twelve members would likely fare even worse than the Eighth Amendment heightened reliability argument. The Supreme Court has established an extremely high threshold for finding a due process violation in the military justice system. The Court has noted that "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."[133] That protection, however, is subject to the requirement that "in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces."[134] Under this deferential standard of review, a court-martial procedure will be struck down only on the basis of a concern so "extraordinarily weighty as to overcome the balance struck by Congress."[135]

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132. No one on military death row today was tried by a court-martial with fewer than six members. *See supra* note 5. One post-*Matthews* Army capital case was tried before a five-member court-martial panel, but a death sentence was not imposed. Record, United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989), *petition denied*, 32 M.J. 316 (C.M.A. 1991) (No. ACMR 87-01179) (on file at Washington National Records Center, Suitland, Maryland). In another post-*Matthews* Army capital case, the government and the defense agreed to a six-member quorum. Record at 412, United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994) (No. ACMR 0446898) (on file at Washington National Records Center, Suitland, Md.). A seven-member panel sentenced Private First Class Dock to confinement for life. The agreement to a six-member quorum may, however, have been unenforceable. *See* MCM, *supra* note 64, R.C.M. 505(c)(2)(B); *see generally supra* note 111.

133. Weiss v. United States, 510 U.S. 163, 176 (1994).

134. *Id*. at 177. U.S. CONST. art. I, § 8. The due process standard governing challenges to states' criminal procedures is also quite deferential. A criminal procedure will not be invalidated under the Due Process Clause "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Medina v. California, 505 U.S. 437, 445-46 (1992) (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)).

135. *Weiss*, 510 U.S. at 177-78 (internal quotation marks omitted).

The Supreme Court has indicated that historical practice is critical when assessing whether a challenged practice violates fundamental fairness.[136] While the Court cautioned that "[w]e do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today,"[137] the Court added that history is "a factor that must be weighed" in the due process "calculation."[138]

As we have seen, the history of court-martial panel size is rather muddled.[139] During the Revolutionary War, Army courts-martial were required to consist of thirteen members, while naval courts-martial initially required a minimum of six members, later reduced to five for capital cases. Before the Constitution's ratification, the minimum size of Army courts also decreased to five members. While up to thirteen members were to be detailed unless manifest injury to the service would result, the Supreme Court's 1827 *Martin v. Mott* decision[140] effectively reduced that caveat to a mere recommendation. In 1920, the preference for thirteen member courts was removed entirely from the Articles of War,[141] though it persisted in the Articles for the Government of the Navy until 1951.[142]

Even considering Attorney General Wirt's 1819 opinion that thirteen members should be appointed in capital cases,[143] the Supreme Court would likely hold that this history does not speak with sufficient clarity "to overcome the balance struck by Congress."[144] The Due Process Clause, therefore, is an unlikely vehicle for establishing an accused's right to a twelve-member panel in a capital court-martial case.

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136. *Id.* at 177, 181.

137. *Id.* at 177.

138. *Id.* at 178.

139. *See supra* notes 12-40 and accompanying text.

140. 25 U.S. (12 Wheat.) 19 (1827); *see supra* notes 26-28 and accompanying text.

141. *See supra* note 48 and accompanying text.

142. 34 U.S.C. § 1200, art. 39 (1946) (repealed by the UCMJ) (providing, "A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court").

143. *See supra* note 23 and accompanying text.

144. Weiss v. United States, 510 U.S. 163, 177-78 (1994).

C. The Fifth Amendment Equal Protection Guarantee

An alternative potential basis for establishing a constitutional right to a twelve-member capital court-martial panel is the equal protection guarantee.[145] In two instances, courts will subject governmental classifications to strict scrutiny: (1) if the classification discriminates on the basis of a protected classification, such as race, alienage, or national origin; or (2) if the classification interferes with the exercise of a fundamental right.[146] Where a classification does not burden a protected group or interfere with a fundamental right, it will be sustained if it satisfies the rational basis test.[147] Affixing the appropriate standard of review usually determines an equal protection challenge's outcome: "[s]trict scrutiny is virtually always fatal to the challenged law," while "[t]he rational basis test is enormously deferential to the government and only rarely have laws been declared unconstitutional for failing to meet this level of review."[148] A rational basis review is particularly unlikely to result in invalidation of a congressional classification concerning the military. As the Supreme Court noted in an equal protection challenge to the Selective Service System's registration of men, but not women, "perhaps in no other area has the Court accorded Congress greater deference" than in cases concerning "Congress' authority over national defense and military affairs."[149]

A court applying this deferential standard would almost certainly reject an equal protection challenge to a capital court-martial with fewer than twelve members. Military status is clearly neither a suspect nor quasi-

145. The Equal Protection Clause appears only in the Fourteenth Amendment, which does not apply to the federal government. Nevertheless, the Supreme Court has held that the Fifth Amendment Due Process Clause includes an equal protection guarantee. Bolling v. Sharpe, 347 U.S. 497 (1954). *See generally* Kenneth Karst, *The Fifth Amendment Guarantee of Equal Protection*, 55 N.C.L. REV. 540 (1977); *see also* United States v. Santiago-Davila, 26 M.J. 380, 390 (C.M.A. 1988) (relying on the equal protection guarantee to apply Batson v. Kentucky, 476 U.S. 79 (1986), to the military).

146. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1 (1997); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE § 13-3(N)(1) (4th ed. 1996). In cases of discrimination based on quasi-suspect classifications, such as gender and illegitimacy, the courts apply a middle-tier level of scrutiny. *Id.*

147. CHEMERINSKY, *supra* note 146, § 9.2; SCHLUETER, *supra* note 146, § 13-3(N)(1).

148. CHEMERINKSY, *supra* note 146, § 9.1.

149. Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981); *see* Schlesinger v. Ballard, 419 U.S. 498 (1975) (rejecting equal protection challenge to Navy policy establishing different promotion rules for male and female officers). The Court may, however, choose to abandon this deferential standard when reviewing capital courts-martial. *See infra* note 192 and accompanying text (discussing Justice Stevens' concurrence in *Loving v. United States*, 517 U.S. 748, 774 (1996)).

suspect classification.[150] Thus, the only means of obtaining heightened scrutiny would be to show that the failure to provide twelve-member panels offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[151]

The Supreme Court has never announced a constitutional right to a twelve-member capital jury. Rather, the Court has merely recognized that no state allows smaller juries to impose a death sentence,[152] a fact that eliminates any opportunity for the Court to decide whether a death sentence imposed by a smaller jury would be unconstitutional. Nevertheless, in light of the considerable body of Supreme Court case law allowing judges rather than juries to impose a death sentence, it is doubtful that a twelve-member capital sentencing panel can truly be considered fundamental.

D. Judicial Consideration of the Twelve-Member Panel Issue

Constitutional attacks on capital court-martial panel size have thus far failed to win judicial support. The CAAF has flatly rejected the argument that the Constitution compels twelve-member capital court-martial panels,[153] and the Supreme Court has twice declined to consider the issue.[154] A denial of certiorari, of course, is not a ruling on the merits of a claim,[155] so these denials do not necessarily mean that the Court would decline to consider the twelve-member panel issue in a future case. Nevertheless, the lack of an established right to a twelve-member jury in capital cases, coupled with judicial deference to Congress concerning military justice matters, suggests

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150. *See* CHEMERINSKY, *supra* note 146, § 9.7 (noting that "the only types of discrimination for which the Supreme Court has approved either intermediate or strict scrutiny" are classifications based on "race, national origin, gender, alienage, or legitimacy").

151. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

152. Williams v. Florida, 399 U.S. 78, 103 (1970).

153. United States v. Curtis, 32 M.J. 252, 267-68 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991); United States v. Loving, 41 M.J. 213, 287 (1994), *aff'd on other* grounds, 517 U.S. 748 (1996). *Curtis* rejected this challenge in light of other factors that the court viewed as promoting fairness, such as the military judge's power to recommend clemency and the intermediate military appellate courts' review of the facts, law, and sentence appropriateness in every case. 32 M.J. at 268. *Loving* simply stated, "This issue was resolved against appellant in *United States v. Curtis*, 32 M.J. at 267-68." 41 M.J. at 287.

In *Curtis*, while agreeing with the majority opinion that the Constitution does not mandate "a 12-member panel in a military capital case," then-Chief Judge Sullivan offered his "personal view" that "in peacetime, a service member in a capital case should be tried by a 12-member court-martial." *Curtis*, 32 M.J. at 271 (Sullivan, C.J., concurring); *see also Loving*, 41 M.J. at 310 (Sullivan, C.J., concurring in part and in the result).

that the Supreme Court would ultimately uphold trial of capital cases before courts-martial with fewer than twelve members. The likelihood of such a ruling on the twelve-member panel issue, however, does not mean that the military's panel size rules are free from constitutional defects.

VI. The Variable Size of Capital Court-Martial Panels

Far more disturbing than the lack of a twelve-member guarantee is the variable number of members on capital court-martial panels. While a general court-martial must consist of at least five members,[156] there is no maximum number.[157] Thus, the size of courts-martial panels varies from case to case. This variability introduces tremendous unfairness into the capital court-martial system.

A. The Effect of Variable Panel Size on Non-Capital Cases

In a non-capital case, the absence of a fixed number of members can benefit the accused. For example, to win an acquittal in a six-member court-martial, the defense needs at least three not-guilty votes, or fifty percent of the court-martial members. In a five-member court-martial, on the other hand, the accused can secure an acquittal with just two not-guilty votes, or forty percent of the court-martial members. The percentage of members necessary to secure an acquittal is even smaller for eight-member and eleven-member panels.[158] Because the defense ordinarily has the option of exercising the last peremptory challenge in a court-martial,[159] it

154. *Curtis*, 502 U.S. at 952 (order denying certiorari); *Loving*, 515 U.S. at 1191 (order granting certiorari). In *Curtis*, the Solicitor General opposed the certiorari petition solely on grounds of ripeness. Memorandum for the United States in Opposition at 3-4, Curtis v. United States, 502 U.S. 952 (1991) (No. 91-99) ("Whatever the merits of petitioner's claims, they are not ripe for review by this Court."). Justices White and Blackmun dissented from the denial of certiorari in *Curtis*, but they did not indicate whether they wished to hear the issue relating to court-martial panel size or the other issue raised by the petition, which concerned the separation of powers question ultimately resolved by *Loving. See* 517 U.S. 748 (1996). In *Loving*, the Solicitor General addressed the merits of the twelve-member panel issue in opposing certiorari. Brief for the United States in Opposition at 20-24, Loving v. United States, 517 U.S. 748 (1996) (No. 94-1966). *See also* Hutchinson v. United States, 469 U.S. 981 (1984) (order denying certiorari); *supra* notes 97-101 and accompanying text.

155. *See generally* STERN ET AL., *supra* note 100, at 239-43.

156. UCMJ art. 18 (West 1998).

157. *See supra* notes 57-58 and accompanying text.

will often be within the defense counsel's power to improve the chances of victory by changing the percentage of members necessary to secure an acquittal.

B. The Effect of Variable Panel Size on Capital Cases

Unlike non-capital cases, the lack of a fixed number of members on capital court-martial panels typically hurts the accused.[160] Almost every time a member is removed from the court through either a challenge for cause or a peremptory challenge, the number of votes that the government must obtain to secure a death sentence is reduced.[161] Thus, a capital accused has a statistical incentive to maximize the size of the court-martial panel.

Air Force Court of Criminal Appeals Judge C. H. Morgan's concurring opinion in *United States v. Simoy*[162] addressed the issue of panel size in a military death penalty case. In *Simoy*, the defense counsel succeeded in

158. In an eight-member court-martial, an accused is acquitted if three members, accounting for 37.5% of the court-martial panel, vote not guilty. In an eleven-member court-martial, an accused is acquitted if four members, accounting for 36.36% of the court-martial panel, vote not guilty. To be acquitted by a twelve member court-martial, an accused must win five votes, accounting for 41.67% of the panel. Thus, in a non-capital case, a twelve member panel actually disadvantages the accused compared to an eleven member panel. Because the percentage of members necessary for a conviction varies according to the number of members on the panel, this aspect of court-martial practice has been characterized as a "numbers game." United States v. Newson, 29 M.J. 17, 19 n.1 (C.M.A. 1989). *See generally* Cohen, *supra* note 13, at 16-17 n.65; Smallridge, *supra* note 68, at 376; Lamb, *supra* note 68, at 132 n.274.

159. MCM, *supra* note 64, R.C.M. 912(g).

160. Some capital cases will feature vigorous contention over guilt or innocence, or a defense attempt to secure a conviction under a lesser included offense rather than under a death-eligible offense. In one Army capital court-martial tried in 1988, the accused was acquitted of all charges. Record, United States v. Chrisco (No. ACMR 8800382) (tried February 4, 1988) (on file at Washington National Records Center, Suitland, Maryland). In such courts-martial where guilt or innocence is the primary issue, defense counsel may choose to emphasize a favorable percentage over a larger panel.

161. An exception is where the exercise of a challenge will require the appointment of additional members. This occurs when a challenge will reduce the number of members below the jurisdictional minimum of five or, in cases where the accused has elected to be tried by a panel including enlisted members, when the exercise of a challenge reduces the percentage of enlisted members below one-third of the court. In such cases, the total number of members ultimately seated in the case may increase as a result of the challenge.

162. 46 M.J. 592 (A.F. Ct. Crim. App. 1996) (en banc), *rev'd*, ___ M.J. ___, No. 97-7001/AF (Oct. 20, 1998) (setting aside the death sentence and authorizing a rehearing on the sentence).

removing three members through challenges for cause. The trial counsel exercised the government's peremptory challenge, after which the defense counsel used his peremptory challenge to remove a fifth member. The original panel of thirteen members was reduced to eight.[163] Judge Morgan wrote:

> Little mathematical sophistication is required to appreciate the profound impact in this case of reducing the court-martial panel size. To use a simple metaphor–if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of fifty-two playing cards, would he prefer to be dealt thirteen cards, or only eight? If he had been made to understand the algorithm of his trial court in those terms, would he have consented to his counsel's connivance in reducing the number of cards he was dealt?
>
> People are not playing cards, of course. Human behavior is more complex, and there is a chance no "ace of hearts" existed in the entire military community who would have voted against the death penalty, much less among the challenged five members. But why take a chance and reject a draw that may turn out to be that ace? Simple arithmetic tells us that the chances of finding such a person improve linearly with each additional individual placed into the pool. Each challenge of an individual "spots" the prosecution one vote, and becomes in essence, a vote for death. Instead of having to convince thirteen people that appellant deserved death in three different votes, the government only had to convince eight, a considerably simplified task.[164]

Judge Morgan observed that the military system is fundamentally different than civilian jurisdictions. Because civilian juries have a fixed number of members, those jurors who are "challenged off *are replaced*. A defendant considering challenging a juror can be assured that the decision to do so will not correspondingly reduce the size of his jury."[165] In the mil-

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163. *Id.* at 625 (Morgan, J., concurring).

164. *Id.* at 625-26 (Morgan, J., concurring). Judge Morgan raised this issue in the course of deciding whether the defense counsel had been ineffective when he peremptorily challenged a member. Judge Morgan ultimately determined that the defense could not make an adequate showing that the exercise of the peremptory challenge changed the court-martial's outcome. *Id.* at 628 (Morgan, J., concurring).

165. *Id.* at 627 (Morgan, J., concurring).

itary, on the other hand, in most cases the removal of a member simply reduces the size of the panel that will ultimately hear the case.[166]

This reality may greatly influence the defense's tactical decisions. A defense counsel who is attempting to obtain a large panel will not engage in voir dire, with the exception of questions designed to rehabilitate any member who appears vulnerable to a challenge for cause by either the government or the defense. After all, it does the defense little good to discover that a member is biased against the accused. An accused whose primary goal is to avoid the death penalty may choose to leave biased members on the panel rather than reduce the panel size by removing them even if only a minuscule chance exists that they could overcome their bias and vote for the defense. On the other hand, if the defense's voir dire reveals a bias against the government, or a moral qualm against the death penalty,[167] then the prosecution would be able to improve its chances of success by reducing the court-martial panel's size. Even if the defense counsel does not intend to exercise challenges, revealing a bias against the accused could result in a smaller panel, as the military judge might remove the member *sua sponte*,[168] or the trial counsel might attempt to have the member removed. Vigorous voir dire thus carries risks for the defense with little countervailing benefit.

A defense counsel attempting to obtain the largest possible panel would obviously also refrain from making a challenge for cause or exercising a peremptory challenge unless doing so would reduce the panel below the five-member minimum or, in cases where an enlisted accused has chosen to be tried by a panel including enlisted members, where the challenge would reduce the percentage of enlisted members below one-third of the panel. The defense counsel attempting to maximize the panel size would even refrain from challenging a member who admits being biased in the government's favor because, as Judge Morgan observed in *Simoy*, that biased member will not be replaced by a neutral member.

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166. Exceptions to this general rule occur where a challenge would require the convening authority to detail additional members to the court. *See supra* note 161.

167. The Supreme Court has held that a juror may be excluded from a death penalty case for possessing views about capital punishment that "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The military justice system follows this line of cases. *See* United States v. Curtis, 33 M.J. 101, 106-07 (C.M.A. 1991), *cert. denied*, 502 U.S. 1097 (1992).

168. *See* MCM, *supra* note 64, R.C.M. 912(f)(4).

The trial counsel, on the other hand, has an interest in reducing the panel size.[169] Every member that the government succeeds in removing is one less potential source for the single vote that could preclude a death sentence. Thus, the trial counsel can be expected to engage in vigorous voir dire, to make challenges for cause, and to exercise the government's peremptory challenge.

The rules governing capital court-martial panel size thus promote the spectacle of a panel vetted and groomed by the government but not the defense. Providing the government with an incentive to voir dire members and exercise challenges while discouraging the defense from doing so is particularly perverse in court-martial practice, as the convening authority's power to select members gives the government "the functional equivalent of an unlimited number of peremptory challenges."[170] A system that encourages the defense counsel in a capital case to imitate a potted plant[171] is constitutionally suspect.

C. A Constitutional Analysis of Variable Panel Size in Capital Courts-Martial

While a challenge to court-martial panels with fewer than twelve members would likely fail on due process, equal protection, and heightened reliability grounds, a challenge to the variable size of capital court-martial panels should succeed under any of these constitutional bases.

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169. *See Simoy*, 46 M.J. at 628 n.7 (Morgan, J., concurring).
170. United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring).
171. The CAAF has noted:

> The term "potted plant" is used in America's image-based society to distinguish passive non-players ("is a potted plant") from people of action ("is not a potted plant"). It is derived from Brendan V. Sullivan, Jr.'s, response to Senator Inouye, when the Senator was attempting to limit Mr. Sullivan's role in protecting his client (Oliver North) from what Mr. Sullivan perceived as unfair questioning by the Senate staff during the 1987 Irangate Hearings: "Well sir, I'm not a potted plant. I'm here as the lawyer. That's my job."

United States v. Martinez, 42 M.J. 327, 332 n.7 (1995), *cert. denied*, 516 U.S. 1075 (1996).

1. The Fifth Amendment Due Process Clause

Even though the Sixth Amendment right to jury trial does not extend to courts-martial, the Court of Military Appeals has established that an accused has "a due-process right to a fair and impartial fact finder."[172] This holding is consistent with Supreme Court precedent recognizing that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors."[173] Denial of the right to trial before "a panel of impartial, 'indifferent' jurors . . . violates even the minimal standards of due process."[174] An important aspect of this right is the ability to engage in meaningful voir dire. The Supreme Court has recognized that in order to obtain an impartial jury, the defense has a constitutional right to subject jurors to voir dire concerning potential bias.[175]

Of course, the military death penalty system does not prevent the defense from engaging in voir dire or exercising challenges. But the system exacts an enormous price for exercising those options. Imposing costs on the defense's right to promote the factfinder's impartiality violates the doctrine of unconstitutional conditions,[176] which recognizes that "[t]here are rights of constitutional stature whose exercise a state may not condition by the exaction of a price."[177]

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172. *Carter*, 25 M.J. at 473; United States v. Jefferson, 44 M.J. 312, 321 (1996) ("The reliability of a verdict depends upon the impartiality of the court members."). *But see* United States v. Curtis, 44 M.J. 106, 133 (1996) ("Appellant has a Sixth Amendment right to a fair and impartial jury."), *rev'd on other grounds*, 46 M.J. 19 (1997). *See generally* Lamb, *supra* note 68, at 135-37.

173. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991).

174. Irvin v. Dowd, 366 U.S. 717, 722 (1961). Interestingly, *Irvin* was decided at a time when Supreme Court case law held that the Fourteenth Amendment did not require jury trials for criminal cases. Fay v. New York, 332 U.S. 261 (1947). State trials before the Supreme Court's ruling in *Duncan v. Louisiana* were on a footing similar to military trials today: they were not bound by the Sixth Amendment jury trial provision, but they were bound by the due process guarantee and its requirement for fundamental fairness. 391 U.S. 145 (1968).

175. Morford v. United States, 339 U.S. 258, 259 (1950) (per curiam); *see also Jefferson*, 44 M.J. at 321 ("*Voir dire* is fundamental to a fair trial.").

176. "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." The doctrine "reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

United States v. Jackson[178] applied the doctrine of unconstitutional conditions to a federal death penalty statute. *Jackson* dealt with the Federal Kidnapping Act, which allowed a jury, but not a judge, to impose a death sentence for violations of the Act. Thus, under the legislation, "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die."[179] The Supreme Court invalidated the statute's death penalty scheme, finding that its "inevitable effect" is "to discourage assertion of the Fifth Amendment right to plead not guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."[180] The Court reasoned that "[w]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[181] Deterring defendants from exercising their Fifth and Sixth Amendment rights was needless because Congress could have adopted other sentencing systems, including systems in place in some states, that do not chill the exercise of constitutional rights.[182]

The right to an impartial factfinder, while arising under the Fifth Amendment Due Process Clause in a military context,[183] is derived from the Sixth Amendment right to trial by an impartial jury, one of the very rights at issue in *Jackson*. The right to an impartial factfinder is thus a constitutional protection "whose exercise a state may not condition by the exaction of a price."[184] Like the limitations on exercising constitutional rights at issue in *Jackson*, the military death penalty system's deterrence of voir dire and challenges is needless. Congress could have easily established a system in which members who are "challenged off *are replaced*."[185] Examples of such systems abound including not only every state's criminal justice system, but

177. Garrity v. New Jersey, 385 U.S. 493, 500 (1967). *See* United States v. Carter, 25 M.J. 471, 475 (C.M.A. 1988) (noting that "since Congress obviously attached importance to the peremptory challenge, clearly it did not intend to countenance procedural rules which would have a 'chilling effect' on the use of this challenge").

178. 390 U.S. 570 (1968).

179. *Id.* at 581.

180. *Id.* (footnote omitted).

181. *Id.* at 582.

182. *Id.*

183. *See supra* note 172 and accompanying text (discussing United States v. Carter, 25 M.J. 471 (C.M.A. 1988)).

184. Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967).

185. United States v. Simoy, 46 M.J. 592, 627 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd*, ___ M.J. ___, No. 97-7001/AF (Oct. 20, 1998) (setting aside the death sentence and authorizing a rehearing on the sentence).

also criminal trials in United States district courts. Congress' failure to adopt such a system for the military results in an impermissible deterrent on the exercise of a fundamental right.

Discouraging the defense from engaging in voir dire and exercising challenges in capital cases presents a test of the Supreme Court's assertion that Congress "is subject to the requirements of the Due Process Clause when legislating in the area or military affairs."[186] If the military death penalty scheme's assault on the fundamental right to an impartial factfinder does not violate the Due Process Clause, it is difficult to imagine what would. Accordingly, the small "measure of protection" that the Due Process Clause provides to military defendants[187] should be sufficient to invalidate the variable size of capital courts-martial.

2. The Equal Protection Guarantee

The Supreme Court's recognition of an impartial factfinder as a "fundamental right" also implicates the equal protection guarantee. As discussed above, when a governmental classification interferes with a fundamental right, it violates the equal protection guarantee unless it is narrowly drawn to serve a compelling government interest.[188]

It is difficult to imagine *any* government interest that would be prejudiced by trying capital courts-martial before a fixed number of members, much less a compelling interest. Assuming that the fixed number of members in capital cases would be set above five, some capital courts-martial may require additional members. In 1786, when the Army included just forty officers, convening courts-martial with more than five members was not always practicable.[189] With today's military force consisting of almost 1.5 million active-duty members,[190] on the other hand, any necessity to occasionally detail a few additional members for capital courts-martial should not prove burdensome.

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186. Weiss v. United States, 510 U.S. 163, 176 (1994).

187. *Id*.

188. *See supra* note 145 and accompanying text.

189. *See supra* note 17.

190. Nat'l Def. Auth. Act for 1998, Pub. L. No. 105-85, § 401, 111 Stat. 1629, 1719 (establishing end strength of 1,431,379 for Department of Defense active duty personnel); Coast Guard Auth. Act for 1997, Pub. L. No. 104-324, § 102, 110 Stat. 3901, 3905 (establishing end strength of 37,561 for active duty Coast Guard personnel).

The fundamental nature of the right to an impartial fact-finder should be sufficient to overcome any deference the military normally enjoys in equal protection cases.[191] Additionally, some question exists as to whether a deferential equal protection standard is even appropriate when considering capital courts-martial. Writing for a total of four members of the Court, Justice Stevens recently opined, "[W]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians."[192] Requiring service members to choose between accepting trial by biased members or diminishing their own statistical chances of escaping a death sentence a choice faced by no civilian death penalty defendant in the nation offends this equal protection principle.

3. The Right to Be Free from Cruel and Unusual Punishments

The variable panel size in capital courts-martial must also be scrutinized under the Eighth Amendment Cruel and Unusual Punishments Clause. The Supreme Court has not expressly ruled that its Eighth Amendment capital jurisprudence applies to courts-martial.[193] Nevertheless, the

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191. *See supra* note 149 and accompanying text.

192. Loving v. United States, 517 U.S. 748, 774 (1996) (Stevens, J., concurring). Justices Souter, Ginsburg, and Breyer joined Justice Steven's *Loving* concurrence. *Id.* Justice Stevens' opinion also suggested that trial by court-martial may be impermissible for death penalty offenses that are not related to military service. *Id. Compare* Meredith L. Robinson, Note, *Volunteers for the Death Penalty? The Application of* Solorio v. United States *to Military Capital Litigation*, 6 GEO. MASON L. REV. 1049 (1998) (concluding that "[b]ecause a service member at a court-martial is deprived of certain protections of the Bill of Rights, Congress and the Supreme Court must ensure that only those crimes with a service connection may be tried by a capital court-martial," *id.* at 1071-72), *with* John F. O'Connor, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177 (1997) (concluding that the Constitution permits court-martial jurisdiction over capital offenses regardless of whether they are service connected).

193. In *Loving*, the majority opinion "assume[d] that [*Furman v. Georgia*, 408 U.S. 238 (1972)] and the case law resulting from it are applicable" to the military justice system. 517 U.S. at 755. Justice Thomas, on the other hand, questioned whether "the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military." *Id.* at 777 (Thomas, J., concurring in the judgment). He also noted, "Although the applicability of *Furman* . . . and its progeny to the military is an open question, the United States surprisingly makes no argument that the military is exempt from the Byzantine rules that we have imposed upon the states in their administration of the death penalty." *Id.* at 777 n.*.

Court of Military Appeals has held that while the Eighth Amendment protections might sometimes have to yield to military necessity, "a service member is entitled both by [Article 55] and under the Eighth Amendment to protection against 'cruel and unusual punishments.'"[194] Indeed, a service member's protection under Article 55 of the UCMJ, which prohibits "cruel or unusual punishments,"[195] may provide "even wider" protection than is granted by the Eighth Amendment.[196]

One aspect of the protection against cruel and unusual punishments is the requirement for heightened reliability in capital cases–a protection that the CAAF has specifically held applies to courts-martial.[197] A death penalty system that deters meaningful voir dire and the exercise of challenges by one party, while encouraging vigorous use of these tools by the other, violates this heightened reliability requirement. Biases against the government will likely be discovered through voir dire, and members possessing such biases will be removed. Biases against the accused, on the other hand, may never be brought to light. Panels drastically tilting toward the government are the almost inevitable result of a system that encourages the defense to keep members on the panel while encouraging the government to remove members. This interference with the adversarial system's norms substantially diminishes the reliability of a capital court-martial.

The cruel and unusual punishment protection also prohibits the arbitrary imposition of death sentences.[198] Yet the lack of a fixed number of members injects an entirely arbitrary factor into the death penalty equation: the number of members who sit on the court-martial.

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194. United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983). The court noted that the possibility of different application in a military setting "is especially great with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war, [for example], spying." *Id.*

195. 10 U.S.C.A. § 855 (West 1998).

196. *Matthews*, 16 M.J. at 363 (quoting United States v. Wappler, 9 C.M.R. 23, 26 (1953)).

197. United States v. Loving, 41 M.J. 213, 278 (1994) (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion)), *aff'd on other grounds*, 517 U.S. 748 (1996).

198. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 306-07 (1987); *Woodson*, 428 U.S. at 303 (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); United States v. Curtis, 44 M.J. 106, 166 (1996), *rev'd in part on other grounds*,46 M.J. 129 (1997) (per curiam); United States v. Gray, 37 M.J. 751, 759 (A.C.M.R. 1993), *mandatory review case filed*, 38 M.J. 305 (C.M.A. 1993) ("the Eighth Amendment prohibition against cruel and unusual punishment does prohibit the 'arbitrary and capricious' imposition of the death penalty").

Common sense suggests that the total number of members impaneled at the end of voir dire and challenges will vary directly with the number of members originally detailed to a court-martial. Yet convening authorities have no guidance concerning how many members to appoint in capital cases. Such unconstrained discretion is the very definition of arbitrariness. A review of convening authorities' actual practice in appointing members to capital cases demonstrates the process's haphazard nature: the courts-martial of the seven service members under death sentence today began with panels ranging in size from nine to twenty members.[199]

This arbitrary factor's unfairness is starkly demonstrated by two hypothetical capital courts-martial arising from the same murder. The commanding general of one accused convenes a court-martial with twenty members; the commanding general of another convenes a court-martial with only ten members. While no legal principle justifies treating the two accused differently, one has a far greater statistical chance of obtaining the single vote necessary to preclude a death sentence. Such an irrelevant factor determining who lives and who dies is precisely the sort of arbitrariness that the Supreme Court has condemned. The military's death penalty scheme, therefore, violates the Eighth Amendment, as well as the due process and equal protection guarantees.

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199. Sergeant Kreutzer's court-martial began with a twenty-member panel. Record, United States v. Kreutzer (No. ARMY 9601044) (on file with Army Court of Criminal Appeals, Falls Church, Virginia). Sergeant Murphy's court-martial began with only nine members. Record, United States v. Murphy (No. ACMR 8702873) (on file with Army Defense Appellate Division, Falls Church, Va.). Of the remaining five trials, one began with nineteen members, two began with fifteen members, and two began with twelve members. Electronic Interview with Lieutenant Lisa C. Guffey, defense appellate attorney, United States Navy, June 22, 1998 (concerning United States v. Quintanilla, which began with 19 members); Record, United States v. Gray (No. ACMR 8800807) (on file with Army Defense Appellate Division, Falls Church, Va.) (indicating that 15 members began the capital case of United States v. Gray); Record, United States v. Walker (No. 95-01607) (on file with Navy-Marine Corps Appellate Defense Division, Washington, D.C.) (indicating that 15 members began the capital case of United States v. Walker); United States v. Loving, 41 M.J. 213, 310 (1994) (Sullivan, C.J., concurring) (indicating that the court-martial began with 12 members), *aff'd*, 517 U.S. 748 (1996); Record, United States v. Parker (No. 95-01500 (on file with Navy-Marine Corps Court of Criminal Appeals, Washington, D.C.) (indicating that the court-martial began with 12 members).

VII. Conclusion

Trying a capital case before a court-martial with fewer than twelve members provides the accused with less protection than a civilian capital defendant would enjoy. With the exception of the military, no capital jurisdiction in the United States allows the death penalty to be imposed without giving the defendant the right to have a twelve-member jury determine guilt or innocence. In thirty of the country's forty death penalty jurisdictions, the defendant also has the right to have a twelve-member jury decide whether to adjudge a death sentence. Providing a military capital accused with less protection is certainly unfair, but it is unlikely to be held unconstitutional.

The extreme unfairness arising from the variable number of members on capital court-martial panels, on the other hand, calls out for judicial intervention. The lack of a fixed number of members deters the defense counsel in a capital case from engaging in voir dire or exercising challenges. This is true regardless of the number of members detailed to the court-martial panel. Thus, this unfairness will infect even those capital court-martial panels in which the convening authority originally detailed twelve members or more.

But judicial action alone cannot bring the military death penalty scheme into compliance with constitutional requirements. While the courts can, and should, declare that the current system is unconstitutional, it is beyond the judiciary's power to remedy the defect.[200] That power, and hence that responsibility, lies with either Congress or the President.

Congress, which bears the constitutional responsibility to make rules and regulations for the land and naval forces,[201] clearly has the authority to establish fixed panel sizes for capital courts-martial. Congress could adopt such a policy through a quite simple UCMJ amendment. Because Congress has delegated to the President the authority to make procedural rules for courts-martial,[202] Congress could merely establish a requirement for fixed panel size in capital courts-martial, and then leave it to the President to adopt specific rules to implement that requirement.

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200. Through the Code Committee, however, the CAAF judges could suggest UCMJ amendments to eliminate variable court-martial panel size in capital cases. *See* 10 U.S.C.A. § 946(c)(2)(B)(ii) (West 1998).

201. U.S. CONST., art. I, § 8, cl. 14.

202. UCMJ art. 36 (West 1998).

One question Congress would face if it adopted a requirement for a fixed number of members in capital cases is what should be the fixed number. The best answer to that question is twelve. Congress has already expressed a general preference for military justice procedures that mirror those used "in the trial of criminal cases in the United States district courts."[203] The Federal Rules of Criminal Procedure provide for twelve-member juries.[204] The absence of any states providing for juries with fewer than twelve members in death penalty cases[205] further suggests the appropriateness of twelve-member panels in capital courts-martial. A UCMJ amendment providing for a fixed number of members should, therefore, require the impaneling of twelve members in general courts-martial empowered to adjudge death.

Even absent such a congressional mandate, requiring a fixed number of members in capital courts-martial would be within the President's power. Under Article 36, the President is empowered to adopt procedural rules for courts-martial, provided that these rules are not "contrary to or inconsistent with" the UCMJ.[206] Establishing a fixed number of members for capital cases would not be inconsistent with any provision of the UCMJ. Article 16 requires that a general court-martial consist of "a military judge and not less than five members."[207] Beyond this requirement, the UCMJ is silent concerning the number of members on a general court-martial panel. Thus, establishing a fixed number of members for capital courts-martial is not inconsistent with the UCMJ, provided that the number is greater than four.[208]

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203. *Id.*

204. FED. R. CRIM. P. 23(a).

205. Williams v. Florida, 399 U.S. 78, 103 (1970).

206. UCMJ art. 36(a). In *Loving v. United States*, the Supreme Court identified Article 36 as one of three UCMJ articles by which Congress delegated to the President the power to establish aggravating factors for capital cases. 517 U.S. 748, 770 (1996). The Supreme Court also relied on Article 18, which provides that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by" the UCMJ, and Article 56, which provides that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." *Id.* at 768-70.

207. UCMJ art. 16(1).

208. *Cf.* Brief of Public Citizen, Inc., as *Amicus Curiae* in Support of the Petition at 18, Loving v. United States, 517 U.S. 748 (1996) (No. 94-1966) (noting that "the UCMJ does not forbid twelve person panels, but only requires that panels cannot include fewer than five members. Thus, it cannot be said that Congress has a policy *against* twelve person juries in military capital cases . . . .").

The Supreme Court's view of the President's authority to make procedural rules for courts-martial provides further support for the conclusion that requiring a fixed number of members in military death penalty cases is within the President's power. In *Loving v. United States*, the Supreme Court noted that "[f]rom the early days of the Republic, the President has had congressional authorization to intervene in cases where courts-martial decreed death."[209] The Court continued:

> It would be contradictory to say that Congress cannot further empower [the President] to further limit by prospective regulation the circumstances in which courts-martial can impose a death sentence. Specific authority to make rules for the limitation of capital punishment contributes more toward principled and uniform military sentencing regimes than does case-by-case intervention, and it provides greater opportunity for congressional oversight and revision.[210]

Providing that death can be adjudged only by a court-martial with a fixed number of members would be just such a limitation by prospective regulation upon the circumstances in which courts-martial can impose a death sentence. The President's authority to adopt such a regulation, therefore, appears to have already won the Supreme Court's approval.[211] Thus, the President is free to adopt a Rule for Courts-Martial requiring a fixed number of members in capital cases even without congressional authorization. In keeping with Article 36's preference for establishing court-martial procedures that are consistent with the Federal Rules of Criminal Procedure,[212] the President should set that fixed number at twelve.

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209. 517 U.S. at 773 (citing Article of War 65, Act of April 10, 1806, ch. 20, 2 Stat. 359, 367) (providing that no "sentence of a general court-martial, in the time of peace, extending to the loss of life . . . [shall] be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case"). *See* UCMJ art. 71(a) ("If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.").

210. 517 U.S. at 773.

211. *See* MCM, *supra* note 64, R.C.M. 1004(a)(2) (noting that the requirement that the members return a unanimous conviction in order for a death penalty to be imposed is such a presidentially-prescribed limitation on the imposition of a death sentence). *See supra* note 64. R.C.M. 1004(a)(2) has not been the subject of litigation.

212. *See supra* note 203 and accompanying text.

Once a fixed number is required whether by congressional or executive action the Rules for Courts-Martial will have to be modified to provide a scheme for achieving a fixed-size panel. One possibility would be to begin with a large number of members perhaps twenty who would be subject to voir dire and challenges, including each side's peremptory challenge.[213] If more than twelve remain after challenges, twelve would be assigned to the panel through some random process. If fewer than twelve members remain after challenges, the convening authority would then detail additional members, who would also be subject to voir dire and challenges.[214] This process would continue until a twelve-member panel was seated. Additionally, the President should consider reviving the process of designating supernumeraries, who would play the same role as alternate jurors in the civilian system.[215]

Regardless of which branch takes the initiative, the problem should be cured quickly. Reforming the system will not only protect the due process rights of military capital defendants, but also serve the government's interest in ensuring that a constitutionally-viable military death penalty remains in effect. Until the problem of variable panel size in death penalty cases is eliminated, capital courts-martial will remain a numbers game fixed in the prosecution's favor.

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213. Article 41(b) of the UCMJ provides that "[e]ach accused and the trial counsel is entitled to one peremptory challenge." UCMJ art. 41(b). The Court of Military Appeals has construed this provision to mean that "each accused is 'entitled' to an opportunity to a single peremptory challenge exercisable as to any person who ultimately sits to try his case." United States v. Carter, 25 M.J. 471, 474 (C.M.A. 1988). Thus, the President does not appear to have the authority to provide more than one peremptory challenge in capital cases absent the detailing of additional members if the court-martial falls below the requisite quorum. *See id.* at 474-75.

214. These members would be subject to both causal and peremptory challenge. *See supra* note 213.

215. *See supra* notes 24-25 and accompanying text.

THE QUIET REVOLUTION: DOWNSIZING, OUTSOURCING, AND BEST VALUE

MAJOR MARY E. HARNEY[1]

In the process of governing, the government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth. In recognition of this principle, it has been and continues to be the general policy of the government to rely on commercial sources to supply the products and services the government needs.[2]

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2. FEDERAL OFFICE OF MANAGEMENT & BUDGET (OMB) CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, para. 4.a (Aug. 4, 1983) [hereinafter OMB CIR. A-76].

We are today engaged in a quiet revolution that extends across the range of our activities.[3]

I. Introduction

A quiet revolution is sweeping across the Department of Defense (DOD). In this revolution, DOD leaders are battling for more money. The weapon: Office of Management and Budget Circular (OMB Cir.) A-76.

This is not a secret weapon. Members of the DOD and the public sector are learning how OMB Cir. A-76 works: the federal government competes with contractors to see who may supply products and services more economically. Consider the following scenario: Officials at a military base solicit offers and use A-76 to cut the costs of its base services. The government submits an offer. A small business also submits an offer, but loses the award–to the government. In light of the policy from OMB Cir. A-76, how can this happen? How can a private offeror even *compete* against the government to provide service, much less *lose* to the government?

The same policy provides the answers. Office of Management and Budget Circular A-76 guides federal agencies that are deciding whether to outsource[4] a commercial activity[5] or perform it in-house.[6] This policy promotes three goals: achieve economy, keep government functions "in-house," and rely on the commercial sector for products and services, but only if more economical.[7] That being said, how does OMB Cir. A-76 mesh with the DOD's warfighting role? Simple: money. Shrinking budgets and

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3. Sheila E. Widnall, A Quiet Revolution, Remarks to Air Force Materiel Command Civilian Leaders (Oct. 29, 1996) *available at* <http://www.af.mil/cgi-bin/multigate/>. In her remarks, then-Secretary of the Air Force Widnall identified three areas of this revolution: operations, leadership, and acquisition. Secretary Widnall attributed the changes in warfare methods to the revolution in operations. She specifically focused on how information technology has offered warfighters new ways to plan and to train for war. In turn, new technology prompted the revolution in leadership. She noted that the military must ensure that its leaders are educated and motivated to lead in an era of highly technical warfare. Likewise, Secretary Widnall cited the acquisition revolution as the heart of supporting the forces. She isolated outsourcing as one impetus to "create a leaner, more responsive Air Force." *Id.* Her remarks apply equally to the rest of the DOD.

4. The term "outsourcing" refers to a government contractor performing what has traditionally been viewed as a government function. Another analogous term is "competitive sourcing." The term "privatization" refers to the government completely divesting itself of a function. This paper focuses only on outsourcing, and will interchange the term "outsourcing" with the phrase "contracting out."

dollar signs have caught the attention of many persons, both in and out of the DOD. Some experts predict OMB Cir. A-76 can save the DOD billions of dollars, money that it can then use for readiness.[8] Talk to commanders at most military bases and you will probably hear them discuss "outsourcing." Peruse a news service covering the DOD and you will probably find an article weighing the pros and cons of outsourcing.[9] According to Sec-

5. OMB CIR. A-76, *supra* note 2, para. 6.a. A "commercial activity" is a product or service that a federal agency provides, but could otherwise obtain from the private sector. *Id.* In attachment A, OMB Cir. A-76 lists examples of commercial activities, such as audiovisual products and services; automatic data processing; health services; and industrial shops and services. It also lists installation support services, management support services, office and administrative services, printing and reproduction services, and transportation services. OMB Cir. A-76 cautions that the list is not exhaustive, but it should help agencies identify commercial activities. OMB Cir. A-76 recommends agencies use "informed judgment on a case-by-case basis in making these decisions." *Id*. attachment A.

6. "In-house" means the government will continue to use federal employees to perform the commercial activity. *Id.* para. 5.b.

7. *Id*. para. 6.

8. Office of Assistant Secretary of Defense (Public Affairs), *Defense Science Board Releases Report on "Achieving an Innovative Support Structure for 21st Century Military Superiority"* (Jan. 24, 1997) <http://www.defenselink.mil/news/>. In its report, the Defense Science Board recommended that the DOD dramatically restructure its support infrastructure. It envisioned that the DOD would operate in only those support functions that are "inherently governmental," such as war fighting; battlefield support; and policy and decision-making. The private sector would provide all other functions through the competitive outsourcing process. The Defense Science Board concluded that this new "vision" for the DOD could shift up to $30 billion per year from support functions to modernization by the year 2002. In a later report, the General Accounting Office (GAO) called the Defense Science Board's predicted savings "overstated." GENERAL ACCOUNTING OFFICE, OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BY DEFENSE SCIENCE BOARD'S PROJECTIONS ARE OVERSTATED, REPORT NO. GAO/NSIAD-98-48 (1997). *See infra* note 47 and accompanying text. Composed of members from the private sector, the Defense Science Board is the senior advisory body of the DOD. The Defense Science Board advises the DOD on scientific, technical, manufacturing, and other matters important to the DOD. *Id*. More information about the Defense Science Board is available at <http://www.acq.osd.mil/dsb/>.

9. *See, e.g.*, Master Sergeant Louis A. Arana-Barradas, *Self-Interest Drives Outsourcing Boom*, A. F. NEWS SERV. (visited Mar. 30, 1998) <http://www.af.mil/cgi-bin/multigate/> (citing modernization dollars as the spark behind outsourcing for the Air Force); *Air Force Pursues Outsourcing, Privatization Programs*, A. F. NEWS SERV. (Jan. 3, 1997) <http://www.af.mil/cgi-bin/multigate/> (according to Former Air Force Chief of Staff Ronald R. Fogleman, outsourcing will help the Air Force sustain readiness "by competitively selecting suppliers to ensure we get the best possible support at the least cost to the service"); John Makulowich, *Outsourcing: Management Obsession or Savings Tool*?, WASH. TECH., Apr. 24, 1997, *available at* 1997 WL 8578189 (calling outsourcing the "management mantra of the moment"); Kevin Power, *Feds, Get Used to Outsourcing*, GOV'T COMPUTER NEWS, June 16, 1997, *available at* 1997 WL 11469304 (noting that federal agencies must accept that outsourcing is here to stay).

retary of Defense William Cohen, the military services have made a difficult but necessary choice: "[t]o preserve combat capability and readiness, the services have targeted the reductions by streamlining infrastructure and outsourcing non-military essential functions."[10]

An old concept with a new look, OMB Cir. A-76 has emerged with new life as the DOD looks for ways to maintain combat readiness in this time of tight budgets and dwindling resources. First promulgated as policy in 1955, OMB Cir. A-76 permits public-private competitions to see which entity performs a commercial activity more economically. As it gained new life, OMB Cir. A-76 also received a new look. In March 1996, the OMB published a Revised Supplemental Handbook (Supplement) to OMB Cir. A-76.[11] The Supplement changed how the DOD and other federal agencies can decide to contract a commercial activity. Among its many revisions,[12] the Supplement introduced the concept of "best value"[13] procurement to the OMB Cir. A-76 outsourcing process.[14] This change created interesting issues. While OMB Cir. A-76 is a cost-savings program, "best value" allows the government to pay more money for a better product or service. This may initially seem to benefit the government.

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10. WILLIAM S. COHEN, REPORT OF THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997) [hereinafter QDR] *available at* <http://www.defenselink.mil/pubs/qdr/>.

11. FEDERAL OFFICE OF MANAGEMENT & BUDGET OMB CIR. A-76, SUPPLEMENT, PERFORMANCE OF COMMERCIAL ACTIVITIES (March 1996) [hereinafter SUPPLEMENT].

12. The OMB made significant changes in the Supplement. For example, it exempted certain activities from the OMB Cir. A-76 cost comparison process, broadened an agency's authority to waive cost comparisons, and required agencies to conduct post-performance reviews of at least 20% of all functions retained or converted in-house. The Supplement also refined the factors for costing in-house performance to ensure a level playing field. This included a standard overhead cost factor of 12% of the direct labor costs. Finally, the Supplement established a streamlined process for competing commercial activities with less than 65 full time equivalent employees. *See* Major Kathryn R. Sommerkamp et. al, *Contract Law Developments of 1996—The Year in Review*, ARMY LAW., Jan. 1997, at 111-12.

13. Prior to the rewrite of Federal Acquisition Regulation Part 15, Contracting by Negotiation, [hereinafter FAR Part 15] the term "best value" referred to an acceptable offer more advantageous than a lower priced offer that justified paying a higher price. Effective October 1997, FAR Part 15 now defines "best value" as any acquisition that obtains the greatest overall value to the government. The term "tradeoff approach" now refers to the traditional best value procurement. GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 15.101-2 (June 1, 1997) [hereinafter FAR]. For a review of the changes to FAR Part 15, *see* Major David A. Wallace, et al., *Contract Law Developments of 1997—The Year in Review*, ARMY LAW., Jan. 1998, at 25-30 [hereinafter *1997 Year in Review*]. In this paper, the term "best value" and "trade-off approach" are interchangeable and refer to the traditional usage: the higher priced, more advantageous offer.

14. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, para. H.3.c.

Despite "best value," however, OMB Cir. A-76 still requires the government to award the contract to the public or private entity offering the lowest price for the product or service.

How to apply the "best value" concept in a cost-driven program is a tough question with no easy answers. This article analyzes that question, focusing on three areas of OMB Cir. A-76 and the quiet revolution: policy, process, and recourse. "Policy" constructs the overall framework for OMB Cir. A-76. "Process" sets OMB Cir. A-76 in motion to review its procedures and identify best value issues. "Recourse" describes the possible legal challenges to the OMB Cir. A-76 process.

II. The Policy: Outsourcing and Downsizing

Often, policy is the compass directing what courses of action leaders choose. Right now, the compass points towards altering how the government does business. As government officials looked inward to discover where and how to change, they called for a more streamlined, efficient government.[15] Within the DOD, leaders seized upon downsizing and outsourcing to achieve these goals. Three documents embody the driving policy behind downsizing and outsourcing and place the OMB Cir. A-76 process in context: the National Performance Review (NPR),[16] the Quadrennial Defense Review (QDR),[17] and the Defense Reform Initiative (DRI).[18]

A. The Policy: The National Performance Review–The White House Throws Down the Gauntlet

Established in 1993, the NPR set a lofty goal: establish a "new customer service contract with the American people" to mold an effective,

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15. *See*, *e.g.*, Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 186; Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; Government Management Reform Act of 1994, Pub. L. No. 103-356, 108 Stat. 3410; Federal Workforce Restructuring Act of 1994, Pub. L. No. 103-226, 108 Stat. 111; Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285.

16. Al Gore, Report of the National Performance Review, From Red Tape to Results, Creating a Government that Works Better & Costs Less (1993) [hereinafter NPR], *reprinted in* 1199 GOV'T CONT. REP. (Sept. 15, 1993).

17. QDR, *supra* note 10.

18. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997) [hereinafter DRI] *available at* <http://www.defenselink.mil/pubs/DODreform/>.

efficient, and responsive government.[19] The NPR proposed four ways to implement this "customer service contract": cut red tape, put customers first, empower employees, and produce better government for less money.[20] Outsourcing fueled the drive towards these goals. The NPR emphasized that public agencies should compete "for their customers–between offices, with other agencies, and with the private sector. . . ."[21]

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19. NPR, *supra* note 16, at 101-2.

20. *Id*. at 121-22. When he announced the NPR on 3 March 1993, President Clinton stated he intended for it "to redesign, to reinvent, to reinvigorate the entire national government." *Id*. at 101. The NPR rallied around these goals. The NPR panel predicted its recommendations would revolutionize government by reducing waste, eliminating obsolete functions, improving services to the taxpayer, and creating a smaller, more productive government. *Id.* at 101.

21. *Id*. at 149. The NPR panel concluded that forcing public agencies to compete for customers would create "permanent pressure to streamline programs, abandon the obsolete, and improve what's left." *Id*. It proposed four steps to break public monopolies and encourage federal employees to better serve their customers. First, it would require all federal agencies to give customers a voice in critiquing and improving government service. Ironically, the NPR singled out the Internal Revenue Service (IRS) as one agency working hard to develop a customer focus. The IRS uses toll-free telephone numbers to serve taxpayers, uses electronic filing, and assigns one person to handle a taxpayer's repeat problems. *Id*. at 150-51. Second, the NPR would require agencies to compete for their customer's business. It noted that the federal government has created its own monopolies that serve its customers–federal workers–poorly. It identified government printing services as a public monopoly that has led to higher costs and more delays. The NPR proposed dismantling this and other public monopolies in favor of competing with the private sector. Stated succinctly, "[I]f [the Government Printing Office] can compete, it will win contracts. If it can't government will print for less, and taxpayers will benefit." *Id*. at 160. Third, when competition is not feasible, the NPR vowed to turn public monopolies into "business-like enterprises." *Id*. at 150. It observed that some public activities do not lend themselves to competition, but are instead government-owned corporations. Examples include the United States Postal Service and the Tennessee Valley Authority. However, the NPR noted that even these corporations are still partial monopolies because they perform specific public tasks with limited open market competition. To improve efficiency, the NPR recommended that the federal government subject its public agencies to business dynamics. For example, the NPR praised the National Technical Information Service (NTIS) for its dramatic turnaround from near disaster. Established to distribute scientific and technical data, the NTIS lost money and customers from poor management. The NTIS immediately responded to this crisis, streamlined its management practices, and regained its customers. *Id.* at 163. Finally, the NPR would rely less on new programs to solve problems, and more on market incentives. By this, the NPR meant using the power of the federal government to trigger greater activity within the private sector. For example, it cited how the Roosevelt administration set home ownership as a national priority. The federal government did not build the homes, but instead created a mortgage loan program that allowed buyers to put down 20% of the purchase price only and pay the balance over a 30-year period. *Id*. at 164.

Though it emphasized public-private competition, the NPR cited government bias against outsourcing. Specifically, the NPR criticized the DOD for not fully embracing this freemarket-oriented concept. Noting that the DOD faced shrinking budgets, the NPR concluded that the DOD could no longer afford to conduct "business as usual." Rather, the NPR challenged the DOD to erase its cultural bias against outsourcing.[22] The NPR urged senior Pentagon leaders to face the outsourcing challenge squarely.[23] The DOD accepted this challenge, responding with the QDR.

B. The Policy: The Quadrennial Defense Review–the DOD Responds

In the National Defense Authorization Act of 1997,[24] Congress directed the Secretary of Defense to examine defense programs and polices "with a view towards determining and expressing the defense strategy of the United States" through the year 2005.[25] Congress presented the Secretary of Defense with a comprehensive list of areas to review, ranging from force structure and defense strategy to budget and infrastructure.[26]

When Secretary of Defense Cohen presented the QDR to Congress on 15 May 1997, he announced that for the DOD to maintain the "tooth," or combat readiness of our national defense, it must cut the "tail," or the sup-

22. *Id*. at 161-62. The NPR observed that statutory roadblocks prevented the DOD from outsourcing. It cited the 1993 National Defense Authorization Act, when Congress stopped the DOD from outsourcing any further work to the contractors. It also cited how Congress required agencies to obtain their construction and design services from either the Army Corps of Engineers or the Naval Facilities Engineering Command. Thus, the NPR recommended that the administration propose legislation to remove these barriers. Moreover, it noted that the OMB would review OMB Cir. A-76 for potential changes to ease the contracting process. *Id*. at 162. The OMB review resulted in the SUPPLEMENT, *supra* note 11.

23. NPR, *supra* note 16, at 161. The NPR observed that while the DOD could not outsource command functions, it could outsource support functions like data processing, billing, and payroll. In fact, the NPR noted that the Pentagon's own defense contractors contract out similar functions. *Id*.

24. National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, §§ 921-926, 110 Stat. 2422, 2623-2628 (1996).

25. *Id*. § 922(6).

26. *Id*. §§ 923-926. Section 926 of the 1997 DOD Authorization Act summarizes the required contents of the QDR. These areas include: national security threats, the impact on the force structure in preparing for peace operations and operations other than war, the effect of new technology on the force structure, the impact of manpower and sustainment policies on conflicts lasting over 120 days, the role of the reserve component, airlift and sealift capabilities, and the impact of shifting defense resources among two or more theaters.

port functions. Harkening to the NPR and its mission to reinvent government, Secretary Cohen stated that the DOD must identify and then choose between the military's core functions and the private-sector functions. He further noted a "leaner, more efficient, and more cost effective" DOD could serve the "warfighter faster, better, and cheaper."[27] By reducing infrastructure, the DOD would unleash money to invest in combat readiness.

The QDR offered four ways for the DOD to invest in combat readiness. First, the QDR proposed further reducing civilian and military support personnel.[28] Second, the QDR recommended additional rounds of base closures.[29] Third, the QDR proposed adopting private sector business practices to improve support activities.[30] Finally, the QDR advocated outsourcing more "defense agency"[31] support functions to achieve both a "tighter focus" on essential tasks while lowering costs.[32]

The QDR study, though impressive, has been challenged.[33] After issuing the QDR, the DOD further scrubbed its infrastructure costs to uncover even more ways to reduce, streamline, and outsource. To accomplish this, the Secretary of Defense commissioned a Task Force on Defense Reform,[34] which produced the DRI.

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27. QDR, *supra* note 10, § 8 at 6.

28. *Id.* § 8 at 2.

29. *Id.* The QDR panel observed that the DOD did not begin to save money from the initial round of base closures, which occurred in 1988, until 1996. It predicted that those savings would grow. The QDR panel also noted, however, that the DOD had enough "excess" infrastructure to warrant two more rounds of base closures. The QDR panel recommended not only closing bases and other support facilities, but also the laboratories and test ranges that support research, development, test, and evaluation. *Id*.

30. *Id*. § 8 at 2-3. The QDR panel did not elaborate on how the DOD should adopt private sector practices. Instead, it noted that American business practices have undergone a "revolutionary transformation." Feeding off this revolution, the DOD must "adopt and adapt the lessons from the private sector" for the warfighter to keep a competitive edge. *Id*. § 8 at 3.

31. *Id*. § 8 at 3. "Defense agency" and "defense-wide activities" perform service and supply functions common to more than one DOD component. According to the QDR panel, 24 defense agencies and 80 defense-wide programs perform services as diverse as managing commissaries and providing intelligence. A sampling of these agencies include the Defense Logistics Agency, the Defense Financial Accounting Service, the Defense Information Service Agency, the Defense Investigative Service, and the On-Site Inspection Agency. *Id*.

C. The Policy: The Defense Reform Initiative–Taking the QDR One Step Further

When he unveiled the DRI report on 10 November 1997,[35] Secretary of Defense Cohen portrayed it as a sweeping program aimed at reforming the "business" of the DOD. Secretary Cohen stated, "American business has blazed a trail and we intend to emulate their success. We have no alternative if we are to have the forces we need as we enter the 21st century."[36] To reshape the DOD into an agile warfighting entity, the DRI expanded upon the QDR[37] to propose more streamlining and outsourcing.[38] The DRI

32. *Id*. § 8 at 2. The QDR panel encouraged the DOD to outsource more non-warfighting support functions. It predicted that the DOD would enjoy the same benefits private industry had gained from outsourcing: better quality, better responsiveness, better access to new technology, and lower costs. The panel justified its position on several grounds. First, it noted that 61% of the DOD employees in FY 1997 performed infrastructure or support functions. These functions included training; logistics support; central personnel services; headquarters functions; medical care; science and technology services; and command, control, and communication services. The QDR panel further observed that the DOD had reduced the total force structure by 32% from 1989 to 1997. Conversely, the DOD had only reduced the infrastructure force by 28% since 1989. Thus, the panel proposed cutting an additional 109,000 civilian and military personnel who perform support functions, boosting the total infrastructure force reduction since 1989 to 39%. As noted above, the panel also suggested two additional rounds of base closures. Additionally, the QDR panel directed that the DOD reengineer its infrastructure in two ways. First, the DOD must streamline and consolidate redundant functions and adopt the lessons and best practices from the business sector. Second, the DOD must outsource those military tasks that mirror commercial functions, especially in the logistics and support areas. *Id.* § 8 at 5-6.

33. After the Secretary of Defense released the QDR, the House National Security Committee (HNSC) expressed some concerns. It questioned the DOD's plans to contract out 109,000 civilian positions between FY 1998 and FY 2003. It also questioned how the DOD could save money by contracting out military support positions while also keeping those military personnel in the system. The HNSC further wondered if the DOD would retain enough resources to manage the increased contract workload from outsourcing. Thus, the HNSC directed the Secretary of Defense to further assess its outsourcing plans and report back on its projected costs and savings. H.R. REP. NO. 105-132, at 298-99 (1997). Finally, the HNSC criticized the DOD for failing to "challenge the inertia of 'business as usual.'" Despite the QDR (which Congress directed the DOD to prepare), the HNSC stated that the DOD could no longer afford to further study reform. *Id*. at 293. *See* GENERAL ACCOUNTING OFFICE, QUADRENNIAL DEFENSE REVIEW: OPPORTUNITIES TO IMPROVE THE NEXT REVIEW, REPORT NO. GAO/NSIAD-98-155 (1998); GENERAL ACCOUNTING OFFICE, QUADRENNIAL DEFENSE REVIEW: SOME PERSONNEL CUTS AND ASSOCIATED SAVINGS MAY NOT BE ACHIEVED, REPORT NO. GAO/NSIAD-98-100 (1998).

34. Memorandum, Under Secretary of Defense, to secretaries of the Military Departments, subject: Management Reform Memorandum #1–Implementation and Expansion of Infrastructure Savings Identified in the Quadrennial Defense Review (QDR) (15 May 1997) (on file with the author).

35. DRI, *supra* note 18.

recommended melding best business practices from the private sector into defense support activities. Along with the additional base closures, the DRI suggested that the DOD consolidate redundant organizations and outsource more in-house functions.

The DRI set ambitious outsourcing goals for the DOD. By 1999, the DOD plans to review its entire military and civilian force to identify those commercial activities falling within the A-76 "net."[39] According to the DRI, the DOD studied over 34,000 positions in fiscal year (FY) 1997 alone, mostly in the areas of base services, general maintenance and repair, and installation support.[40] By FY 2002, the DOD plans to study 150,000 more positions.[41] By competing these positions, the DRI predicts that the DOD could save nearly six billion dollars by FY 2002.[42]

D. The Policy: Is Everyone on the Outsourcing Bandwagon?

Despite such predictions, not everyone has climbed aboard the outsourcing bandwagon. Historically, Congress has not fully embraced OMB Cir. A-76. Until recently, Congress erected statutory roadblocks that hampered the DOD's attempts to use the outsourcing process. For example, in

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36. Office of Assistant Secretary of Defense (Public Affairs), *Secretary Cohen Reshapes Defense for the 21st Century* (Nov. 10, 1997) *available at* <http://www.defenselink.mil/news/>.

37. *See supra* notes 24-33 and accompanying text.

38. The DRI devotes a chapter to each cost-savings method it proposed. Chapter one highlights the nine best business practices that the DOD plans to adopt. Some of these business practices include paperless contracting, increased use of the government purchase credit card (IMPAC card), and increased use of internet shopping. DRI, *supra* note 18, at 1. Chapter two focuses on reorganizing and reducing the DOD headquarters elements, such as the Office of Secretary of Defense (OSD) staff, Defense Agencies, DOD Field Activities, Defense Support Activities, and the Joint Staff. By reorganizing, the OSD will key on the "corporate" level tasks, while lower echelons will zero in on the operational tasks. With a trimmer headquarters, the DRI expects that the DOD will resist mission creep: the temptation to take on new non-core functions. *Id*. at 15. Chapter three identifies outsourcing opportunities for the DOD under OMB Cir. A-76, such as payroll, personnel services, surplus property disposal, and drug testing laboratories. *Id*. at 27. Chapter four identifies ways that the DOD may eliminate unneeded infrastructure. For example, the DRI also proposes additional base closures; consolidating, restructuring, and regionalizing many support agencies; privatizing family housing; and privatizing all utility systems, except those needed for security reasons. *Id*. at 37. Congress passed legislation that established procedures for the DOD to use when privatizing housing and utilities. *See* 10 U.S.C.A. §§ 2871-85 (West 1998) (housing); 10 U.S.C.A. § 2688 (West 1998) (utilities). For more information on housing privatization, *see* <http://www.acq.sd.mil/iai/hrso/>. For more information on utilities privatization, *see* <http://www.afcesa.af.mil>.

the late 1980s, Congress empowered installation commanders to decide whether or not to study commercial activities for outsourcing.[43] Not surprisingly, when offered the option to outsource or maintain the status quo, most commanders chose the latter course. Later, in the 1991 Defense Appropriations Act, Congress prohibited the DOD from funding lengthy OMB Cir. A-76 studies.[44] Finally, Congress flatly prohibited the DOD from outsourcing for eighteen months, from October 1992 to April 1994.[45] As a result, Congress slowed the DOD outsourcing boom until 1995, when

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39. DRI, *supra* note 18, at 27. The DRI also noted that the DOD has established guidelines for pursuing public-private competitions for depot maintenance work. While depot maintenance is beyond the scope of this paper, Congress and the GAO are scrutinizing this area closely. By statute, the DOD may use only 50% of its funds to contract for depot maintenance and repair work. 10 U.S.C.A. § 2466. This is a fertile, highly publicized, and thus hotly contested area for cost savings as the private sector competes for more depot maintenance work. The GAO has issued numerous reports on depot maintenance and repair. *See, e.g.*, GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: PUBLIC AND PRIVATE SECTOR WORKLOAD DISTRIBUTION REPORTING CAN BE FURTHER IMPROVED, REPORT NO. GAO/NSIAD-98-175 (1998); PUBLIC-PRIVATE COMPETITIONS: REVIEW OF SACRAMENTO AIR FORCE DEPOT SOLICITATION, REPORT NO. GAO/OGC-98-48 (1998); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE COMPETITIONS: DOD'S DETERMINATION TO COMBINE DEPOT WORKLOADS IS NOT ADEQUATELY SUPPORTED, REPORT NO. GAO/NSIAD-98-76 (1998); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE COMPETITIONS: PROCESSES USED FOR C-5 AIRCRAFT AWARD APPEAR REASONABLE, REPORT NO. GAO/NSIAD-98-72 (1998); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: INFORMATION ON PUBLIC AND PRIVATE SECTOR WORKLOAD ALLOCATIONS, REPORT NO. GAO/NSIAD-98-41 (1998); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: UNCERTAINTIES AND CHALLENGES DOD FACES IN RESTRUCTURING ITS DEPOT MAINTENANCE PROGRAM, REPORT NO. GAO/T-NSIAD-97-112 (1997); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: UNCERTAINTIES AND CHALLENGES DOD FACES IN RESTRUCTURING ITS DEPOT MAINTENANCE PROGRAM, REPORT NO. GAO/NSIAD-97-111 (1997).

40. DRI, *supra* note 18, at 30.

41. *Id*.

42. *Id*. The DOD relied on what it called "historical experience" to conclude it could save six billion dollars through FY 2002. The DOD further predicted that it could save an additional $2.5 billion annually after FY 2002 as a result of OMB Cir. A-76 studies. *Id.*

43. Pub. L. No. 101-189, § 11319a)(1), 103 Stat. 1352, 1560 (1989). Codified at 10 U.S.C. § 2468, this law expired on 30 September 1995. Most commanders opted not to outsource because of how much an OMB Cir. A-76 study costs in terms of money, employee morale, and workforce control. *See* GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING 2-3, REPORT NO. GAO/NSIAD-97-86 (1997).

44. Department of Defense Appropriation Act for Fiscal Year 1991, Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.

45. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

many of the restrictive laws lapsed and the DOD again attempted to employ OMB Cir. A-76.[46]

The GAO has also jumped into the outsourcing fray. Now that the DOD has quickened its outsourcing pace, the GAO has questioned whether the DOD can meet its ambitious cost savings goals. In report after report, the GAO has pulled the DOD back down to earth, calling its projected savings "achievable" but often "overstated."[47] Though the GAO has applauded the DOD's attempts to save money, it has challenged its data for projecting savings, its overly optimistic timelines to meet savings goals, and its myopic view of meeting mission requirements in the face of severe personnel cuts.[48]

Despite the DOD's rosy outlook for savings from outsourcing, the GAO has praised it for at least using OMB Cir. A-76 as a cost-savings tool. Noting that civilian agencies have lagged behind the DOD, the GAO has decried OMB's lack of leadership in monitoring A-76 studies. In fact, the GAO questioned how executive agencies generally could shift priorities towards using OMB Cir. A-76 when it is not a high priority within OMB. The GAO challenged OMB to get A-76 on track through strong leadership so other agencies besides the DOD might find incentives to use OMB Cir. A-76 to save money.[49]

Many in the private sector view the OMB Cir. A-76 process as skewed in favor of the government. Not surprisingly, some contractors claim that in its present form, OMB Cir. A-76 "does not work" because the government lacks incentive to review some commercial activities for their cost-savings potential.[50] Others oppose public-private competitions from

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46. From 1 October 1995 to 15 January 1997, the DOD projected OMB Cir. A-76 studies of over 34,000 base support positions. At that time, the DOD announced plans to study nearly 100,000 more positions over a six-year span. *See* GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING, *supra* note 43, at 1.

47. *See, e.g.*, GENERAL ACCOUNTING OFFICE, OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BY DEFENSE SCIENCE BOARD'S PROJECTIONS ARE OVERSTATED, REPORT NO. GAO/NSIAD-98-48 (1997). The GAO reviewed findings from the Defense Science Board predicting that the DOD could save $30 billion annually by the year 2002 by outsourcing support functions. The GAO noted, however, that the Defense Science Board overstated the DOD's total savings from outsourcing, labeling the estimates unfounded. For example, the GAO observed that the Defense Science Board did not have any data for estimating some logistics costs, such as those for supply and repair functions. Thus, the GAO opined that the Defense Science Board conservatively and inaccurately estimated these DOD expenses. *Id.* at 3-9.

a philosophical stance and argue that the taxpayer suffers when the government competes with its citizens. These critics recognize, however, that outsourcing is popular in some circles, but urge for a legislative rather than a pure policy approach to public-private competitions.[51]

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48. Prior to the Secretary of Defense releasing the QDR, the GAO addressed the DOD's efforts to cut costs to fund modern weapons systems. In one report, the GAO noted that the DOD could "achieve savings in military personnel accounts" by replacing active duty military personnel with less costly civilian personnel. According to the GAO, civilians cost less because they rotate less frequently. GENERAL ACCOUNTING OFFICE, DEFENSE BUDGET: OBSERVATIONS ON INFRASTRUCTURE ACTIVITIES 20-23, REPORT NO. GAO/NSIAD-97-127BR (1997). In another report, the GAO lauded the DOD's outsourcing push, but cautioned that each service must evaluate the individual cost benefits of outsourcing opportunities. The GAO questioned the projected DOD savings from outsourcing, noting that the services may not achieve such ambitious savings with a reduced force structure. If the DOD could not achieve its projected savings, the GAO recommended that Congress squarely address the difficult issue of how to fund modern weapons systems. GENERAL ACCOUNTING OFFICE, DEFENSE OUTSOURCING: CHALLENGES FACING DOD AS IT ATTEMPTS TO SAVE BILLIONS IN INFRASTRUCTURE COSTS, REPORT NO. GAO/NSIAD-97-110 (1997). *See* GENERAL ACCOUNTING OFFICE, DEFENSE MANAGEMENT: CHALLENGES FACING DOD IN IMPLEMENTING DRI, REPORT NO. GAO/T-NSIAD-98-122 (1998). In this report, the GAO noted that the DOD faced a difficult task when trying to implement the DRI. It supported the DRI, but observed that the DOD needed to embrace other opportunities to save money and meet mission needs. In this regard, the GAO focused on four key points from the DRI. First, the GAO expressed concern that the DOD will reduce future budgets based only on expected savings from OMB Cir. A-76 competitions and base closings. The GAO noted that these tools produced savings, but not as much or as quickly as the DOD initially estimated. Consequently, the GAO viewed the DOD's approach as a readiness risk. Second, the GAO concluded that the DOD failed to think broadly enough about how to implement its business reengineering reforms. Although the GAO noted that the DOD expected these initiatives to save money and provide quality service, it cautioned that the DOD failed to consider how to implement them in a timely, efficient, and effective manner. Third, the GAO found that the DOD needed to fully capitalize on the savings potential from initiatives to consolidate, restructure, and regionalize functions. Finally, the GAO criticized the DOD for not addressing systemic management problems that hamper change. It focused on such hurdles as service parochialism, lack of incentive to change, lack of goals to achieve change, and lack of data to measure change. *Id*. at 2-4. *See* GENERAL ACCOUNTING OFFICE, DEFENSE INFRASTRUCTURE: CHALLENGES FACING DOD IN IMPLEMENTING REFORM INITIATIVES, REPORT NO. GAO/T-NSIAD-98-115 (1998).

49. *See* GENERAL ACCOUNTING OFFICE, OMB CIRCULAR A-76: OVERSIGHT AND IMPLEMENTATION ISSUES, REPORT NO. GAO/T-GGD-98-146 (1998).

50. *See Improve Federal Procurement System: Hearings on H.R. 4244 Before the Subcomm. on Government Management, Information, and Technology of the Comm. on Reform and Oversight*, 105th Cong. (1998) (statement of John M. Palatiello, President, Management Association for Private Photogrammetric Surveyors) *available at* 1998 WL 469554.

51. *See id.* (statement of Gary D. Engebretson, President, Contract Services Association of America).

Congress has answered these critics. After several near misses,[52] Congress recently passed outsourcing legislation entitled the Federal Activities Inventory Reform Act of 1998 (FAIR).[53]

The FAIR does not create new outsourcing policy, but gives "teeth" to the current policy stated in OMB Cir. A-76. Significantly, the FAIR gives federal agencies[54] certain marching orders. First, agencies must annually prepare a list of noninherently governmental functions performed by federal employees, submit the list to OMB for review, and then make the list publicly available.[55] Second, the FAIR establishes an appeal process for "interested parties" within each agency and the private sector to challenge the contents of the list.[56] Significantly, the FAIR creates a statutory definition–identical to OMB Cir. A-76–of "inherently governmental function."[57] Finally, the new bill requires agencies to conduct "fair and reasonable cost comparisons," a term Congress left largely undefined.[58]

Even with the FAIR, therefore, agencies must continue to rely on OMB Cir. A-76 for the outsourcing process.[59] For the DOD, this means culling lessons from the current outsourcing policy and fervor highlighted in the NPR and` the QDR. These reports brandish a constant theme: out-

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52. In the past, Senate and House members have introduced varying versions of a bill to codify the outsourcing process. This early bill was initially known as the Freedom from Government Competition Act. This Act would have prohibited agencies from providing or obtaining goods or services from other agencies unless the goods or services are inherently governmental, dictated by national security, or offer the federal government the best value for the goods or services. Regarding best value, the initial bill would have required the OMB to write regulations considering cost, qualifications, past performance, technical capability, and other relevant non-cost factors for both the public and private sector. *See* S. 314, 105th Cong. (1997); H.R. 716, 105th Cong. (1997). *See* GENERAL ACCOUNTING OFFICE, PRIVATIZATION AND COMPETITION: COMMENTS ON H.R. 716, THE FREEDOM FROM GOVERNMENT COMPETITION ACT, REPORT NO. GAO/T-GGD-97-185 (1997); GENERAL ACCOUNTING OFFICE, PRIVATIZATION AND COMPETITION: COMMENTS ON S. 314, THE FREEDOM FROM GOVERNMENT COMPETITION ACT, REPORT NO. GAO/T-GGD-97-134 (1997) (providing a general summary of the pros and cons of the prior proposed legislation).

53. Pub. L. No. 105-270, 112 Stat. 2382 (1998). On 30 July 1998, the Senate passed the FAIR and referred it back to the House Committee on Government Reform and Oversight. On 5 October 1998, the House passed the FAIR, which President Clinton signed into law on 19 October 1998.

54. The FAIR applies to executive and military departments, but does not apply to the GAO, government corporations, nonappropriated fund instrumentalities, or DOD depot maintenance and repair functions. Pub. L. No. 105-270, 112 Stat. 2382, 2384 (1998).

55. Agencies must submit their lists to the OMB by the end of the third quarter of each FY. After the OMB review, the agency must then send the list to Congress and make it available to the public. The OMB will publish a notice in the federal register that the list is publicly available. Pub. L, No. 105-270, 112 Stat. 2382 (1998).

sourcing is fueling the quiet revolution for a leaner and more efficient government, especially within the DOD. So, as part of the current DOD landscape, how does outsourcing work?

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56. The FAIR defines an "interested party" as follows:

> (1) A private sector source that—
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> (A)is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and
>
> (B)has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.
>
> (2) A representative of any business or professional association that includes in its membership private sector sources referred to in paragraph (1).
>
> (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.
>
> (4) The head of any labor organization referred to in section 7103(a)(4) of title 5, United States Code, that includes within its membership officers or employees of an organization referred to in paragraph (3).

Pub. L. No. 105-270, 112 Stat. 2382, 2383 (1998).

57. Pub. L. No. 105-270, 112 Stat. 2382, 2384-85. *See infra* notes 107-108 and accompanying text.

58. The FAIR does not define the term "realistic and fair cost comparisons." Rather, the bill directs the agencies to ensure that "[a]ll costs (including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs) are considered and that the costs are considered realistic and fair." Pub. L. No. 105-270, 112 Stat. 2382, 2383.

59. The OMB has indicated that it will issue new guidance to OMB Cir. A-76 to assist agencies in complying with the FAIR. Viewing the FAIR as an "important reinvention and management tool," the OMB has emphatically stated that it plans to do more than just "tweak and reissue A-76." The OMB has assured its critics that it is "quite committed to fully implementing the FAIR." *Contracting Out: OMB To Issue Supplemental A-76 Guidance To Help Agencies Comply With New Statute*, Fed. Cont. Daily (BNA), Nov. 17, 1998, *available at* WESTLAW Legal News, BNA-FCD, Nov. 17, 1998 FCD, d3. The overall potential impact of the FAIR on outsourcing remains unknown. Interestingly, some commentators predict the FAIR will allow Congress and the private sector to more closely scrutinize the activities government employees currently perform. They opine that Congress will have a more direct hand in outsourcing oversight. By requiring agencies to submit annual lists of noninherently governmental functions, Congress can ask the tough questions and hold agencies' "feet to the fire" for why they either labeled a function "noninherently governmental" or excluded it from their lists. The FAIR, however, does not articulate any outsourcing procedures, other than to require "fair and reasonable cost comparisons." *See* Leroy H. Armes, *House Passes Compromise Bill Requiring Federal Agencies To List Activities That Could Be Contracted Out*, 70 FED. CONT. REP. 355 (1998).

III. The Process: OMB Cir. A-76 Procedures[60]

A. The Process: An Overview

Like it or not, the OMB Cir. A-76 process is here to stay. For nearly forty years,[61] OMB Cir. A-76 has offered federal agencies a tool to save money as budgets dwindled. Several statutes,[62] directives,[63] and regulations[64] reference OMB Cir. A-76. Its process generally resembles other government contracting procedures, with one notable exception: the *government* also submits an offer. A snapshot of the OMB Cir. A-76 procedures provides a backdrop for analyzing how best value contracting fits in this process.

Often, an example illustrates concepts better than mere theory. Assume the following facts:[65] A military base has conducted an OMB Cir. A-76 competition. Using a base operating services solicitation (BOS),[66] base officials bundled[67] three functions together: civil engineering, transportation, and supply. Civil engineering encompassed family housing, lodging, ground maintenance, and general operations. Supply encompassed the entire base supply system. Transportation encompassed vehicle maintenance and operations.

The OMB Cir. A-76 process began when the DOD notified Congress of the A-76 study for the BOS functions.[68] A local base team[69] then developed several plans for the study, including a performance work statement (PWS),[70] the quality assurance surveillance plan (QASP),[71] and the management plan.[72] Together, these plans formed the government's "Most Efficient Organization" (MEO).[73] The government MEO team also prepared a cost estimate of the government's performance.[74] The contracting

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60. *See* Major Gregory S. Lang, *Best Value Source Selection in the A-76 Process*, 43 A.F. L. REV. 239 (1997) (providing an overview of the OMB Cir. A-76 procedures).

61. OMB CIR. A-76, *supra* note 2, para. 4.a. In 1955, the Bureau of Budget issued a bulletin establishing the federal policy to buy goods and services from the private sector. Bureau of Budget Bulletin 55-4 (Jan. 1955) *reprinted in* Diebold v. United States, 947 F.2d 787, 799 (6th Cir. 1991). The OMB issued OMB Cir. A-76 in 1966, which restated this policy but justified outsourcing for its cost-savings. The OMB revised the circular in 1967, 1979, and 1983. OMB CIR. A-76, *supra* note 2, para. 4.b. The OMB recognized that the private sector could not provide all goods and services. Therefore, it also carved out some exceptions. These exceptions include the unavailability of a commercial source, patient care, national defense interests, inherently governmental functions, time of war or military mobilization, and research and development. OMB Cir. A-76, *supra* note 2, para. 8; SUPPLEMENT, *supra* note 11, pt. 1, ch.1, § C.

officer received the MEO, management plan, and in-house estimate as sealed documents, which the contracting officer safeguarded until the base received bids or proposals from the contractors.[75]

The contracting officer also selected the best value procurement method[76] for the OMB Cir. A-76 BOS competition. Three private contractors then submitted offers for the BOS contract. After receiving these

62. *See* 10 U.S.C.A. § 2460 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 341, 112 Stat. 1920, 1973 (1998) (defining depot-level maintenance and repair); 10 U.S.C.A. § 2461 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998) (requiring notice to Congress and a cost comparison study before changing any commercial activity with 50 or more DOD civilians to contract performance); 10 U.S.C.A. § 2462 (West 1998) (requiring the Secretary of Defense to purchase goods and services from the private sector if more economical, but exempting goods and services that military or government personnel must perform); 10 U.S.C.A. § 2463 (requiring the Secretary of Defense to collect and maintain cost comparison data for the term of the contract or five years when converting a contractor-operated DOD commercial activity with 50 or more employees to DOD civilian employee performance); 10 U.S.C.A. § 2464 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 343, 112 Stat. 1920, 1976 (1998) (requiring the Secretary of Defense to identify logistics capability that the DOD must have to ensure a ready and controlled source of technical competence and resources); 10 U.S.C.A § 2465 (prohibiting the DOD from using appropriated funds to contract for fire-fighting or security guard functions at domestic bases, except as follows: overseas; on a government-owned but privately operated installation; for services prior to 24 Sept. 1983; or for services with local governments at an installation closing within 180 days); 10 U.S.C.A. § 2466 (permitting the DOD to use only 50% of funds to contract for depot-level maintenance and repair work); 10 U.S.C.A. § 2467 (requiring the Secretary of Defense to include any retirement costs in an A-76 cost comparison, and to consult with affected employees and their labor organizations); 10 U.S.C. § 2468 (1994) (authorizing the DOD installation commanders to enter A-76 contracts for performing commercial activities until 30 Sept. 1995); 10 U.S.C.A. § 2469 (requiring the Secretary of Defense to use merit-based procedures when moving depot-level activities over three million dollars million to another DOD depot activity, and to use public-private competition when moving a depot level workload over three million dollars to contractor performance); 10 U.S.C.A. § 2469a (establishing the procedures for converting depot-level maintenance and repair workload from the DOD to the private sector on installations approved for closure or realignment under the Base Closure and Realignment Act of 1990). *See also* Federal Workforce Restructuring Act of 1994, Pub. L. 103-226, 108 Stat. 111, 117 (requiring the President to ensure that buyouts or streamlining do not increase service contracts without a cost comparison); Government Performance and Results Act of 1993, Pub. L. 103-62, 107 Stat. 285 (requiring federal agencies to improve the confidence of the American people in government by focusing on government results, service, quality, and customer satisfaction).

63. *See* U.S. DEP'T OF DEFENSE, DIR. 4100.15, COMMERCIAL ACTIVITIES PROGRAM (10 Mar. 1989); U.S. DEP'T OF DEFENSE, INSTR. 4100.33, COMMERCIAL ACTIVITIES PROGRAM PROCEDURES (9 Sept. 1985).

offers, a senior base official evaluated them and identified one of the con-

64. *See* FAR, *supra* note 13, subpt. 7.3. The military departments have implemented OMB Cir. A-76 via commercial activity programs. *See, e.g.*, U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE POLICY DIR. 38-6, OUTSOURCING AND PRIVATIZATION (1 Sept. 1997); U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 38-203, COMMERCIAL ACTIVITIES PROGRAM (26 Apr. 1994); U.S. DEP'T OF ARMY, REG. 5-20, COMMERCIAL ACTIVITIES PROGRAM (1 Oct. 1997); U.S. DEP'T OF ARMY, PAM. 5-20, COMMERCIAL ACTIVITIES STUDY GUIDE (31 July 1998) [hereinafter DA PAM 5-20]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 4860.44F, COMMERCIAL ACTIVITIES (29 Sep. 1989).

65. This scenario resembles the facts in *Madison Services*. *See* Madison Services, Inc., B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136. In *Madison*, agency officials issued the request for proposals in January 1996, before the OMB issued the Supplement in March 1996. Even so, agency officials still used best value contracting, and the facts offer a good example of some key issues. Beyond these facts, the hypothetical scenario in this article is not modeled precisely after *Madison*. Moreover, the hypothetical assumes additional facts. For example, in the BOS hypothetical, the base officials not only used best value contracting, but they also used a PWS, selected certain evaluation criteria, communicated with the government MEO team, and eventually kept the BOS functions in-house.

66. *See* AIR FORCE LOGISTICS MANAGEMENT AGENCY (AFLMA), U.S. DEP'T OF THE AIR FORCE, PROJECT NO. LC9608100, OUTSOURCING GUIDE FOR CONTRACTING 60-61 (1996) [hereinafter AFLMA OUTSOURCING GUIDE] (on file with the author). According to AFLMA, the Air Force has found that BOS contracts offer cost savings and efficiency. Specifically, BOS contracts use private sector expertise while saving money, and also reduce the number of overall contracts to a manageable level. When using a BOS contract, the Air Force typically "bundles" certain requirements together, such as supply, transportation, civil engineering, and services. It then appoints an in-house manager to administer the contract. *Id*. at 61.

67. *See id*. at 59-60. "Bundling" occurs when an agency consolidates several functions into one contract, usually at one location. In the DOD, numerous functions lend themselves to bundling, such as civil engineering, logistics, and services. Bundling presents two challenges, however. First, the installation must have the ability to manage a multi-function contract. Second, the installation must find a qualified source to perform multi-function tasks. When outsourcing, the installation should consider how bundling impacts small businesses and their resources to perform within a larger "umbrella" contract. The small businesses currently performing a function on a base may suffer if that function is bundled with others and then outsourced. The AFLMA recommends including a subcontracting requirement in the solicitation when a small business is unavailable as a prime contractor. *Id*. at 59-60, 64.

68. *See* 10 U.S.C.A. § 2461 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998) (requiring notice to Congress and a cost comparison if 50 or more persons perform the function proposed for OMB Cir. A-76 study); 10 U.S.C.A. § 2467 (requiring the DOD to consult with employees and their labor organizations after identifying a function for a cost comparison study).

69. The Supplement refers to this team as the "cost comparison study team" (CCST). It consists of agency experts in contracting, civilian personnel, civil engineering, financial management, legal, manpower, and the functional area under review. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § B, para. 1.

tractors as offering the "best value" to the government.[77] The same base official also reviewed the in-house offer (not the cost estimate) and decided it did not meet the same performance standards as the selected best value

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70. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § C. The PWS defines the agency's needs, the performance standards and measures, and the timeframes for performance. The PWS also serves as the basis for all costs. The Supplement encourages a performance-based PWS, and refers agencies to various Office of Federal Procurement policy letters for guidance. *See* Office of Federal Procurement Policy Letter 91-2, Service Contracting, (9 Apr. 91); Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting, (18 May 94); Office of Federal Procurement Policy, Best Practices Guide to Performance-Based Service Contracting (Apr. 1996). *See* SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § C. The Supplement cautions that the PWS should not limit service options, arbitrarily increase risk, reduce competition, violate industry service norms, or omit statutory or regulatory requirements without full justification. After OMB published the Supplement in 1996, the Federal Acquisition Council issued final rules on performance-based service contracting. *See* Federal Acquisition Council (FAC) 97-01, 62 Fed. Reg. 44,813 (1997). These rules encourage contracting officers to use positive or negative performance incentives. To assist contracting officers and legal advisors, the Office of Federal Procurement Policy (OFPP) has placed several model performance-based performance work statements on the internet. *See* <http://www.arnet.gov/>. *See generally 1997 Year in Review*, *supra* note 13, at 94 (providing a brief discussion of FAC 97-1).

71. SUPPLEMENT, *supra* note 11, app. 1. The QASP outlines how the federal employees will inspect the in-house or contract performance to determine if their service meets standards.

72. *Id*. The management plan defines the organizational structure, operating procedures, equipment, and inspection plans for the MEO.

73. *Id*. The MEO describes the way the government will perform the commercial activity. Together with the management plan, the MEO forms the basis for the government's in-house estimate. It must reflect the scope of the PWS. It must also identify the organization structures for the MEO, including the staffing and operating procedures, equipment, and transition plans to ensure that MEO performs the in-house activity in a cost-effective manner.

74. *Id*. pt. 2, ch. 2, § A. The government MEO prepares the in-house estimate from the PWS and then forwarded the MEO to the independent review officer for an audit. The in-house cost estimate includes the following items: personnel costs, material and supply costs, depreciation, capital costs, rent, maintenance and repair, utilities, insurance, travel, MEO subcontracts, overhead costs, and any additional costs. The agency calculates these costs using formulas in part two of the Supplement.

75. *Id*. pt. 1, ch. 3, § F. The contracting officer seals the MEO after the independent review officer completes the audit.

76. *Id*. pt. 1, ch. 3, § H. The Supplement permits all competitive methods under the FAR. This includes sealed bid, two-step, source selection, and other competitive-procedures. Time restraints should guide this choice. Congress has limited the DOD OMB Cir. A-76 studies to 24 months for a single function and 48 months for multiple functions. *See* Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8026, 112 Stat. 2279, 2302 (1998).

offer. After adjusting its offer and cost estimate, the government MEO resubmitted its in-house offer for review.

Base officials then selected a winner. To win, a private offeror's cost estimate must be at least ten percent lower than that offered by the government MEO.[78] Otherwise, the government MEO "wins" and the base keeps the function in-house.[79] For the BOS competition, base officials compared the contractor and MEO cost estimates. Because the government MEO offered comparable performance at a lower cost, the base retained the BOS functions in-house.

Following the cost comparison, several events took place. First, the contractor[80] appealed the decision to keep the BOS functions in-house to the appeal authority.[81] After the appeal authority denied the appeal, the contractor protested the government's decision to the General Accounting Office (GAO).[82] Additionally, the base MEO began performing the BOS

77. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § G. If the agency chooses a negotiated procedure, the Supplement establishes guidelines to ensure equity in the cost comparison process. First, the government submits a technical performance plan, like the commercial offerors. The technical performance plan also reflects the MEO and is sealed prior to the decision authority considering any part of any contract offer. *Id.* pt. 1, ch. 3, § H, para. 3.a. Second, the agency establishes a source selection authority (SSA). The SSA reviews the contract offers and identifies the one representing the best overall value to the government. This offer competes with the government's in-house cost estimate. *Id*. pt. 1, ch. 3, § H, para. 3.c. After selecting the competitive offer, the SSA evaluates the in-house offer and assesses whether or not it achieves the same level of performance. The SSA performs this review without viewing the in-house cost estimate. The government then adjusts the MEO to meet the performance standards accepted by the SSA. It submits a revised cost estimates to the independent review officer to ensure that the revised in-house cost estimate meets the same scope of work and performance levels as the best value commercial offer. *Id*. at pt. 1, ch. 3, § H, para. 3.e.

78. According to the Supplement, the "minimum cost differential" is the lesser of ten percent of personnel costs or ten million dollars over the performance period. Unless the private offer "beats" the MEO by the lesser amount, the government keeps the commercial function in-house. SUPPLEMENT, *supra* note 11, pt. 2, ch. 4, § A, para. 1.

79. SUPPLEMENT, *supra* note 11, pt. 2, ch. 4. The Supplement explains that the ten percent differential ensures "that the [g]overnment will not convert for marginal cost savings." *Id.*

80. *Id*. pt. 1, ch. 3, § K. In the hypothetical BOS competition, the losing private offeror is an "interested party." This term includes federal employees and contractors who submitted bids or offers. It also includes agencies that submitted formal offers to compete for the right to provide the service through an inter-service support agreement (ISSA).

81. The appeal authority is an impartial government official at a level organizationally higher that the official who made the original award decision. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § K, para. 3.

function.[83] Finally, after one year, base officials will review the MEO's performance to ensure it is performing the function in line with the PWS and the in-house estimate.[84]

With our hypothetical BOS competition, we have set the stage to explore the OMB Cir. A-76 process. Specifically, we may now delve into the issues our base officials face after selecting the best value procurement method for the cost study.

B. The Process: An Overview of Best Value Contracting[85]

When buying a product or service, a savvy shopper might look beyond mere cost to other areas before making a final choice. For example, our shopper might explore if the company offers a quality service or enjoys a good reputation. Or, our shopper may examine the company's performance or the quality of its employees. In the end, the consumer may select the company providing the best value for the product or service, despite the higher cost. In such a case, the consumer obviously believes that the higher cost is more than outweighed by the non-cost considerations.

Similarly, in negotiated government procurements,[86] best value contracting permits an agency to evaluate cost and non-cost factors so as to select the offer providing the "biggest bang for the proverbial dollar."[87] In

82. *Id.* pt.1, ch. 3, § K, para. 7. Note that if a party files an agency appeal, the appeal authority must decide within 30 days to either award the contract or cancel the solicitation. *Id.* pt. 1, ch. 3, § K, para. 8. The contractor may also file a protest in federal court. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (amending 28 U.S.C. § 1491).

83. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § E, para. 4d. The government's management plan contains a transition plan designed to minimize any disruption, adverse impact, or start-up requirements when shifting work from in-house to contract or vice versa.

84. *Id.* pt. 1, ch. 3, § L. The agency must conduct a post-MEO performance review on not less than 20% of the functions the government performs resulting from a cost comparison. If this review reveals any in-house deficiencies, the agency should give the MEO personnel adequate time to correct them. If the MEO personnel fail to correct these deficiencies, or deviate from the PWS, the contracting officer has two options. If possible, the contracting officer must first award the work to the next lowest offer that participated in the cost comparison. Otherwise, the contracting officer must immediately resolicit the cost comparison. *Id.*

85. *See generally* Carl J. Peckinpaugh & Joseph M. Goldstein, *Best Value Source Selection: Contracting for Value, or Unfettered Agency Discretion?*, 22 PUB. CONT. L. J. 275 (Winter 1993) (providing an overview of best value contracting).

the underlying solicitation, the agency must state every factor and significant subfactor and its "relative importance."[88] Additionally, it must always evaluate certain factors, such as cost or price,[89] the quality of the product or service,[90] and past performance.[91] The agency may also communicate with offerors on limited subjects.[92] Following any discussions, the agency selects a competitive range and allows certain offerors to submit revised proposals.[93]

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86. *See generally* RALPH C. NASH. JR. & JOHN CIBINIC, JR., COMPETITIVE NEGOTIATION: THE SOURCE SELECTION PROCESS (1993). The negotiated procurement process evolves as follows: Once the agency has developed the PWS and the evaluation factors, it then solicits proposals from offerors. Upon receiving the offers, the contracting officer or the source selection evaluation team reviews them against the evaluation factors and subfactors. The contracting officer may then communicate with certain offerors to help determine the competitive range. After selecting the offerors who fall within the competitive range, the contracting officer conducts discussions. The contracting officer's overall purpose is to enhance the government's ability to obtain the best value from the procurement. During discussions, the contracting officer and the offeror address past performance and any weaknesses or deficiencies in the proposal. However, the contracting officer may not reveal another offeror's price, favor one offeror over another, or reveal an offeror's technical solution to another offeror. When the contracting officer has completed discussions, the offerors may submit a revised proposal. After conducting a tradeoff analysis, the source selection authority then selects the offeror that represents the best value to the government.

87. FAR, *supra* note 13. When OMB published the Supplement, the FAR did not specifically define "best value." Rather, it stated that an agency should structure a negotiated procurement "to provide for the selection of the source whose proposal offers the greatest value to the government in terms of performance, risk management, cost or price, and other factors."

88. FAR, *supra* note 13, at 15.304(d).

89. *Id*. at 15.304(c)(1).

90. *Id*. at 15.304(c)(2). When evaluating quality, the agency must consider one or more non-cost evaluation factors, such as past performance, technical excellence, management capability, personnel qualifications, and prior experience.

91. *Id*. at 15.304(c)(3)(ii). According to the FAR, agencies must evaluate past performance in contracts expected to exceed one million dollars. Effective 1 January 1999, agencies must evaluate past performance for contracts expected to exceed $100,000. *See 1997 Year in Review*, *supra* note 13, at 27. *See generally* Sunita Subramanian, *The Implications of the FAR Rewrite for Meaningful Discussions of Past Performance*, 26 PUB. CONT. L. J. 445 (1997).

92. FAR, *supra* note 13, at 15.306(b), (d)(3), (e). The agency limits these discussions to offerors who have not responded to inquiries about adverse past performance and offerors whose competitive range status is uncertain. The agency may also communicate with an offeror to decide whether that offeror's proposal belongs in the competitive range. The agency may also award the contract without discussions if it notified the offerors of this fact in the solicitation. If so, the agency may only allow the offeror to resolve minor or clerical errors, or clarify certain parts of the proposal, such as past performance. *Id*. 15.306(a)(1)-(3).

Effective October 1997,[94] the Federal Acquisition Regulation (FAR) defines "best value" as the "expected outcome of an acquisition that provides the greatest overall value for the agency."[95] To help agencies select the offer with the "greatest overall value," the FAR creates a "best value continuum." On one end, cost factors may drive an agency's award decision.[96] The agency selects the lowest priced, technically acceptable offer as the best value.[97] On the other end of the best value continuum, non-cost factors drive the agency's award decision.[98] Thus, the agency may tradeoff cost and non-cost factors to select the best value offer, which may not be the lowest priced offer.[99]

The Supplement to OMB Cir. A-76 thrust best value contracting into the outsourcing arena. By choosing the negotiated procurement method in an OMB Cir. A-76 study, an agency triggers the best value tradeoff process. For example, the SSA[100] initially compares the private sector offers to each other and makes tradeoffs between various cost and non-cost fac-

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93. FAR, *supra* note 13, at 15.307(b). Formerly known as "best and final offers," the FAR part 15 rewrite now refers to them as "revised proposals."

94. On 30 September 1997, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council issued Federal Acquisition Circular (FAC) 97-02, which revised part 15 of the FAR and made conforming changes to other parts of the FAR. Although effective on 10 October 1997, FAC 97-02 allowed agencies to delay implementing the FAR part 15 changes until 1 January 1998. *See supra* text accompanying note 13.

95. *See* FAR, *supra* note 13, at 2.101. This section defines "best value" as follows: "Best value means the expected outcome of an acquisition that, in the [g]overnment's estimation, provides the greatest overall benefit in response to the requirement." *Id.*

96. *Id*. at 15.101. This section states:

> In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

Id.

97. *Id*. at 15.101-2(a). This section further states that "solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors." *Id*. at 15.101-2(b)(1).

98. *Id*. at 15.101.

99. *Id*. at 15.101-1(a). This section requires the agency to state in the solicitation all evaluation factors and significant subfactors and their relative importance to each other. It also requires the agency to state whether the non-cost factors are "significantly more important than, approximately equal to, or significantly less important than cost or price." *Id*. at 15.101-1(b)(1)-(2).

tors. After selecting the best value offeror, the SSA then compares the private offer with the MEO's technical and other proposal data, except cost.[101] This step permits the SSA to determine if the MEO meets the same scope of work and performance levels as the private sector's best value offer. If not, the MEO team must revise its technical proposal and cost estimate before the agency conducts the final cost comparison and chooses a winner. Even best value, however, cannot escape the proverbial "bottom line": the private offeror, best value or not, must still "beat" the MEO by ten percent.

An agency must determine when to choose the best value procurement method in an OMB Cir. A-76 study. The GAO has reviewed OMB Cir. A-76 studies employing best value competitions.[102] It found the best value method most appropriate for complex work requiring technical expertise and carrying some risk. Initial OMB Cir. A-76 "best value" studies completed since 1996 rated non-cost evaluation factors above cost factors. Some claimed that best value in these OMB Cir. A-76 studies balanced the competition because the MEO had to submit a technical proposal, allowing the agency to better compare the contractor's proposal with the MEO's proposal.[103] According to the GAO, "best value" leveled the playing field and arguably allowed the agency to better compare the technical aspects of the private offeror's proposal with those of the MEO's proposal.[104]

With or without best value, outsourcing promises to save money. The question remains, however, whether "best value" helps or hinders this promise, and what issues arise when best value is mixed with OMB Cir. A-76.

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100. The SSA is the government official responsible for selecting the private sector offer providing the best overall value to the government and deciding whether the MEO meets the same level of performance as the private sector offer. *See also supra* note 77 and accompanying text.

101. If the agency selects negotiated procedures, the Supplement directs the government, like the private offerors, to submit a technical management plan based on the solicitation requirements. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § H, para. 3.a.

102. GENERAL ACCOUNTING OFFICE, DEFENSE OUTSOURCING: BETTER DATA NEEDED TO SUPPORT OVERHEAD RATES FOR A-76 STUDIES 10-11, REPORT NO. GAO/NSIAD-98-62 (1998).

103. *Id*. at 11.

104. *Id*.

IV. The Process in Action: Selected Issues in OMB Cir. A-76

When using OMB Cir. A-76 and best value, an agency will address several issues. Three of the more significant issues are as follows: selecting evaluation factors; evaluating past performance; and conducting discussions. First, however, an agency must decide whether or not a function is "inherently governmental."[105] Identifying a function as "inherently governmental" exempts it from the OMB Cir. A-76 process.

A. Selected Issues: Inherently Governmental Functions

In our hypothetical BOS competition, the base officials competed the installation civil engineering, transportation, and supply functions. The base officials first decided that they could compete these functions. To a large extent, this decision hinges on whether or not those functions are inherently governmental. The OMB has exempted inherently governmental functions from OMB Cir. A-76 coverage because they are "so intimately related to the exercise of the public interest as to mandate performance by federal employees."[106]

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105. Conflict of interest questions may also arise during an OMB Cir. A-76 competition, especially as they impact employees. Here, a legal advisor can offer invaluable advice and guidance on several critical and potentially "show-stopping" issues. For example, employees preparing the MEO or developing the PWS have access to procurement sensitive data. The Procurement Integrity Act forbids them from disclosing or obtaining "contractor bid or proposal information" and "source selection information." 41 U.S.C.A. § 423(a)-(b) (West 1998). Employees who participate "personally and substantially" in preparing the PWS must also report employment contacts from bidders or offerors under 41 U.S.C.A. § 423(c). Some employees may not accept jobs with the winning bidder or offeror under 41 U.S.C.A. § 423(d). This ban applies if the procurement exceeds $10 million and the employee held certain jobs or roles, such as source selection authority or contracting officer, or made certain contract decisions. Employees working on the MEO or PWS may also run afoul of the financial conflict of interest ban of 18 U.S.C.A. § 208 (West 1998). For example, an employee offered a job from a bidder must either reject the offer or disqualify himself from the OMB Cir. A-76 process. Finally, an employee who accepts a job from a winning bidder must avoid the "side-switching" ban in 18 U.S.C.A. § 207 (West 1998). Throughout the process, the legal advisor should also consider how these statutes affect an employee's right of first refusal for employment with a winning bidder under FAR 7.305(c). As always, the legal advisor should consult the Office of Government Ethics regulations and the Joint Ethics Regulation for further guidance. *See* Standards of Conduct for the Executive Branch, 5. C.F.R. § 2635 (1998); U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993).

106. OMB CIR. A-76, *supra* note 2, para. 6.e. *See* SUPPLEMENT, *supra* note 11, pt. 1, ch.1, § B.

When analyzing this issue, agency officials should rely on policy guidance. Office of Federal Procurement Policy Letter 92-1 outlines the scope of inherently governmental functions, defining them as activities requiring a federal employee to exercise discretion or make value judgments for the government.[107] The Policy Letter distinguishes between discretionary and "value" judgments and ministerial acts. It encourages agencies to consider whether an agency official uses discretion to commit the agency to a course of action.[108] For example, the agency official might consider whether the employee makes hiring or purchasing decisions, or whether the employee only performs assigned tasks. Appendix A to Policy Letter 92-1 also lists examples of inherently governmental functions that the DOD may not outsource. These include conducting criminal investigations; controlling prosecutions; managing and directing the military; and commanding military forces in a combat, combat support, or combat service support role.[109] Likewise, OMB Cir. A-76 and its Supplement cite

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107. Policy Letter on Inherently Governmental Functions, (Sept. 23, 1992), *reprinted in* SUPPLEMENT, *supra* note 11, app. 5. The policy letter further states:

> Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlement.
>
> An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:
> (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
> (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
> (c) significantly affect the life, liberty, or property of private persons;
> (d) commission, appoint, direct, or control officers or employees of the United States; or
> (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.
>
> Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature. . . .

Id. app. 5, para. 5.
108. *Id*. app. 5, para. 7(a).
109. *Id*. app. 5, app. A.

examples of commercial activities that the DOD may outsource[110] absent a congressional bar.[111] These include installation support services, management support services, and transportation services, akin to those in our BOS hypothetical.

What about those so-called "gray areas," where a function sports characteristics of both an inherently governmental and a commercial activity? [112] Outsourcing military legal services illustrates the vexing nature of this issue. Some military legal functions are inherently governmental because of how they affect command and control, such as prosecuting courts-martial. Military attorneys interpret and execute laws in a criminal proceeding by exercising discretion and making decisions for the government. Hence, military attorneys must perform these roles, not contractors.

Other legal services, such as legal assistance, may lend themselves to outsourcing.[113] On the installation, the military could arguably contract out legal assistance. Contractors may provide both the ministerial and legal counseling that judge advocates currently perform. These tasks include preparing documents (especially wills and powers of attorney), one-on-one counseling, and legal negotiations. Off the installation, however, legal assistance arguably becomes more of an inherently governmen-

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110. *See* OMB CIR. A-76, *supra* note 2, attachment A; SUPPLEMENT, *supra* note 11, app. 2. *See also supra* note 5 and accompanying text.

111. *See, e.g.*, 10 U.S.C.A. § 2465 (West 1998). An anachronism of days past, this statute prohibits the DOD from using appropriated funds to contract for firefighting or security guard functions at domestic bases. The statute permits contracting for these functions only if the contract is performed overseas; on a government-owned but privately operated installation; existed prior to 24 September 1983; or is for services with a local government at an installation closing within 180 days. Congress enacted this statute to allay concerns about the reliability of private firefighting and security services; control over contractor personnel; and the contractor's right to strike. Recently, the GAO has reviewed whether the DOD should contract out these services in light of the DOD's belief that doing so could save money. After reviewing some active contracts, however, the GAO found mixed results. Though some bases rated the firefighters and security personnel as "outstanding," other bases employed contractors who went bankrupt or failed to perform. Despite 10 U.S.C.A. § 2465, the GAO recommended that bases wanting to compete these services conduct a cost comparison study to see if they actually will reap any cost savings. GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CONTRACTING FOR FIREFIGHTERS AND SECURITY GUARDS, REPORT NO. GAO/NSIAD-97-200BR (1997). The HNSC, however, expressed concern that repealing 10 U.S.C.A. § 2465 would seriously impact national security. Instead, it directed the Secretary of Defense to identify those firefighting and guard functions that are inherently governmental and propose a plan to outsource these functions should Congress repeal the current prohibition. H.R. REP. NO. 105-132, at 293-94 (1997). Congress' treatment of this function belies the clear political nature of the outsourcing process.

tal function. For example, judge advocates perhaps can offer immediate legal assistance not otherwise available to troops in a deployed environment. Conversely, the military may just as easily deploy contracted attorneys to meet the immediate needs of the troops.[114]

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112. Labeling a function "inherently governmental" is a prickly issue for DOD agencies. The term is slippery and agencies have wide discretion. Congress has also struggled with the slippery and highly political definition of "inherently governmental." Noting that the DOD lacked a "clear definition" of inherently governmental functions, Congress directed it to propose a DOD-wide definition. Of note, the HNSC expressed concern that each military department defines differently "inherently governmental functions" and "commercial activities." For example, it criticized the Air Force after it redefined nearly 194,000 personnel from the commercial activity category to the inherently governmental category between FY 1994 and FY 1996 without changing their role or mission. By 1 March 1998, the HNSC directed the DOD to prepare a report addressing inherently governmental functions. It directed the DOD to propose a way to uniformly define this term, and to list all "inherently governmental" functions. H.R. REP. NO. 105-132, at 296 (1997). In response, the DOD issued Defense Reform Initiative Directive (DRID) 20. As of 31 October 1998, DRID 20 required all DOD components to use the same guidelines to classify functions and positions as inherently governmental, commercial activities exempt from OMB Cir. A-76, and commercial activities subject to OMB Cir. A-76 study. Upon completing their individual inventory, DRID 20 directed the services and other offices within the OSD to complete a joint review by 30 November 1998. This review will uniformly identify within the DOD the inherently governmental functions and those subject to OMB Cir. A-76 procedures. *See* Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Department of Defense Reform Initiative Directive #20: Review of Inherently Governmental Functions (16 Jan. 1998) (on file with the author). To date, the DOD has issued 45 DRIDs under the auspices of the DRI. For a sampling of other DRIDs, *see* Defense Reform Initiative Directives (visited Sep. 14, 1998) <http://ca.dtic.mil/dri/drids/>.

113. Contracting attorneys for legal assistance present a special problem: working against their own financial interests. Usually, a successful preventive law program educates troops before they need an attorney. A contract legal assistance attorney lightens his wallet if he decreases this demand. The role of the acquisition attorney raises similar issues. A typical acquisition attorney reviews contracts and documents for legal sufficiency, renders advice, attends meetings, and offers litigation support for bid protests, contract claims, or other legal proceedings. These tasks do not always require the acquisition attorney to exercise discretion. Of course, the same attorney who reviews a contract file for legal sufficiency may also advise a source selection panel. In this role, the acquisition attorney may exercise discretion or provide advice directly related to the contract award decision. This blurs the role between reviewing a contract file and advising a SSA. It also creates additional administrative problems. The supervising attorney in the office must ensure that the contractor does not participate in reviews or actions that conflict with his employment contract. Other questions arise. For example, does the legal office use some attorneys only for routine legal reviews and advice, while using other attorneys for the complex contracts? If so, the staff judge advocate may need more manpower, which arguably defeats the cost savings goal of outsourcing.

An even more immediate issue centers on how much legal support the military should outsource. At a military base, the staff judge advocate plays an inherently governmental role. Does the military service then outsource the other base-level attorneys? Or, does the military service designate the major command staff judge advocate slot as inherently governmental and outsource all subordinate base level legal services? Either option presents an alarming problem. The military must decide how to train future staff judge advocates from the current pool of company grade officers if contract attorneys perform military legal services.[115] One wonders, though, if the overall quality of military legal services will suffer needlessly in the long run for the sake of a few dollars? Though difficult, these issues graphically show the challenges facing agencies as they struggle to classify functions as either commercial activities or inherently governmental functions.

Our hypothetical BOS competition discussed above also illustrates how an agency may decide whether a function is inherently governmental. Base officials did not label the civil engineering, transportation, and supply functions as inherently governmental, but classified them as commercial functions subject to OMB Cir. A-76. The OMB Cir. A-76, its Supplement, and Policy Letter 92-1 all guided this choice.

Using Policy Letter 92-1, assume base officials in our hypothetical distinguished between an employee's discretionary or ministerial roles. Using a simple example, suppose a base employee properly approved purchasing new lawnmowers for the installation. The employee committed the base to a course of action (purchasing equipment) and spent money. Thus, the employee exercised discretion, an inherently governmental act,

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114. Contractors are already on the battlefield. In Bosnia, the Army used the Logistics Civil Augmentation Program (LOGCAP) contract to provide logistics support. The LOGCAP contractor, Brown and Root Services Corporation, provided services in civil engineering, environmental support, maintenance, and cargo handling. The GAO found that the LOGCAP contractor "performed well," despite some financial and oversight problems. GENERAL ACCOUNTING OFFICE, CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM, REPORT NO. GAO/NSIAD-97-63 (1997). If the military uses logistics contractors on the battlefield, may it also use contract attorneys on the battlefield?

115. One service has addressed this overall issue. The Navy General Counsel has opined that the Navy Office of General Counsel provides an inherently governmental function that only federal employees can perform. *See* Memorandum, General Counsel of the Navy, to Principal Deputy General Counsel, Deputy General Counsel, Associate General Counsel, Assistant General Counsel, and Command Counsel, subject: Out-Sourcing Legal Services (9 July 1997) (on file with the author).

and the base may not compete this function in the BOS competition. Suppose, however, the base employee's only job is to cut the grass. The employee performed a ministerial act, one that is not inherently governmental. The base may compete this function. Moreover, Appendix B to the Supplement offers more guidance, specifically listing a multi-function contract as a commercial activity.[116] The Supplement also lists the BOS functions (civil engineering, transportation, and supply) as commercial activities under the heading "installation services," as well as "maintenance, repair, alteration, and minor construction of real property."[117]

Even though base officials labeled the BOS functions commercial activities, they must perform one last review: ensuring that no congressional statutes bar the DOD from outsourcing the BOS functions. Absent such statutory bars, base officials may continue with the OMB Cir. A-76 BOS competition.[118]

B. Selected Issues: Evaluation Factors

In the hypothetical BOS competition, base officials selected and used the best value procurement method. Best value contracting may allow an agency to meet its needs better in certain procurements. The issue becomes: does best value contracting allow an agency to meet its needs in an OMB Cir. A-76 cost comparison?

To meet its needs, an agency must have well-defined evaluation factors and a well-defined PWS. The PWS is the heart of an OMB Cir. A-76 competition.[119] It captures the workload and defines the requirements. Unlike a statement of work, a PWS defines what the agency wants, not how the contractor or the government MEO must perform those tasks. The PWS must also allow the agency to determine if either acceptably performed the work.

Another simple example illustrates this point. Suppose that the hypothetical BOS solicitation contained a requirement for grounds maintenance, specifically grass cutting. Using a statement of work, base officials

116. SUPPLEMENT, *supra* note 11, app. 2.

117. *Id*.

118. *See, e.g.*, *supra* note 111 and accompanying text. *See also* 10 U.S.C.A. § 2464, *amended by* Pub. L.N o. 105-261, § 343, 112 Stat. 1920, 1976; 10 U.S.C.A. § 2466. 10 U.S.C.A. § 2464 prohibits the DOD from using OMB Cir. A-76 for logistic capability, absent a waiver from the Secretary of Defense. 10 U.S.C.A. § 2466 allows the DOD to use only 50% of its funds to contract for depot-level maintenance and repair work.

would have defined the grass cutting requirement for the offerors, telling them both how and when to cut the grass. A statement of work might have defined for the offeror what type of equipment to use when cutting the grass, how short to cut the grass, how often to cut the grass, and when to fertilize the grass. Using a carefully drafted PWS, however, base officials need only define the grass-cutting requirement. The PWS might state that the grass must be green and not exceed three inches in length. The offerors then decide how and when to cut the grass, how and when to fertilize, and other ways to meet the performance standard.[120]

Well-defined evaluation criteria are equally important.[121] In the solicitation, agency officials may weigh each factor equally or weigh them differently. For the BOS competition hypothetical, assume that base officials evaluated three factors: the offeror's technical capability, past performance, and price. Technical capability requires the offeror to understand the mission and staff each function with skilled personnel to perform the numerous technical tasks. Past performance gauges the offeror's track record for quality, responsiveness, and timeliness. The offeror's price must also be realistic and complete in light of the technical proposals.

From the hypothetical, recall that base officials selected the government MEO to perform the BOS functions because it prepared a lower cost estimate than the private offeror. Yet base officials evaluated the contractor on cost and other non-cost factors. This discrepancy highlights the tension between best value and OMB Cir. A-76. Both have different goals.

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119. On 22 August 1997, the FAR Council issued new rules and policy guidance on performance-based service contracting (PBSC). *See* FAC 97-01, 62 Fed. Reg. 44,813 (1997). These final rules amend the FAR to implement the Office of Federal Procurement Policy Letter 91-2, Service Contracting. This policy letter prescribes policies and procedures for PBSC methods. *See* Policy Letter on Service Contracting, 56 Fed. Reg. 15,110 (Apr. 15, 1991). Performance-based contracting methods ensure that the agency receives and the contractor achieves performance quality levels, and the total cost relates to how the contractor meets the performance standards. FAR, *supra* note 13, at 37.601. The key to performance-based contracting methods is the PWS. It must define the requirements in "clear, concise language identifying specific work to be accomplished." *Id*. at 37.602-1. When preparing a PWS, agency officials "shall, to the maximum extent practicable," describe the work by what tasks the contractor should accomplish, rather than how it would accomplish those tasks. The PWS should also use measurable performance standards and financial incentives to encourage competitors to develop innovative and cost-effective methods for performing the work. *Id*. at 37.602-1(b)(1)-(4). The new rules also require agencies to use competitive negotiations "when appropriate to ensure selection of services that offer the best value to the government, cost and other factors considered." *Id*. at 37.602-3.

120. AFLMA OUTSOURCING GUIDE, *supra* note 66, at 29.

By using best value, base officials evaluated the overall quality of the offeror's performance, including cost. With OMB Cir. A-76, base officials evaluated the overall cost of the MEO. Moreover, the SSA allowed the base MEO to revise its proposal to meet the same performance level as the contractor. Cost saved the day for the MEO because it eventually "won" the competition. When used together, though, could the base officials easily reconcile these two different approaches, best value and cost? If answered honestly, their response would have to be "no." The OMB Cir. A-76 process forces agency officials to ultimately focus on cost when selecting a "winner," that is, giving them "best value" on a budget.

Second, the BOS solicitation highlights a potential "gaming" issue between the MEO and the ultimate award decision. The losing offeror may accuse the agency of deliberately inflating the evaluation factors to exceed its minimum needs. The motive: to favor the MEO and to keep the function in-house. In such a scenario, the evaluation factors and the PWS clash with OMB Cir. A-76. The PWS is a budget-driven document and it must state only the agency's minimum needs. This presents an interesting issue: does best value contracting permit an agency to propose performance requirements and factors above what it really needs, thus allowing it to "game" the process?

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121. *See* NASH & CIBINIC, *supra* note 86, at 211-12. The agency has three options when drafting the evaluation factors for the base operating services contract. First, if technical and other factors outweigh cost, the evaluation factors must still state that the government will not award to the higher cost offeror for only slightly superior technical or other factors. Second, if the agency weighs cost and technical factors equally, the evaluation factors should recite that the government's goal is to achieve a balance between these factors. Finally, if cost outweighs technical or other factors, the evaluation factors should state that the government will not award to the lowest cost offeror for inferior technical or other factors. The AFLMA suggests the following language in an OMB Cir. A-76 best value procurement for base operating services:

> The services to be performed under any contract resulting from this solicitation are highly technical and essential to the Air Force mission. THEREFORE, TECHNICAL CAPABILITY IS MORE IMPORTANT THAN PRICE. THE LOWEST PRICED PROPOSAL MAY NOT NECESSARILY RECEIVE THE AWARD. LIKEWISE, THE HIGHEST TECHNICALLY RATED PROPOSAL MAY NOT NECESSARILY RECEIVE THE AWARD. FINAL SELECTION IS BASED ON THE PROPOSAL [THAT] IS MOST ADVANTAGEOUS TO THE GOVERNMENT.

AFLMA OUTSOURCING GUIDE, *supra* note 66, app. 4 (emphasis in original).

The cost-savings goal of OMB Cir. A-76 drives the answer to these questions. Returning to our hypothetical, suppose an offeror submitted a highly rated technical proposal for the BOS solicitation that met the minimum needs for the base. Suppose also that the offeror proposed an innovative, fast way to automate the entire supply system to track inventory. Base officials rated the proposal highly and selected it as the "best value" offer. However, the MEO team offered a lower cost and base officials kept the function in-house. The offeror may argue that the base deliberately rated the technical factor higher than cost. As a result, the private offeror may have estimated a higher cost for performing the function because of its technical requirements. The offeror could assert that the agency "gamed" the OMB Cir. A-76 process, knowing that virtually any best value offer could ultimately lose to the MEO on cost.[122] This process may not seem fair to the disgruntled offeror. Fair or not, however, the OMB Cir. A-76 process protects an agency if it followed the rules. The offeror will prevail before the GAO only if it shows that base officials conducted a faulty or misleading cost comparison, failed to act in good faith, or failed to follow the OMB Cir. A-76 "ground rules."[123]

From the previous two issues comes the final, and perhaps most vexing issue: encouraging private offerors to submit quality best value proposals, knowing that OMB Cir. A-76 is a cost-driven process. In the hypothetical BOS competition, assume that the offeror spent money and time preparing an innovative proposal that met the best value criteria. Even so, base officials selected the government MEO because it offered a lower cost. The losing offeror might take one of three approaches in the future. First, it could still spend a massive amount of time and money to prepare a superior proposal that meets both the best value criteria and the agency's minimum needs, hoping to beat the MEO on cost. Or it could simply prepare an average proposal that competes with the MEO only on cost. Both proposals might then meet, but not exceed, the PWS and the

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122. Exposing this "gaming" issue is intended to show a flaw in the OMB Cir. A-76 process, not to suggest that agency officials would deliberately "game" the competition to favor the MEO. Based on the author's experience, the DOD officials working OMB Cir. A-76 issues strive to level the playing field for both sides. Nevertheless, the OMB Cir. A-76 process seems to inherently favor the agency.

123. *See, e.g.*, Madison Services, Inc., B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136 (finding cost comparison was neither faulty nor misleading, and agency personnel acted in good faith); Crown Healthcare Laundry Services, Inc., B-270827, B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207 (limiting the scope of review to determining if the agency conducted a faulty or misleading cost comparison). For a detailed discussion of available legal recourses, *see* Part V, *infra*.

evaluation factors. Finally, the private offeror could choose not to even submit a proposal, assuming the process is skewed towards the agency.

If OMB Cir. A-76 drives away contractors, who wins? Arguably, nobody wins. The agency loses because cost alone may or may not always yield a "best value" for the government. The contractor loses if it spends time and money only to fall short to the government MEO. Even if the agency makes tradeoffs between various cost and non-cost factors to obtain a best value, cost still rules the result. The private offeror must still "beat" the MEO's cost estimate by ten percent to win the competition. Any *successful* MEO must perform to the same performance standards as the best value offeror, but at a lower cost.

Despite these issues, may a DOD agency still receive "best value" in an OMB Cir. A-76 competition? Perhaps, but only within budget constraints. To receive an outstanding product or service, agency personnel must carefully draft the evaluation factors and the PWS. Sensible evaluation factors and a clear, "results-oriented" PWS encourages offerors to propose unique, cost-effective ways to meet the agency's needs. No matter what the outcome, however, the government will realize cost savings thanks to the A-76 process—at least for the short term.

This approach has, in fact, worked in non-OMB Cir. A-76 procurements. A recent report from the OFPP validates the overall PWS performance-based contracting method. The OFPP study, entitled "A Report on the Performance-Based Service Contracting Pilot Project"[124] (Pilot Project), caps a four year government-wide test. In 1994, OFPP kicked off the Pilot Project after executive officials from twenty-seven agencies volunteered to participate.[125] Agencies identified non-PBSC contracts about to expire and resolicited them using PBSC methods. The Pilot Project studied twenty-six contracts totaling $585 million and measured them on the following factors: price, agency satisfaction, type of work performed, contract type, competition, audit workload, and procurement lead-time.[126]

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124. FRANKLIN D. RAINES, A REPORT ON THE PERFORMANCE-BASED SERVICE CONTRACTING PILOT PROJECT (May 1998) [hereinafter PILOT PROJECT], *available at* <http://www.arnet.gov/References/Policy_Letters/>.

125. *Id*. at 6. Executive officials from the participating agencies signed a pledge committing them to use PBSC for the volunteered contracts. The pledge committed the agencies to use PBSC and measure its effects on volunteered contracts. Four industry associations representing over one thousand companies also endorsed the Pilot Project and promised to promote PBSC methods in their member firms. *Id.* at 3, 6.

Significantly, the Pilot Project showed that PBSC saved the government money and improved contractor performance. Not only did PBSC reduce contract price by an average of fifteen percent, [127] it also increased agency satisfaction with its contractors by eighteen per cent.[128] The Pilot Project revealed drastically improved contractor performance in terms of quality, quantity, and timeliness. Additionally, the Pilot Project reduced contract audits by ninety-three per cent.[129] As a result, OMB instructed its staff to "adopt a priority objective" of increasing PBSC government-wide.[130]

The Pilot Project is hard evidence that the DOD can receive "best value" in an OMB Cir. A-76 competition. To achieve "best value" with PBSC, however, the DOD agencies must craft a thorough PWS and solid evaluation factors. Letting both the MEO and the contractor decide how to best meet the PWS encourages them to be innovative. As the Pilot

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126. *Id.* at 3, 7. In the Pilot Project study, the OFPP encouraged agencies to choose contract services not traditionally acquired by PBSC methods. From the contracts resolicited, the OFPP and the participating agencies compared the before and after results against these criteria.

127. *Id*. at 8. The Pilot Project did not consider that, absent the conversions to PBSC, additional inflation-related price increases could have been expected. According to the report, the Bureau of Labor Statistics Employment Cost Index for Private Industry Workers reported a compensation increase of 16% for the 1993-1997 timeframe. *Id*. From this data, the OFPP concluded that the PBSC savings would have been even greater if the Pilot Project study had factored in the inflation:

> [I]t may be concluded that, after taking inflation into account, the contract price savings would have been substantially larger. It is important to point out that while inflation-related price increases have not been factored into the data contained in this report, the additional savings they represent should be considered in discussing the benefits of PBSC and agency decisions regarding whether to convert requirements to PBSC.

Id.

128. *Id*. at 11. The Pilot Project obtained data on the following five criteria: (1) quality of work performed, (2) quantity of work performed, (3) timeliness of work performed, (4) cost effectiveness of work performed, and (5) overall performance. The PBSC methods generated higher customer satisfaction ratings when agencies converted cost reimbursement requirements to fixed-price contracts. According to the OFPP, these results validated the "strong preference" for fixed price contracts emphasized in various OFPP checklists for PBSC. *Id*. at 13.

129. *Id.* at 16. According to the OFPP, the total number of audits decreased from 44 to 3. The OFPP predicted this result because agencies converted cost contracts to fixed-price contracts. In turn, this highlighted the "reduced process-oriented expense that PBSC promises to offer, at least for this one significant burden of contract administration." *Id.*

130. *Id*. at 1.

Project suggests, this method saves the government money. It also shows that OMB Cir. A-76 and best value can co-exist to give the agency "more bang for its buck."

C. Selected Issues: Evaluating Past Performance

In the hypothetical BOS competition, the base officials did not evaluate the past performance of the government MEO. Yet, the FAR requires agencies to evaluate a private offeror's past performance.[131] A critical factor, past performance is a good barometer of an offeror's future contract performance.[132]

When reviewing past performance, an agency must allow contractors to identify past or current contracts for similar efforts. It must also allow contractors to explain any problems they encountered with other contracts, plus corrective actions. [133] With this past performance data in hand, our base officials evaluated offers in the hypothetical BOS competition. The date permitted them to scrutinize how well an offeror and its employees previously performed as a prime and subcontractor. Past performance also led base officials to consider other aspects of an offeror's past performance. For example, has the offeror previously performed a BOS contract? Did the offeror meet contract requirements? Did it meet performance schedules? How well did it manage costs? What feedback did it receive from its customer, the end user? Acquiring the names and resumes of the offeror's key personnel would further verify their experience and availability to perform the contract tasks.[134]

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131. FAR, *supra* note 13, at 15.304(c)(3)(i). This applies to all competitive negotiations expected to exceed one million dollars. After 1 January 1999, agencies must evaluate past performance for all acquisitions expected to exceed $100,000.

132. *See, e.g.*, Rotair Indus., Inc., B-276435.2, July 15, 1997, 97-2 CPD ¶ 17; Int'l Bus. Sys., Inc., B-275554, March 3, 1997, 97-1 CPD ¶ 114.

133. FAR, *supra* note 13, at 15.305(2)(ii). For an offeror without a record of relevant past performance, or for whom past performance information is unavailable, the agency gives the offeror a neutral rating on this factor. *Id.* at 15.305(2)(iv). In an OMB Cir. A-76 competition, this raises an interesting issue: does a neutral rating hurt or help a private offeror when the agency does not evaluate the MEO's past performance? A neutral rating arguably hurts the private offeror because this is one area where it could have offered a "best value." Even though the agency gives the offeror a neutral rating, it might still view the lack of past performance as a moderate risk. Conversely, a neutral rating arguably helps the private offeror because it levels the playing field. The agency does not evaluate the past performance of either the private offeror or the MEO.

134. *See* AFLMA OUTSOURCING GUIDE, *supra* note 66, app. 4.

Even so, some critics still cry "foul" when an agency only evaluates the private offeror on non-cost factors, such as past performance, claiming this favors the MEO.[135] If so, then agencies must find ways to avoid bias. The Supplement to OMB Cir. A-76 requires an agency to evaluate a MEO's performance after one year if it kept the function in-house.[136] In our hypothetical BOS competition, base officials must review in-house performance under the MEO to see if the work was performed within the PWS and the cost estimate. If not, the MEO team must correct any problems. Otherwise, base officials must either award the work to the next lowest offeror or re-compete the functions. Though not ideal, this belated review of the MEO's performance represents an attempt to protect the integrity of the OMB Cir. A-76 process.[137]

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135. Until recently, Congress unsuccessfully tried to legislate the outsourcing process in order to level the playing field. *See supra* note 52 and accompanying text. Testimony supporting early legislation, which included "best value" language, offered three reasons why outsourcing should, but does not, always provide the best value. First, the OMB Cir. A-76 procedures fail to account for a comprehensive and realistic cost comparison and thus favor the in-house MEO. Second, certain statutes still require the DOD to base outsourcing decisions on the lowest cost. *See* 10 U.S.C.A. § 2462 (West 1998). Although OMB Cir. A-76 encourages "best value," these statutes make that assessment specious. The DOD evaluates the in-house offer only for cost, but evaluates the private sector offer on cost and other factors. This fails to equally account for non-cost factors and circumvents best value. Early proposed legislation would have amended these statutes to refer to "best value" rather than lowest cost. Third, some proponents testified that subordinate commands within the DOD do not support outsourcing and either ignore or subvert the process. *See Privatization and Outsourcing DOD Reform Initiatives: Hearings on H.R. 716 Before the Subcomm. on Readiness of the Comm. on National Security*, 105th Cong. (1997) (statement of Gary D. Engebretson, President, Contract Services of America), *available at* 1997 WL 8220135.

136. *See supra* note 84 and accompanying text.

137. This raises an interesting question: If an agency could evaluate the MEO's past performance, how would it do so? Would it evaluate the employees in the MEO currently performing the functions? Would this be meaningful if the agency must implement a reduction-in-force (RIF), where employees have bump and retreat rights? If so, the agency may have to staff the MEO with different personnel. Would the personnel in the "new" MEO" perform the functions as efficiently as the personnel in the original MEO? Second, the agency must decide what to evaluate. Unlike the private offeror, the MEO does not have prior contracts for the agency to review. There are alternatives, however. For example, the MEO might have won current performance-related awards that indicate its probable future performance. An agency could also review the MEO's quality assurance reports or other inspections for positive and negative data about the MEO. Finally, the DOD's emphasis on "total quality management" provides yet another source of data about the MEO in the form of metrics, goals, progress towards those goals, and customer feedback.

D. Selected Issues: The Scope of Discussions

In our hypothetical BOS competition, base officials selected a "best value" offeror, but concluded that the MEO could not meet the same performance standards. In an OMB Cir. A-76 competition, agency officials may discuss with the MEO team the deficiencies in their offer as compared to the private offer. They must, however, avoid technical leveling and technical transfusion.

Prior to the rewrite of FAR Part 15, the FAR defined technical leveling as "helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal."[138] The FAR defined technical transfusion as disclosing technical information about a proposal to improve a competing proposal.[139] The revised FAR Part 15 does not use the terms "technical leveling" or "technical transfusion," but retains the concept. The FAR now prohibits agency officials from favoring one offeror over another, revealing an offeror's technology, revealing an offeror's price without permission, revealing the names of persons providing past performance data, or revealing source selection information.[140]

Does OMB Cir. A-76 invite technical leveling and technical transfusion? That danger exists when agency officials communicate with the MEO team as they adjust performance standards. Officials risk tainting the entire process if they disclose to the MEO team the technical, cost, or past performance data from the best value offer. After all, the offeror has spent time and money figuring out how to meet or even exceed the agency's needs. If agency officials disclose the offeror's approach, ideas, or cost to the MEO team, it arms them with an unfair advantage. Using

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138. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.610(d) (Apr. 1, 1984) [hereinafter 1984 FAR]. *See* Steven W. Feldman, *Traversing the Tightrope Between Meaningful Discussions and Improper Practice in Negotiated Federal Acquisitions: Technical Transfusions, Technical Leveling, and Auction Techniques*, 17 PUB. CONT. L.J. 211, 238-246 (1987) (providing an overview of technical leveling).

139. 1984 FAR, *supra* note 138, at 15.610(e)(1). This provisions of the 1984 FAR defined technical transfusion as "[g]overnment disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal." *Id. See* Feldman, *supra* note 138, at 227-38.

140. FAR, *supra* note 13, at 15.306(e). However, FAR 15.306(e) permits a contracting officer to inform an offeror that its price is too high or too low, and reveal the basis for that conclusion. *Id*. *See* Policy Letter on Service Contracting, *supra* note 119 and accompanying text.

this data, the MEO team may then adjust the in-house offer to perform the function at a lower cost than the private offeror. The result: the contractor essentially provides a free consulting service to the agency. The impact: the contractor loses any incentive to propose innovative ideas or a higher level of performance in future OMB Cir. A-76 competitions.

Agency officials may use case law and statutes as guides to avoid technical leveling or transfusion when communicating with the MEO team. The GAO has ruled time and again that agency officials may generally lead offerors into deficient areas of their proposal without running afoul of the bar prohibiting technical transfusion and leveling. For example, in *Simmonds Precision Products, Inc*., the GAO ruled that the Air Force *properly* asked other offerors during discussions if they considered alternate approaches to the design standards in the solicitation.[141] The GAO concluded that the Air Force did not reveal the other offeror's unique design or approach. Rather, by merely inquiring about alternative methods, the Air Force encouraged all offerors to explore alternate--and more acceptable--alternatives.[142] The GAO ruled differently in *Litton Systems, Inc.*[143] In that case, the agency blatantly disclosed another offeror's source

141. B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 (finding that the agency properly informed the other offerors that solicitation contemplated an alternate approach without suggesting a certain design or another offeror's proposal). In *Simmonds*, the Air Force issued a Request for Proposals (RFP) for the fuel savings advisory system (FSAS) for the KC-135 aircraft. The FSAS consisted of three components: a fuel management advisory computer (FMAC), an integrated fuel management panel (IFMP), and the fuel savings advisory computer (FSAC). In its offer, Simmonds offered two alternatives for replacing the FSAS. First, it recommended replacing the three original boxes with three new boxes. Alternatively, Simmonds recommended a two-box approach that combined the FSAC and the FMC into one unit and also directly replacing the IFMP. Another offeror, Lear, offered a three-box approach in its initial proposal. During discussions, the Air Force asked Lear, in writing, if it had considered any alternate approaches to the RFP requirements. The Air Force did not ask a similar question of Simmonds because it viewed its two-box approach as an acceptable alternative method. In response, Lear stated it had considered a two-box approach and ultimately submitted this alternative to the Air Force as its best and final offer (BAFO). After evaluating the BAFOs, the Air Force found Lear offered the technically acceptable proposal with the lower price and awarded it the contract.

142. *Id.* at 10. In reaching its decision, the GAO quickly dismissed Simmonds' argument that the two-box approach was an "obvious technical solution" leading to technical transfusion or leveling. Instead, the GAO called the two-box approach the product of a "natural design evolution" within the industry. It noted that Lear, being familiar with this trend, would have initially offered the two-box approach if it had understood the RFP to permit alternative design models. Thus, the GAO opined that the question the Air Force posed to Lear merely "clarified that the agency was prepared to consider alternate approached under the RFP, without suggesting a particular design approach or disclosing another offeror's proposal information." *Id*. at 5.

selection information to the awardee. The awardee then used this data to improve its offer. The GAO concluded that the agency *improperly* disclosed protected data to the awardee, giving it an unfair advantage.[144]

A more recent case depicts how easily an agency may gain access to and use a private offeror's cost estimate in an OMB Cir. A-76 competition. In *Madison Services, Inc.*,[145] the Air Force solicited offers for a base operating services contract. After performing the OMB Cir. A-76 cost comparison, the Air Force kept the functions in-house because the MEO offered the overall lower cost. Madison filed an agency appeal. Although the

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143. B-234060, May 12, 1989, 89-1 CPD ¶ 450 (finding that the agency tainted the procurement process when it disclosed the competitor's source selection sensitive information to the awardee, thus giving the awardee an unfair competitive advantage about the competitor's product). The facts in *Litton* portray a classic scenario from the "Ill Wind" investigation conducted in the late 1980s. The Air Force solicited proposals from Litton and Loral Systems Manufacturing Company (Loral) for an advanced radar warning receiver (ARWR). Both companies submitted technically acceptable offers, but Loral proposed a lower cost. As a result, the Air Force awarded the contract to Loral. One week later, on 27 December 1989, the federal district court in Maryland unsealed an affidavit filed as part of the Ill Wind scandal. The affidavit reported that the Assistant Air Force Secretary of Acquisition for Tactical Systems provided sensitive data to a private consultant whom, in turn, exchanged the information to a Loral official for money. Regarding the ARWR, the affidavit stated that the consultant told Loral about the Air Force official's visit to Litton to evaluate its ARWR progress. Moreover, the consultant gave Loral a copy of a book describing Litton's ARWR methodology, as well as a copy of a classified briefing describing Litton's ARWR testing. According to the affidavit, the consultant continued to feed Loral information about the ARWR competition that he obtained from the Air Force Assistant Secretary. Not surprisingly, Litton argued, successfully, that the Air Force should terminate the ARWR award to Loral. *Id.* at 3.

144. *Id.* at 5. In sustaining this protest, the GAO showed little sympathy for the Air Force and reminded agencies to protect the procurement process as sacrosanct:

> It may well be, as the Air Force argues, that this information did not give Loral a competitive advantage in the competition. Nevertheless, we do not believe the propriety of an award decision should turn solely on whether or not the improperly obtained information ultimately proved to be of benefit to the wrongdoer. The propriety of the award must also be judged by whether the integrity of the competitive process is served by allowing the award to remain undisturbed, despite the awardee's misconduct. Judged by this standard, we believe that the integrity of the system would be best served by a termination of the contract.

Id. at 5.

145. B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136. In *Madison*, the Air Force used best value contracting procedures. It evaluated technical and price factors to determine which offer or combination of offers gave the Air Force the "best value."

reviewing officials upwardly adjusted the in-house cost estimate during the review process, they denied Madison's appeal. Madison protested to the GAO.

Madison contended that the Air Force personnel who prepared the in-house cost estimate "gamed" the procurement by deliberately omitting some costs from the initial in-house estimate. According to Madison, Air Force personnel omitted these costs so they could review its proposed costs before recalculating the in-house estimate during the appeal process.[146] Madison also alleged that the appeal process favored the MEO. According to Madison, the appeal review team discussed the omitted costs with the Air Force employees who had initially prepared the in-house cost estimate.[147]

The GAO ruled that the Air Force did not "game" the OMB Cir. A-76 cost comparison. Significantly, the GAO found that Madison failed to show bad faith and excused the base personnel for mistakenly omitting costs from the in-house estimate. The GAO further noted that the confusing language in the cost comparison and solicitation made it difficult for the Air Force personnel to accurately calculate the in-house cost estimate.[148] Moreover, the GAO ruled that the appeal review team acted properly when it consulted with the personnel who prepared the in-house estimate. The GAO concluded that only those personnel could logically

146. *Id*. at 3-4. Specifically, Madison argued that the Air Force omitted material and supply costs from the original in-house estimate. According to Madison, the Air Force then inserted an unrealistically low figure for the agency material and supply costs only after Madison's prices were revealed during the later appeal. Madison opined the Air Force did this to ensure it kept the functions in-house. *Id*. at 4.

147. *Id*.

148. *Id*. at 5. At the hearing before the GAO, the base independent review officer (IRO) testified that, upon reviewing the initial draft of the in-house cost estimate, she noticed that it omitted material and supply costs. When the IRO quizzed the base employee who prepared the form about these omitted figures, he responded that he understood from reading the RFP and its PWS that most materials and supplies would be government furnished equipment (GFE). Thus, he excluded these costs from the in-house estimate because these items would be GFE regardless of whether the contractor or the base activity performed the work. The IRO also testified that she had difficulty gleaning from the PWS what, if any, materials and supplies should be priced and what were GFE. After reviewing the RFP, the GAO agreed with the IRO that the RFP required "close scrutiny" to understand what materials and supplies were contractor-provided. For example, the GAO observed that the RFP required the contractor to provide materials and supplies for most of the work, but also included a lengthy list of GFE. As a result, the GAO reasoned that the base employees "simply made a mistake and misinterpreted the RFP's requirements. . . . " *Id*. at 5-6.

identify the omitted costs and then properly recalculate the in-house cost estimate.[149] Last, the GAO observed that the base officials significantly increased the in-house cost estimate only after they reviewed Madison's costs, an act inconsistent with agency bias.[150]

Although the GAO exonerated the Air Force, this case illustrates some of the pitfalls associated with the OMB Cir. A-76 process. First, it exposes how agency personnel may have ready access to an offeror's cost estimate during discussions.[151] After reviewing Madison's cost estimate, the appeal review team adjusted the in-house cost estimate. Although base officials in *Madison* acted in good faith, might agency officials at another time and place be tempted to act otherwise? Moreover, such adjustments on the heels of the private offeror's proposal certainly lead to the appearance of improper gaming, with the agency potentially giving the MEO team an unfair advantage. Additionally, the case underscores the questionable importance of cost in an OMB Cir. A-76 award, even when the agency uses best value procedures.

Finally, keep in mind that two statutes protect a private offeror from technical leveling or transfusion during the OMB Cir. A-76 process. First, the Procurement Integrity Act prohibits DOD officials from disclosing or obtaining contractor bid or proposal information.[152] Additionally, the Trade Secrets Act prohibits agency officials from disclosing the private

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149. *Id*. at 6. The GAO also noted that the Air Force was "empowered and obligated" to review the in-house cost estimate after Madison complained about its "unreasonably low costs." *Id*. As the GAO reasoned:

> [B]ecause the base personnel, having originally calculated the in-house cost estimate as well as the most efficient organization upon which it was based, were the people most knowledgeable about the agency's support for its proposed costs, the review team logically and reasonably turned to the base activity personnel for justification of the cost estimates and for additional information that would allow the review team to make appropriate adjustments.

Id.

150. *Id*. at 6. In fact, the GAO noted that the Air Force upwardly adjusted the in-house cost estimate by more than $1.7 million after discussing Madison's allegations with the base personnel. *Id*.

151. The GAO observed that the agency held two rounds of discussions with the private offerors and twice allowed them to revise their proposals. However, the agency did not discuss the MEO or the in-house cost estimate with the MEO personnel. *Id*. at 4. The point: an agency may also communicate with a private offeror in a OMB Cir. A-76 competition.

offeror's proprietary data.[153] It forbids officials from disclosing "practically any commercial or financial data collected by any federal employee from any source."[154] Within the framework of OMB Cir. A-76, these statutes shield the private offeror's cost and proprietary data from the MEO. If the SSA determines that the MEO fails to meet the same level of performance as the private offeror, agency officials cannot reveal to the MEO

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152. Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 93-400, § 27, 102 Stat. 4063, *as amended by* The Clinger-Cohen Act, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996) (codified as amended at 41 U.S.C.A. § 423 (West 1998)). *See* FAR, *supra* note 13, at 3.104 (implementing the Procurement Integrity Act). The Procurement Integrity Act prohibits the following persons from knowingly disclosing contractor bid or proposal information or source selection information before contract award:

> [A]ny person who--
>
> (i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a federal agency procurement; and
>
> (ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

FAR, *supra* note 13, at 3.104-4(a)(2).

"Contractor bid or proposal information" includes cost or pricing data; indirect costs or labor rates; and information the offeror has marked as proprietary. *Id*. at 3.104-3. "Source selection information" includes bid prices; proposed costs or prices in a negotiated procurement; source selection plans; technical evaluation plans; technical evaluation of proposals; cost or price evaluation or proposals; competitive range determinations; rankings of bids, proposals, or competitors; reports or evaluations or source selection panels, boards, or advisory councils; or other information marked as source selection sensitive if disclosure would jeopardize the integrity of the competitive process. *Id.* at 3.104-3. An agency official who either discloses or obtains this information faces five years confinement and a civil penalty up to $50,000. 41 U.S.C.A. § 423(a)-(b).

153. 18 U.S.C.A. § 1905 (West 1998). The Trade Secrets Act states, in part:

> Whoever, being an officer or employee of the United States or of any department of agency thereof . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets . . . of any person, firm, partnership, corporation, or association . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Id.

team the private offeror's "bid or proposal information" or its "commercial or financial data." Instead, agency officials may lead the MEO team only into deficient areas and inquire about alternative approaches, all without disclosing cost, past performance, or unique technical data from the private offeror.

What guidance do these cases and statutes offer agency officials to avoid technical leveling and technical transfusion? Suppose that in our hypothetical BOS solicitation the private offeror proposed an innovative way to automate the supply system. Suppose, as well, that the government MEO proposed a slower, less efficient method. The SSA concluded that the MEO did not meet the same performance levels as the private, best value offeror and allowed them to adjust their offer. Under these circumstances, what could base officials tell the MEO team? Using sound judgment, they can only identify general deficiencies, if any, in the MEO's proposal. They may, for example, inquire into whether the MEO considered alternate approaches. However, base officials could not suggest specific solutions. Otherwise, they risk improperly cloaking the MEO with a competitive advantage, responding to charges of "gaming" the study, and tainting the overall OMB Cir. A-76 process.

One wonders, though, if the potential for "gaming" the OMB Cir. A-76 process poses a real threat or is merely a "paper tiger." Arguably, the threat exists for several reasons. First, the process draws in agency officials who must play on both sides of the court. Such conduct may lead to charges of bias. For example, the SSA selects the private offeror and decides if the MEO can meet the same performance standards. As the senior base official, the SSA may also command, supervise, or rate members of the MEO. Aware of this rather incestuous relationship, it should come as no surprise when a contractor cries "foul" and argues that the SSA favored the MEO by leaking vital data that allowed it to adjust its offer and win the competition. Whether real or imagined, this scenario certainly creates an appearance of bias, possibly generating a protest to the GAO.

Second, some have cited possible union affiliations as creating legal disputes in an OMB Cir. A-76 study.[155] Unions play a major role in the

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154. CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987). *See* Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining a "trade secret" as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort").

155. *See* Lang, *supra* note 60, at 251.

cost comparison. They strive to protect employees possibly affected by the study.[156] In fact, Congress requires the DOD initially to notify such employees of the cost comparison in certain cases [157] and then update the employees and their unions monthly.[158] Nonetheless, poor union-management relations could easily generate a protest. Disgruntled employees could claim, rightly or wrongly, that the agency did not fairly assess its ability to meet the PWS, but instead favored the private offeror.

The agency can, however, neutralize these "threats." Selecting and training the right persons to participate for the agency is crucial. First, the agency should select the best persons available to work on the cost comparison study team from start to finish. Additionally, the agency should minimize personnel turnover during the study to ensure it completes the cost comparison on time. This ensures continuity and reduces unnecessary delay. Second, the agency must train the persons it selects to conduct the cost comparison. Team members must understand and adhere to the rules and policies of OMB Cir. A-76. They must also appreciate the legal ramifications if they fail to follow the rules, namely, administrative appeals and GAO protests. Thus, the agency should use its functional experts to train the entire team on the process. For example, the manpower experts can train members on the overall OMB Cir. A-76 process. Contracting personnel can train on the solicitation, best value, and selection process. Civilian personnel specialists can train on critical union-employee issues, such as the right of first refusal for displaced employees.[159] Last, the legal advisor must advise and train personnel on the pitfalls awaiting the agency if it fails to follow the rules.[160]

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156. For example, the American Federation of Government Employees (AFGE) has authored a training guide for local union leaders to use when educating their members about OMB Cir. A-76, and their rights and responsibilities during a cost study. *See* NATIONAL OMB CIR. A-76 CONFERENCE, AFGE FIELD SERVICES DEPARTMENT, THE AFGE ACTIVIST'S PERSONAL CONSULTANT TO A-76 POLICY IMPLEMENTATION: A SELF-PACED GUIDE TO A-76 POLICY AND PROCEDURES (ESI International, Apr. 1998) (on file with the author). In this guide, the AFGE walks its members through the A-76 process from start to finish. Using learning objectives and quizzes, the AFGE follows the adage "knowledge is power" to inform its members about the outsourcing procedures so they will more fully participate in the cost study at the installation level.

157. 10 U.S.C.A. § 2461, *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998). This statute requires the DOD to notify Congress if the OMB Cir. A-76 cost study will affect 50 or more civilian employees. Prior to the 1999 amendment, Congress required notice if the cost study affected 20 or more employees.

158. 10 U.S.C.A. § 2467.

Finally, the agency must keep the union and employees informed throughout the entire process. Although the unions do not have approval authority over agency actions, the agency can help them "buy in" to the final result, whether for the MEO or for the private offeror. Thus, the agency may include the unions in the PWS and the MEO development.[161] At the same time, the agency must attempt to reduce the adverse impact on employees if the private offeror "beats" the MEO.[162] To the extent practicable, an agency must advise employees of their right of first refusal for employment with the winning offeror.

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159. FAR, *supra* note 13, at 7.305(c) (requiring that the contracting officer insert a clause outlining an employee's right of first refusal in all solicitations which may result in a conversion from in-house to contract performance). The clause, found at FAR 53.207-3, reads in part:

> (a) The [c]ontractor shall give the [g]overnment employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-[g]overnment employment conflict of interest standards.

The right of first refusal applies to permanent employees who are otherwise qualified for the positions the winning contractor offers.

160. The OMB Cir. A-76 process offers the legal advisor plenty of chances to practice preventive law. For example, the legal advisor should present a standards of conduct briefing to the CCST members early in the process. The attorney also should be the "voice of reason" as the agency develops the various plans, such as the PWS, the QASP, and the management plan. The contracting process and union/management dynamics may further challenge the attorney. The attorney should keep everyone focused on the A-76 "big picture" and help the CCST understand the dangers of ignoring the A-76 "rules of the road." *See* Part V, *infra*. Using his or her legal "radar," the attorney can preempt a host of legal issues while guiding the CCST through the entire A-76 ordeal.

161. For example, at White Sands Missile Range, New Mexico ("America's Range"), installation officials have brought union stewards into the PWS process; by necessity, the stewards also work on the MEO. Moreover, the Commanding General at White Sands Missile Range has regular meetings with the workforce. As a result, White Sands has so far averted any legal challenges to its OMB Cir. A-76 studies. Telephone Interview with Lieutenant Colonel Karl M. Ellcessor III, Office of the Staff Judge Advocate, White Sands Missile Range, New Mexico (Nov. 11, 1998).

162. For example, the Army guidance suggests establishing a telephone hot line for employees to ask questions and to give input on the study, publishing articles, issuing a special weekly newsletter addressing employee concerns, using suggestion boxes, and developing employee questionnaires to gather ideas and comments about the study. *See* DA PAM 5-20, *supra* note 64, para. 2-9. Moreover, electronic mail and the internet are natural viaducts the agency may use to quickly and frequently dialog with the workforce.

Even if an agency studiously abides by the "rules of the road" for an OMB Cir. A-76 study, someone may disagree with the result. Whether a bidder, employee, or union, these parties have available discrete avenues of legal recourse to dispute the cost comparison outcome.

V. The Recourse: Legal Challenges to the OMB Cir. A-76 Award Process[163]

Using best value contracting in our hypothetical BOS competition, base officials applied both cost and non-cost criteria, including past performance, to select the private offeror proposing the best value to the government. Base officials then communicated with the government MEO before awarding the contract because it failed to meet the same performance level as the private offeror. After resubmitting its offer, the MEO team proposed a lower cost, beating out the best value offeror. What legal recourse is available to the unsuccessful offeror, other private offerors, or affected employees now faced with the prospect of losing their jobs? An agency's decision, though treated with deference on review, is still subject to challenge. The following opinions depict some of the legal issues that may arise during an OMB Cir. A-76 study.

A. The Recourse: GAO Protests

The GAO generally views beyond the scope of its review an agency's decision to perform commercial activities in-house rather than outsource a function.[164] The GAO, however, will consider OMB Cir. A-76 cases challenging the cost comparison in two broad areas. First, the GAO will review procedural issues, such as whether the protester exhausted administrative remedies, is an interested party, and met its burden of proof. Second, the GAO will review substantive issues, such as whether the agency displayed bias and conducted a fair cost comparison.

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163. Several publications provide a comprehensive summary of OMB Cir. A-76 decisions. *See* Agnes Dover, *Increased Emphasis on Outsourcing Puts Spotlight On Defending and Challenging Public-Private Competitions*, 40 THE GOV'T CONT. No. 9, 3 (Mar. 4, 1998); Lang, *supra* note 60, at 251-55; MICHAEL R. CHARNESS, NATIONAL OMB CIR. A-76 CONFERENCE, COURT ACTIONS RELATING TO OMB CIR. A-76 DETERMINATIONS (ESI International, Apr. 1998) (on file with the author); U.S. DEP'T OF ARMY, MATERIEL COMMAND, U.S. DEP'T OF ARMY, AVIATION AND TROOP COMMAND, WHITE PAPER, MATERIEL MANAGEMENT: OUTSOURCING AND PRIVATIZATION (9 May 1997) (on file with the author).

164. *See generally* Dover, *supra* note 163.

1. Procedural Issues

Before seeking GAO review, protesters must exhaust agency appeal procedures outlined in the Supplement to OMB Cir. A-76. To preserve its right to protest to the GAO, the protester must first raise all known issues in the agency forum.[165] The Supplement limits the range of eligible parties who can administratively challenge the cost comparison. For example, the contractor selected for the study and affected federal employees can appeal to the agency. Conversely, contractors not selected for the cost comparison cannot challenge that decision through the administrative appeal route. Within thirty days, the appeal authority renders a decision on the appeal, allowing the disappointed party to timely file its protest to the GAO.[166]

The GAO opens the door to a broader range of protesters than does the administrative appeal process. Upon exhausting administrative remedies, an interested party may protest to the GAO. According to the GAO, an interested party encompasses bidders or offerors with a direct economic interest in the OMB Cir. A-76 award.[167] Thus, the GAO will hear protests from the private entity selected for the OMB Cir. A-76 cost comparison, as well as disappointed contractors not selected to participate.[168] The GAO

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165. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § K. *See, e.g.*, Trans-Reg'l Mfg., Inc., B-245399, Nov. 25, 1991, 91-2 CPD ¶ 492 (dismissing the protest when the protester failed to raise the issue to the agency in administrative appeal); Prof'l Services Unified, Inc., B-257360.2, July 21, 1994, 94 CPD ¶ 39 (dismissing as premature the protest over cost comparison); Big Picture Co., B-209380, Nov. 8, 1982, 82-2 CPD ¶ 417 (dismissing the protest because the agency appeal was pending).

166. 4 C.F.R. § 21.2 (1998). *See, e.g.*, Inter-Con Sec. Sys., Inc., B-257360.3, Nov. 15, 1994, 94-2 CPD ¶ 187 (dismissing the protest as untimely when the protester who challenged the OMB Cir. A-76 solicitation waited until after the agency announced cost comparison results to raise alleged improprieties); Northrop Worldwide Aircraft Services, Inc., B-212257.2, Dec. 7, 1983, 83-2 CPD ¶ 655 (dismissing the appeal that was filed 10 days after the agency decision).

167. *See, e.g.*, Wildcard Assoc., B-235000, July 24, 1989, 89-2 CPD ¶ 74 (finding the protester in line for an OMB Cir. A-76 award because the federal employees who owned the firm stated that they would retire before receiving the award, thus avoiding the FAR limits on awarding contracts to employees). *But see* American Overseas Marine Corp; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (finding the protester not in line for the OMB Cir. A-76 award); Joseph B. Evans, B-218047.2, Mar. 11, 1985, 85-1 CPD ¶ 296 (finding that a federal employee was not an interested party to protest OMB Cir. A-76 award of base services); Sidney R. Jenkins, B-217045, Nov. 27, 1984, 84-2 CPD ¶ 581 (finding that a federal employee was not an interested party to protest OMB Cir. A-76 award of water plant operations).

168. *See, e.g.*, ITT Fed. Serv. Corp., B-253740.2, Jan. 24, 1994, 94-1 CPD ¶ 30 (considering but eventually denying a protest that was filed by a contractor who was not selected for the cost study).

will not, however, hear protests from either unions or federal employees displaced by the OMB Cir. A-76 award, finding neither an interested party.[169]

Once properly before the GAO, the protester bears the burden of exposing deficiencies in the agency's OMB Cir. A-76 cost comparison. The GAO generally defers to agency discretion in an A-76 study. Thus, a protester challenging the agency's actions must show that the agency failed to follow proper procedures, which materially affected the cost comparison.[170] The heart of an OMB Cir. A-76 study–the cost comparison–generates a host of substantive issues for GAO review.

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169. *See, e.g.*, Hawaii Fed. Lodge No. 1998, Int'l Ass'n of Machinists & Aerospace Workers, B-214123, Feb. 7, 1984, 84-1 CPD ¶ 109 (finding that an employee union was not an interested party to protest an OMB Cir. A-76 award for housekeeping services); NAGE, Local R5-87, B-212735.2, Dec. 29, 1983, 84-1 CPD 37 (finding that an employee union was not an interested party to protest an OMB Cir. A-76 award of pest control services); Local 1662, AFGE, B-197210.2, Apr. 7, 1980, 80-1 CPD ¶ 255 (finding that an employee union was not an interested party to protest an OMB Cir. A-76 award of avionics maintenance services). Congress, however, has opened the door for unions to voice complaints early in the cost study process. In the DOD Authorization Act for FY 1999, Congress amended 10 U.S.C.A. § 2461, which requires the DOD to submit a detailed report to Congress before considering a function for a cost study. Among other items, the report must identify the function and its location, the number of civilian employees potentially affected, and the expected length and cost of the analysis. The DOD must also certify the following:

> A proposed performance of the commercial or industrial type function by persons who are not civilian employees of the Department of Defense is not a result of a decision by an official of a military department or Defense Agency to impose predetermined constraints on such employees in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees.

10 U.S.C.A. 2461(b)(1)(E), *amended by* Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998).

The statute goes on to state that "any individual or entity at a facility" being considered for "change" to contractor performance may object to the command's actions for failure to provide the Congressional notice and reports, to include the certification. The individual or entity has 90 days to object from when it know or should have known that the function was under study for possible "change" to contractor performance. The term "any individual or entity" seems to allow unions to challenge a DOD decision to target a function for a cost study.

170. *See, e.g.*, United Media Corp., B-259425.2, June 22, 1995, 95-1 CPD ¶ 289 (stating that the GAO would recommend corrective action only if the agency failed to follow the procedures that materially affected the outcome of the cost comparison); Ameriko Maint. Co., B-243728, Aug. 23, 1991, 91-2 CPD ¶ 191 (finding no basis upon which to question the judgment of the agency evaluators).

2. Substantive Issues

Substantively, the GAO may review an OMB Cir. A-76 cost comparison on several grounds. Among the more common grounds, the GAO will review a cost comparison to ensure the agency followed the "ground rules" and conducted a fair cost comparison,[171] and to determine if the agency acted in good faith during the process.[172] As noted above, the protester must demonstrate that the agency prejudiced the process before the GAO will recommend corrective action.

Two cases illustrate how the GAO resolved issues centering on the fairness of the cost comparison and agency bias. In the first case, *Crown Healthcare Laundry Services*,[173] the GAO addressed the agency's "ground rules" for conducting the OMB Cir. A-76 study. In *Crown*, the Air Force conducted an OMB Cir. A-76 competition for laundry services at Keesler Air Force Base, Mississippi. Because of an interagency agreement, the Department of Veteran's Affairs (VA) submitted cost information to the Air Force for providing laundry services. The Air Force used the VA's cost estimate to generate the MEO and the in-house estimate. The VA offered a lower cost estimate, and the Air Force kept the laundry services in-house.[174]

Crown challenged the award, alleging the Air Force prepared a flawed cost comparison. According to Crown, the VA based its cost estimate on performing less work than described in the PWS upon which Crown based its bid.[175] The GAO disagreed and denied Crown's protest. At the outset of its decision, the GAO noted that it only reviews OMB Cir. A-76 awards to ensure that the bidders and the agency competed on the same scope of work, and to ensure that the agency followed the A-76 "ground rules."[176] After reviewing the facts, the GAO ruled that the Air Force had indeed followed the A-76 ground rules and Crown suffered no competitive prejudice.

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171. *See, e.g.*, United Media Corp., B-259425.2, June 22, 1995, 95-1 CPD ¶ 289 (finding that the Air Force properly conducted an OMB Cir. A-76 cost comparison); Tecom, Inc., B-253740.3, July 7, 1994, 94-2 CPD ¶ 11 (finding that the Army properly conducted an OMB Cir. A-76 cost comparison). *See also* Crown Healthcare Laundry Services, Inc., B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

172. Madison Services, Inc., B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136.

173. B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

174. The VA provided its cost estimate to the Air Force along with an interagency sharing agreement stating that it would provide laundry services for Keesler Air Force Base. *Id.* at 1.

The GAO concluded that the PWS allowed offerors to use their experience to estimate the contract workload, even if they reached different results when preparing their cost estimates. According to the GAO, both Crown and the VA exercised "independent business judgment" to arrive at "different logical conclusions of doing the work."[177] For example, the GAO observed that the Air Force reasonably chose the VA as the in-house estimate because it reasonably determined that the VA could provide the laundry services as described in the PWS at its estimated cost. Moreover, the GAO noted that the PWS fully described the laundry requirements, yet both the VA and Crown estimated the number of workers needed to accomplish laundry pick-up and delivery differently. Likewise, both "experienced offerors" used similar methods to estimate the weight of the workload, but reached different results. From these facts, the GAO opined that the Air Force conducted a fair cost comparison.[178]

In the second case, the GAO addressed alleged agency bias. In *Madison Services, Inc.*,[179] the Air Force kept base operating services in-house after conducting a cost comparison. Madison alleged base officials acted

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175. The PWS required the launderer to "receive, account for, launder and return" all items. *Id*. at 4. According to Crown, the "account for" language in the PWS required whoever performed the laundry service to count each laundry article at the time of pickup from and delivery to Keesler AFB. Crown stated that its bid prices included the costs of two delivery trucks, two drivers, and four other employees who would help count the items. By contrast, Crown alleged that the VA based its estimated costs on one truck and one driver from a private company, which would make it impossible for the VA to always make timely pickups and deliveries and also count the laundry items. The Air Force countered that the PWS did not require counting laundry items at the pickup and delivery points. Rather, government clerks would count the laundry at each point. *Id.*

176. *Id*. at 2 (citing DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543). In *DynCorp*, the Air Force converted aircraft maintenance services at Laughlin Air Force Base to in-house civilian employees rather than outsourcing the services. The protester alleged that the Air Force failed to include certain costs in its bid. The GAO sustained the protest, ruling that the Air Force failed to include in its offer such costs as recruiting, relocating, and training new employees. The Air Force, however, required that the protester include these costs in its bid. According to the GAO, both the offeror and the government must compete on the same scope of work in an OMB Cir. A-76 competition. *DynCorp*, 89-1 CPD ¶ 543 at 4.

177. *Crown*, 96-1 CPD ¶ 207 at 5. Crown further alleged that the Air Force improperly added contract administration costs to Crown's bid, but failed to add those same costs to the VA's bid. The GAO disagreed and ruled that the Air Force properly added these costs to Crown's bid and the VA reasonably estimated its own costs. The GAO noted that Crown's bid was still higher than the VA's, even without the contract administration costs. In addition, the Air Force added to the cost estimate the salaries for government employees performing quality assurance and administrative tasks.

178. *Crown*, 96-1 CPD ¶ 207 at 5.

179. B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136.

in bad faith and "gamed" the process to favor the MEO. As discussed previously,[180] Madison argued (during the agency appeal process) that the Air Force omitted certain costs from the in-house estimate so that they could insert a figure that was lower than Madison's during the agency appeal process.

Stating that agency officials presumably act in good faith, the GAO found that Madison failed to show that the Air Force officials had a "specific, malicious intent" to harm Madison.[181] In fact, the GAO agreed that the Air Force had erred by erroneously omitting the disputed costs from the in-house cost estimate. Additionally, the GAO concluded that the Air Force properly corrected this mistake during the appeal process to ensure accuracy. Finding no evidence of bias to motivate the appeal review team, the GAO denied Madison's protest.

Thus, a disappointed bidder in an OMB Cir. A-76 competition can succeed before the GAO only after exhausting administrative remedies and meeting its burden of proof. To seek recourse in the federal courts, however, a disappointed bidder first must dodge several obstacles.

B. The Recourse: Federal Court

OMB Cir. A-76 does not authorize "an appeal outside the agency or judicial review" nor does it authorize "sequential appeals."[182] Even so, disappointed bidders still attempt to seek judicial review, with mixed results. Mostly, aggrieved protesters (now plaintiffs) seek to challenge OMB Cir. A-76 decisions in federal court under the Administrative Procedures Act (APA).[183] The APA states that a person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," is entitled to judicial review except for two circumstances: a statute precludes judicial review or the agency action is discretionary.[184]

The courts have generally ruled that an agency exercises discretion when deciding to outsource a function.[185] For example, in 1979, the Third Circuit in *Local 2855, AFGE v. United States*[186] upheld the Army's deci-

180. *See supra* note 145 and accompanying text.
181. *Madison Services*, 97-2 CPD ¶ 136 at 2.
182. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § K, para. 7.
183. Administrative Procedures Act, 5 U.S.C.A. §§ 701-706 (West 1998).
184. 5 U.S.C.A. §§ 701-702.

sion to outsource terminal services in Bayonne, New Jersey. The court found that the "type of decision made by the Army here is necessarily a matter of judgment and managerial discretion" and not subject to judicial review.[187] Moreover, the court reasoned that neither OMB Cir. A-76 nor its implementing regulations offered a "fixed standard" to adjudicate the plaintiffs' challenges to the Army's cost comparison.[188] Finding no law to apply, the Third Circuit ruled for the Army.

Some courts dismiss challenges to OMB Cir. A-76 on discretionary grounds; other courts dismiss for lack of standing. Under the APA, a plaintiff acquires standing from injury stemming from an "agency action within the meaning of a relevant statute."[189] Courts tend to view OMB Cir. A-76 more as a managerial tool and internal operating procedure, rather than as a statute conferring any legal right.[190] Thus, plaintiffs must "bootstrap" their claim to another statute that does, in fact, confer a legal right. Plaintiffs must then show standing in one of two ways: their claim falls within the statute's "zone of interest" or the agency action injured the plaintiff.[191]

Two cases illustrate how plaintiffs have successfully challenged OMB Cir. A-76 cost comparisons. In both cases, the plaintiffs convinced the court that the agency's decision was not only discretionary, but they also established standing. In the first case, *CC Distributors v. United*

185. *See* Department of the Treasury, Internal Revenue Service v. FLRA, 494 U.S. 922 (1990) (holding that the FLRA had discretion to determine if OMB Cir. A-76 was an "applicable law" under Title VII of the Civil Service Reform Act); Local 2017, AFGE v. Brown, 680 F.2d 722 (11th Cir. 1982) (holding that outsourcing decisions are "inherently unsuitable" for judicial review); Local 2855, AFGE v. United States, 602 F.2d 574 (3d Cir. 1979) (holding that the Army exercised agency discretion when it opted to contract out services under OMB Cir. A-76); Local 1668, AFGE v. Dunn, 561 F.2d 1310 (9th Cir. 1977) (holding that the Air Force exercised discretion when it decided to conduct a cost comparison study under OMB Cir. A-76).

186. 602 F.2d 574 (3d Cir. 1979).

187. *Id*. at 583.

188. *Id*. at 582-83. In reaching its decision, the court noted that OMB Cir. A-76 and the parallel Army regulation allowed the Army to consider "nonquantifiable and non-cost-related factors" in deciding against continued in-house performance. In the court's opinion, "[t]he statutory and regulatory provisions do not provide rules or specifications that would permit a court to adjudicate plaintiffs' disagreements with the formulas, factors, and cost projections relied upon by the Army." *Id*. at 582.

189. 5 U.S.C.A. § 702.

190. *See Local 2855, AFGE*, 602 F.2d at 582-83 (quoting Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 38 (3d Cir. 1976)).

191. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982).

States,[192] the Air Force converted supply stores from contractor to in-house performance.[193] CC Distributors challenged the Air Force, arguing that the agency failed to conduct a cost comparison under OMB Cir. A-76 before converting back to an in-house supply system. The district court, however, dismissed the complaint for two reasons: because CC Distributors lacked standing and because the Air Force exercised its discretion properly.[194]

On appeal, the District of Columbia Circuit reversed. The court held that the contractors had standing to sue under the APA because the National Defense Authorization Act for FY 1987 and the DOD regulations required cost comparisons for obtaining services or supplies. Thus, before reverting back to an in-house supply function, the Air Force had to determine whether a commercial source was unavailable, or perform a cost comparison.[195] The court found the Air Force deprived CC Distributors of an opportunity to compete for the supply function, creating an injury sufficient to acquire standing.[196] Moreover, the court relied on the 1987 Defense Authorization Act and the DOD regulations to find that the Air Force lacked any discretion to decide whether to conduct a cost compari-

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192. 883 F.2d 146 (D.C. Cir. 1989).

193. The Air Force established the Contractor Operated Civil Engineer Supply Stores (COCESS) program in the 1970s with the hope that privately operated stores could supply materials for Air Force engineers more efficiently than the government's internal supply system. Under the COCESS program, the individual Air Force base prepared a list of "pre-priced" materials it expected to use. The Air Force incorporated these items into the COCESS contract for that base, which required the contractor to supply those items at the contract price. Conversely, the contract did not identify "non-priced" materials because of uncertainty about whether the base would need those items. Thus, the contractor would negotiate the terms for those items as the need for them arose. In 1988, the DOD opted not to renew contracts for "non-priced" materials, and decided to bring this part of the COCESS program in-house. *Id.* at 147.

194. *Id*. at 149.

195. *Id*. at 152-53.

196. *Id*. at 151. The court opined that "requiring the Air Force to conduct recompetitions and cost comparison studies regarding COCESS is likely to afford plaintiffs just that opportunity [to compete] the loss of which constitutes their injury [and] given plaintiffs' demonstrated capacity to compete for and to obtain such contracts in the past . . . this opportunity would not be illusory." *Id*.

son.[197] Consequently, the court remanded the case to the district court for further proceedings.[198]

In the second case, the Sixth Circuit Court of Appeals in *Diebold v. United States*[199] wrestled with whether OMB Cir. A-76 conferred standing under the "zone of interest" prong. In *Diebold*, a group of civilian employees challenged the Army's decision to privatize food service operations at Fort Campbell, Kentucky. The district court dismissed the complaint, finding it did not have jurisdiction under the APA because the Army's decision was "committed to agency discretion."[200]

The Sixth Circuit reversed, finding that the employees had standing under the APA. The court concluded that the Army's decision to contract out the food service function was not discretionary. Rather, certain statutes and policies required the Army to make this decision. The court reasoned that the employees' zone of interests fell within the 1979 Office of Federal Procurement Policy Act Amendments (OFPPAA),[201] which established the Office of Federal Procurement Policy (OFPP). According to the court, the OFPPAA articulated the broad procurement policy of the United States: to promote economy, efficiency, and effectiveness.[202] The court further noted that the OFPP streamlined the federal procurement process in several ways, including outsourcing.

The court further noted that Congress addressed for the DOD the issue of contracting out supplies and services in 10 U.S.C.A. § 2462. In that statute, Congress mandated contracting out when the private sector can provide the services or supplies at a lower cost than the DOD cost.[203] The court stated that this statute required "measurable, objective comparison of costs" and did not allow the Secretary of Defense to contract out as

197. *Id*. at 153, 156. The court had little trouble concluding that the DOD regulations governing cost studies (and implementing OMB Cir. A-76) incorporated standards subject to judicial review. For example, the court observed that the regulations required a "more economical," "satisfactory," and "available" commercial source; and a cost comparison. *Id.* at 153 (citing 32 C.F.R. § 169.4 (1989)).

198. *Id*. at 156.

199. 947 F.2d 787 (6th Cir. 1991).

200. *Id*. at 789. A federal court may review an agency action under the APA unless the action is "committed to agency discretion by law." 5 U.S.C.A. § 701(a)(2) (West 1998). An agency act is "committed to agency discretion" absent any law or other standards to measure the decision. *Diebold*, 947 F.2d at 789.

201. Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, 93 Stat. 648 (codified as amended at 41 U.S.C.A. §§ 401-430 (West 1998)).

202. *Diebold*, 947 F.2d at 793.

a matter of discretion.[204] The court concluded that this statute also provided standards against which it could evaluate the agency's action.[205]

Finally, the Sixth Circuit found that OMB Cir. A-76 carries the "force of law" requiring agencies to pursue economy and efficiency in federal procurements.[206] The court noted that the 1983 version of OMB Cir. A-76, unlike its predecessors, offers more specific guidelines for agencies to follow. For example, it requires a cost comparison, mandates at least a ten-percent cost savings, and erases agency discretion about when and if a cost comparison is required.[207] Finding OMB Cir. A-76 "part of the law" to apply, the court concluded that OMB Cir. A-76 achieved the status of a mandatory regulation rather than mere internal operating procedures.[208] The Sixth Circuit reversed and remanded the case to the district court for further proceedings.[209]

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203. *Id*. at 794. 10 U.S.C. § 2462 states, in part:

> Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the [DOD] . . . from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower . . . than the cost at which the Department can provide the same supply or service.

204. *Diebold*, 947 F.2d at 797. The court conceded that 10 U.S.C.A. § 2462 did not apply to functions the Secretary of Defense finds that government personnel must perform: "Here we find discretionary language: the Secretary may 'determine' that some functions cannot be performed by contract. Apart from this standardless determination, Congress has required a mandatory cost-benefit analysis." *Id*.

205. *Id*.

206. *Id*. at 801.

207. *Id*.

208. *Id*. The court proffered two interesting reasons why OMB Cir. A-76 is cloaked with the force of law. First, it noted that the circular responds to a "specific statutory command to pursue economy and efficiency in federal agency procurement" (via 10 U.S.C.A. § 2462) and thus carries the "force of law." *Id*. The court went on to say that OMB A-76 reaches the status of "enforceable regulations" at the point when the process encompasses the procurement process. *Id*. Consequently, the Sixth Circuit had no problem finding standards against which to measure an agency's actions:

> Thus, evidence that an agency did not follow Circular A-76 cost calculation directives, that it did not include all costs made necessary by contracting out, and that the agency will not save the ten percent required to justify the contracting-out decision could support a claim that the agency was not complying with statutory directives to pursue economy and efficiency and to contract-out commercial activities if contracting-out will cost less than in-house production—the law to be applied.

Id. at 801-2.

C. The Recourse: Lessons for the Future

Current case law offers several lessons to those involved in the OMB Cir. A-76 process. First, the GAO offers easier access to qualified protesters seeking recourse, provided they first exhaust the agency's administrative appeal remedies. Moreover, the GAO generally defers to agency discretion on a cost study and instead targets only specific areas for review. For example, *Crown Healthcare and Laundry Services* reaffirms that the GAO only reviews OMB Cir. A-76 awards if the agency failed to follow the cost comparison procedures or conducted a faulty or misleading cost comparison.[210] *Madison Services, Inc*. further reaffirms the presumption that the agency acts in good faith, making it difficult for protesters to prove agency bias or bad faith.[211]

In federal courts, however, future plaintiffs may enjoy more success challenging OMB Cir. A-76 awards. This trend, as illustrated by the *Diebold* and *CC Distributors* cases, bears watching. As the DOD continues to push outsourcing, more employees and contractors will likely turn to the federal courts for full judicial review. A tactical decision, plaintiffs will have to weigh the time, expense, and probable success when deciding whether to challenge in federal court an OMB Cir. A-76 award.

Aside from these lessons, at least one recent case has heightened the mystery surrounding best value and OMB Cir. A-76. In *Pemco Aeroplex Inc*., the GAO upheld the Air Force's decision to cancel a RFP for depot maintenance and bring the work in-house.[212] Significantly, the GAO reasoned that the Air Force did not violate a statutory requirement to permit private companies to provide goods and services unless the government can provide them at a lower cost.

This protest has a tortuous history. In July 1996, the Air Force issued a solicitation for depot maintenance for C-130 aircraft. It awarded the con-

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209. *Id*. at 811. *See* National Air Traffic Controllers Ass'n v. Pena, No. 95-3016, 78 F.3d 585, 1996 WL 102421, at *6 (6th Cir. (Ohio) Mar. 7, 1996)) (reversing the district court's ruling that the plaintiffs lacked standing, and affirming its holding in *Diebold v. United States* that it may review agency decisions to privatize government services). On remand, the district court applied OMB Cir. A-76 as law to find that the plaintiffs had standing to sue in federal court. The court ruled that the plaintiffs had an interest in their federal jobs. Once they lost those jobs, they gained standing in federal court. National Air Traffic Controllers Ass'n v. Pena, 944 F.Supp. 1337 (N.D. Ohio 1996).

210. B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

211. B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136.

212. B-275587.10, B-275587.11, B-275587.12, June 29, 1998, 98-2 CPD ¶ 1.

tract to Aero in April 1997; Pemco protested. In response, the Air Force admitted that it failed to properly evaluate the offerors' past performance, and agreed to revise the RFP. The GAO dismissed Pemco's protest in May 1997.[213] However, the Air Force concluded that it could not complete the corrective action until October 1997. As a result, it terminated Aero's contract and tasked Warner Robins AFB to temporarily perform the depot work. In June 1997, the Air Force advised offerors that it was reevaluating the depot work to "determine the best approach to ensure readiness and sustainability of the C-130 weapon system." Finally, on 3 March 1998, the Air Force announced that it was canceling the RFP, concluding that keeping the work in-house was the "most cost effective means" of performing the work.[214] Both Pemco and Aero protested, arguing that (1) the Air Force improperly canceled the RFP; and (2) the Air Force violated 10 U.S.C. § 2462, which requires a "reasonable and fair cost comparison" before acquiring goods or services from the private sector.[215]

The GAO denied the protest. Initially, the GAO agreed with the protesters that 10 U.S.C. § 2462 applied when the Air Force decided to bring work in-house. However, the GAO found the "except as otherwise provided by law" proviso of 10 U.S.C. § 2462 triggered 10 U.S.C. § 2466(a), which prohibited the Air Force from contracting out more than fifty percent of depot maintenance.[216] The GAO concluded that the Air Force properly canceled the solicitation to comply with this statutory cap. The GAO further agreed with the Air Force that it teetered on the brink of exceeding the fifty-percent cap despite the C-130 solicitation. Thus, the GAO reasoned that the Air Force properly exercised its discretion when it canceled the solicitation to stay within the statutory limits.[217]

Though not strictly a "best value" case, *Pemco* highlights, albeit briefly, the tension between the "low cost" language of 10 U.S.C. § 2462 and the current trend of using "best value" or non-cost factors in cost comparisons. Not faced with this issue, the GAO relied on the controlling language in 10 U.S.C. § 2466(a) to rule for the Air Force. Nonetheless, by what it *did not* say, the GAO exposed the "best value" versus low cost dichotomy. The DOD uses OMB Cir. A-76 to conduct cost comparison studies. Though ultimately a cost-driven process, OMB Cir. A-76 permits the DOD to use best value and non-cost factors. Slapped on top of OMB

213. Pemco filed for reconsideration, which the GAO denied. Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102.

214. *Pemco Aeroplex, Inc*., 98-2 CPD ¶ 1 at 2.

215. *Id*.

216. *Id*. at 6.

Cir. A-76 is 10 U.S.C. § 2462, which requires the DOD to purchase a supply or service from the private sector only if it can provide them at a cost lower than provided by the DOD.

Certainly, it is premature to predict how *Pemco* will affect the best value procurement method in an OMB Cir. A-76 cost study, if indeed it will have an impact. It does, however, seem to crack the door open a little wider for a disappointed bidder to challenge a cost study where the DOD used the best value procurement method. Whatever the outcome, in whatever forum, this and other cases offer crucial lessons as the DOD and the private sector participate in this "quiet revolution."

VI. Conclusion

After fighting General Lee for seven grueling days in 1862, a frustrated General George B. McClellan sent a plaintive telegraph from the battlefield to President Lincoln: "I have seen too many dead and wounded comrades to feel otherwise that the [g]overnment has not sustained the Army. If you do not do so now the game is lost."[218]

During the Civil War, President Lincoln and generals such as McClellan had to find ways to maintain combat readiness, sometimes with scarce resources. Over a century later, things have not changed much. Leaders are still looking for ways to maintain readiness with dwindling budgets. Only this time, the current acquisition and fiscal revolution is quietly reshaping how the DOD does business. Fueled by the policy and process of outsourcing and OMB Cir. A-76, the DOD is searching for unexplored ways to cut costs and still serve the warfighter.

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217. *Id*. at 9. The GAO also agreed with three specific reasons the Air Force offered to explain why 10 U.S.C. § 2466(a) required it to cancel the RFP. First, the Air Force noted the statute requires agencies to carefully balance the funds used for depot maintenance workloads, whether performed in-house or contracted out to the private sector. According to the Air Force, shifting funds from public depot maintenance to private contractors could cause it to exceed the statutory cap. Second, the Air Force stated agencies lose valuable "headroom" or available funds for contracting out depot maintenance every time it makes such a decision. Thus, the Air Force (and other DOD agencies) loses some financial flexibility for future, and perhaps more appropriate, decisions to contract out depot maintenance. Finally, the Air Force observed that Congress amended 10 U.S.C. § 2466 to define "depot-level maintenance and repair" as including "interim contractor support or contractor logistics support." The private sector traditionally has performed the latter work, which altered the workload balance for purposes of 10 U.S.C. § 2466(a). *Id.* at 8.

218. STEPHEN B. OATES, WITH MALICE TOWARDS NONE: THE LIFE OF ABRAHAM LINCOLN 304 (1977) (quoting McClellan's Report, June 28, 1862, OR, ser. I, vol. XI, pt. 1, 61).

Though a cost-driven process, OMB Cir. A-76 permits the DOD and other agencies to use "best value." This makes good business sense. After all, best value theoretically gives the DOD "more bang for its buck." With best value, the DOD establishes evaluation factors, requires the MEO to submit a technical proposal, and then selects the private offer that is most advantageous to the DOD. Are best value and OMB Cir. A-76 compatible? One hopes that these procedures are a perfect match–for the good of the DOD, the warfighter, and the taxpayer. Ultimately, however, this issue raises more questions than it answers. Significantly, do OMB Cir. A-76 and best value work at cross-purposes–one to save money, the other to promote quality? In the end, mixing best value into the OMB Cir. A-76 recipe may only produce best value on a budget.

In the long run, only time will tell if weaving best value methods into cost studies is good for the DOD. Best value contracting merged with OMB Cir. A-76 is a growing and evolving process. Both DOD personnel and private contractors are experiencing the good and the bad of this merger. One the one hand, best value allows the DOD to move beyond cost to consider other factors as part of the cost study. On the other hand, neither OMB Cir. A-76 nor its Supplement offer any clear guidance on how an agency can or should glean the most benefit from the best value method. Despite this lack of guidance, however, the marriage between best value and OMB Cir. A-76 seems to offer the DOD a vehicle for buying better quality services and products to meet its needs.

Importantly, the DOD can help its own cause when using "best value" in cost comparison studies. In fact, by passing the FAIR, Congress can now hold the DOD's "feet to the fire" when it classifies functions as either inherently governmental or commercial. Subject to congressional scrutiny, the DOD now has a greater impetus to produce a sound list of noninherently governmental functions. Second, the DOD agencies must develop a thorough PWS. The heart of the cost study, the PWS can make or break the outcome. A solid PWS should encourage innovative and creative performance methods from both the private sector and the MEO team. In the end, the DOD should garner a cost savings. This is not a pipe dream. From the OFPP Pilot Project study, we know that PBSC methods frequently inspired innovative techniques that cut costs. Last, but certainly not least, the DOD agencies must keep the lines of communication open between management and the workforce at every step along the OMB Cir. A-76 trail. By educating, informing, and training all personnel about the OMB Cir. A-76 process, the DOD stands a better chance of getting the best value for all.

Throughout, this article has explored the policy, process, and recourse of OMB Cir. A-76. Using a hypothetical BOS competition as a backdrop, this article has examined the tension and issues associated with mixing best value in a cost driven process. Despite this tension, and in the face of these issues, the DOD will continue to march forward in its quest to outsource and downsize.

The quiet revolution has started. Now, we anxiously await the outcome.

TWENTY-SECOND EDWARD H. YOUNG LECTURE IN LEGAL EDUCATION: PROFESSIONALISM: RESTORING THE FLAME [1]

COLONEL DONALD L. BURNETT, JR.[2]

I. Introduction

Perhaps I should address you as "senior partners, partners, and associates in one of the world's largest law firms." That description literally would be true, and it would illustrate my purpose today: to emphasize values held in common by lawyers in military service and members of the general legal profession. It is appropriate to underscore common values here at The Judge Advocate General's (JAG) School. This is a schoolhouse connected to the world; people come from the field, teach and learn, and return to the field. The JAG School is a place where we reaffirm fundamental values such as ethical conduct, principled decision-making, and personal selflessness (recognizing that life has a meaning larger than our own pains and pleasures).

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1. This article is an edited transcript of a lecture delivered on 26 February 1998 by then-Lieutenant Colonel Donald L. Burnett, Jr. to members of the staff and faculty, distinguished guests, and officers attending the 46th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The lecture is named in honor of Colonel Edward H. (Ham) Young, who served two tours as the Commandant of The Judge Advocate General's School. He was the first Commandant of the School when it was established in Washington D.C. in 1942. He presided over the School for two years and oversaw its expansion and transfer to the University of Michigan. He returned as Commandant when The School was reactivated at Fort Meyer in 1950. His distinguished military career began when he received his commission in 1918 from West Point and served with the American Expeditionary Force and the Army of Occupation in Europe after World War I. His impressive legal career in the Army also included assignments as an Assistant Professor of Law at the United States Military Academy, the China Theatre Judge Advocate and legal advisor to the Far East United Nations War Crimes Commission, the Chief of the War Crimes Branch in the Office of the Judge Advocate General, and service on the First Judicial Council and Board of Review at The Office of The Judge Advocate General. Colonel Young ended his career in the Army in 1954 while serving as Staff Judge Advocate, Headquarters, Second Army.

2. Reserve Deputy Commandant, The Judge Advocate General's School, and Dean, Louis D. Brandeis School of Law, University of Louisville. A.B. *magna cum laude*, Harvard University; J.D., University of Chicago; LL.M., University of Virginia. Former president, Idaho State Bar, and judge, Idaho Court of Appeals.

Values are embedded in a culture of professionalism, sustained by this school. Visionary leaders helped build the culture, as we are reminded by the name of this room–the Decker Auditorium. Colonel Decker, then working with the Special Projects Division of the Office of The Judge Advocate General, oversaw the creation of the first permanent installation for the JAG School at the University of Virginia. Colonel "Ham" Young, for whom today's lecture is named, provided the spirit, spark, and programmatic concept for the JAG School itself. Their vision has given us a place with a purpose.

In my civilian occupation, I work at another place where a visionary figure gave the school its purpose, the Louis D. Brandeis School of Law. Justice Brandeis, whose remains are buried at our school, provided a tangible legacy in the form of 250,000 of his books and papers, and helped us obtain the papers of Justice John Marshall Harlan. He directed that we receive original Supreme Court briefs (a tradition still honored by the Court today), and he even reached into his own pocket to buy light fixtures for our law school during the Depression.

The most enduring part of his legacy, however, has been intangible. He had a vision of an academic institution expressing the community at its best. "The aim must be high," he declared, "and the vision broad."[3]

Today, we in legal education serve a public disaffected with lawyers, and a legal profession, especially on the civilian side, appearing to drift away from high aims and broad visions. I propose to talk about these problems, and the challenge of reclaiming our common values, as a collective responsibility of the academy and the profession. My remarks begin with the early role–what should be the enduring role–of the lawyer as a community leader and as a link connecting persons and groups within a community. Then I will comment on the evolution of legal education, contrasting the Langdell model, which analogizes law to science, with the Brandeis model, which connects law to public service. I will discuss the importance of rekindling our profession's historic values that resonate with the service mission of the academy. Finally, I will ask you to think of how all of us as lawyers and educators–now in uniform, perhaps in civilian attire during a second career–can improve the profession while responding constructively

3. Letter from Justice Louis D. Brandeis, to Alfred Brandeis, his brother, Alfred Brandeis (1925) (on file in the Brandeis Collection, Louis D. Brandeis School of Law, University of Louisville).

to unfair attacks upon it. In short, I will challenge you to help restore the flame of professionalism.

II. Our Historical Legacy: Lawyers, Clients and Communities

Aristotle observed that three great professions–priests, doctors, and lawyers (or "lawgivers")–confront common ethical questions from different perspectives.[4] Priests answer to a divine power and doctors answer to science, but lawyers answer to society. As servants of the public, we lawyers may have the most difficult of professions, for society can be an arbitrary and ungrateful taskmaster. Moreover, unlike a divine power that can fulfill faith, and unlike a body of scientific knowledge that can verify a medical opinion, society cannot validate the lawyer's work by achieving perfect, harmonious justice. Rather, justice is an endless pursuit and, in a free society, the subject of an ongoing debate.

Nonetheless, the pursuit of justice is ennobling. During the early history of the United States, the role of the lawyer was understood to be that of seeking justice. The lawyer provided a voice for community values and, by serving many clients of different backgrounds, furnished a dynamic of inclusiveness within the community. Of course, inclusiveness then did not mean what it does now–it certainly did not include people of color or, in most circumstances, women–but to the extent there was inclusion at all, a lawyer's work generated and protected it. Thus, de Toqueville wrote that although the United States had no ancestral, landed aristocracy, it did have a democratic aristocracy in the practicing Bar.[5] He praised the service of lawyers in holding their communities together.

Even in the first half of the twentieth century, a lawyer was known primarily for service. Sol Linowitz, who wrote a mournful critique of today's legal profession, recalls:

> When I entered the profession fifty-six years ago, a lawyer was a member of an esteemed and honored profession. Becoming a lawyer meant joining a helping profession–one [that] dealt with the problems of people and did so sensitively and effectively.

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4. THE POLITICS OF ARISTOTLE (Newman, ed., Oxford Univ. Press, 1887).

5. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Alfred A. Knopf 1945) (12th ed. 1848).

> Lawyers regarded themselves as charged with public trust–committed to strengthening our systems of law and justice . . . .
>
> I knew the fulfillment of having men and women who entered my office in panic and distress leave it grateful and with peace of mind, and I came to understand that human relations is the stuff of which law is made; that no lawyer worth his salt can practice his calling impersonally; that to be a lawyer in the deepest sense of the word is to concern oneself with people and the things which bring people together; and that being a real lawyer involves knowing how to work with those you must serve. The law was for me truly a human profession.[6]

There is a close nexus between Linowitz's remembrance of a "human profession" and de Tocqueville's description of lawyers serving communities. Each sees something noble in helping real people in real situations, accepting their human imperfections and serving them in response to a higher calling.

As judge advocate officers–members of an organization older than the United States itself–we have a special appreciation for lawyers whose service has helped shape the nation's history. Consider these images of American lawyers, past and present:

> Think of a Philadelphian in New York, the first Philadelphia lawyer who undertook the defense of John Peter Zenger, protecting his right to publish what he chose free from censorship or interference. His name was Alexander Hamilton and he was a lawyer.
>
> You would see another at the trial of Captain Preston, the trial that arose out of the Boston Massacre. His name was John Adams. He would become the second President of the United States. He was a lawyer.
>
> You would see him at the Miracle at Philadelphia, the Constitutional Convention of 1787, fighting for a statement of rights that

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6. Sol Linowitz, *Respect for Lawyers, Respect for Law*, 54 BENCH & B. OF MINN. No. 10, 27-28 (Nov. 1997). *See* SOL LINOWITZ (with Martin Meyer), THE BETRAYED PROFESSION (1994).

> eventually became the basis of American freedom. His name was James Madison. He was a lawyer.
>
> You would see him at Gettysburg, tears in his eyes, gaunt and morose, rededicating our country to principles of equal justice for all. He said, "As I would not be a slave, so I would also not be a master." His name was Abraham Lincoln and he was a lawyer.
>
> You would see him, an elemental man, fighting for one cause or another and in Dayton, Tennessee, preaching the legitimacy of evolution. His name was Clarence Darrow. He was a lawyer.
>
> You would see him speaking to us from a wheel chair, lifting our spirits, making us stronger with his inspirational philosophy: "The only thing we have to fear, is fear itself." His name was Franklin Delano Roosevelt. He was a lawyer.
>
> You would see her standing before the podium of the United States Supreme Court and insisting that her client, Gerald Gault, a fifteen year old juvenile, had a right to due process -- a radical proposition at the time. Her name was Amelia Lewis and she was a lawyer.
>
> You would also see her in the U.S. House of Representatives in July, 1974, during the most serious constitutional crisis of this century. She gave voice to our fear, our anguish, our hope. She showed us the way. Her name was Barbara Jordan. She was a lawyer.[7]

In this glimpse of history, we find a noble heritage of lawyers serving as the connective tissue in a society torn by divisive forces. That heritage has special meaning today. John Sexton, dean of the New York University School of Law, and immediate past president of the Association of American Law Schools, has observed:

> From the beginning, America has been a society based on law and forged by lawyers. For Americans, the law has been the great arbiter, the principal means by which we have been able to

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7. John G. Prather, Jr., *President's Page*, KY. BENCH & B. 2-3 (Summer 1993). These excerpts paraphrase portions of an oft-quoted speech on the American lawyer.

> knit one nation out of a people whose principal characteristic always has been diversity. And, just as the law has been a principal means for founding, defining, preserving, reforming, and democratizing, a united America, America's lawyers have been charged with setting the nation's values–a charge that runs not only to "great cases" and major reform movements, but also to the lawyer's day to day dealing with clients. In our society, lawyers are and must be the conscience of both the legal system and the client–for if they are not, no one will be.[8]

As Dean Sexton implies, nobility in the legal profession is not limited to a high-profile public practice. The simple, quiet, competent service rendered to individuals is noble, too. Indeed, the reflective practitioner is the true hero of our profession today–a lawyer who understands that our professional responsibilities are threefold. First, of course, the lawyer is a representative of clients. This is the role of the lawyer as an attorney. Although anyone can be an attorney in a contractual sense–an agent for someone else–only lawyers are trained to be attorneys in the full professional sense, exercising an informed and independent judgment. Second, lawyers–unlike contractual "attorneys"–are officers of the courts and legal system. Third, lawyers are public citizens having a special responsibility for the quality of justice. All these roles are recognized, as you know, in the Model Rules of Professional Conduct.[9]

Because lawyers are expected to perform every role, they cannot be mere contractual "attorneys" or narrow technicians of a legal craft. They should view each client's interests in the broader context of justice, pursued with independent professional judgment, with obedience of duties owed to the courts and legal system, and with awareness of the leadership obligations of lawyers as public citizens. To paraphrase Justice Brandeis, lawyers must have an aim high and a vision broad.

II. Science and Service: Two Models of Legal Education

Regrettably, most young lawyers learn little in law school that raises their aim or broadens their vision. Although modern legal education is a

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8. John Sexton, *The President's Message: Restoring the Notion that Lawyers are Society's Conscience*, 97-2 THE NEWSL. (Ass'n of Am. Law Schools, April 1997).

9. American Bar Association, *Model Rules of Professional Conduct*, "Preamble: A Lawyer's Responsibility" (adopted 1983).

trilogy of doctrine, skills, and values, most students find the primary emphasis to be on doctrine, with a secondary focus on skills and scant attention paid to values beyond a mandatory single course in professional responsibility.

Legal doctrine has been at the top of the educational agenda since the days of Christopher Columbus Langdell at Harvard. Langdell's approach to law teaching in the late nineteenth century was a brilliant adaptation of the scientific method, which had produced an explosion of new knowledge and, through applications of technology during the Industrial Revolution, had generated extraordinary new wealth in the Western world. Langdell advocated enabling students to learn law the way scientists learn about the natural world. Scientists observe phenomena, develop hypotheses to explain what they have observed, and validate their hypotheses by repeating the observations or by replicating the phenomena under controlled conditions. If they observe new phenomena, they either adjust their hypotheses or create new ones. Through this repetitive process of observation and hypothesis, scientists discover the natural order.

Langdell believed students could learn the law in a similar way. Students would investigate the sources of law–consisting, at that time, mainly of judge-made common law–by reading cases. They would develop hypotheses to explain these legal phenomena and validate their hypotheses against other cases. These validated hypotheses would express the underlying rules of law, actively discovered in the classroom rather than passively absorbed in lectures. A sage professor would guide the students in this process, employing a questioning technique to facilitate the discoveries. Hence, the Socratic method that we have employed in legal education for a century.

Although the Langdell model has served us well, we have come to recognize its limits. The method teaches doctrine; it does not address skills, nor is it well suited to inculcating values. Even with respect to doctrine, it works less well in a world of statutes and regulations than in the common law world where it was born. It also creates a false economy of teaching resources because it can be employed with large audiences of students, unlike the clinical model of medical education developed by Dr. Abraham Flexner of Louisville.[10] Flexner gave to medicine what Langdell omitted from law–an educational process employing a high ratio of faculty

10. John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993).

to students, developing skills in small working groups, and inculcating professional values through mentoring relationships. Langdell's model also lacked insight into the social, economic, or political processes that shape law–or into the role of lawyers as participants in those processes.

These insights came in the twentieth century from another Louisvillian: Louis D. Brandeis. Although Justice Brandeis is rightly lionized for his profoundly influential service on the Supreme Court, he had fashioned an historic career as a lawyer before President Woodrow Wilson appointed him. While maintaining an active practice, he lectured at Harvard, wrote such landmark pieces as *The Right to Privacy*[11] and *Other People's Money*,[12] became one of the Bar's first international figures, and stirred the idealism of our profession by serving as one of America's first pro bono lawyers (devoting roughly a day per week to clients and causes that could provide him no compensation).

Justice Brandeis' experiences as a lawyer helped shape his views about legal education. Although he saw a continued role for Langdell's approach, he envisioned a new educational model, anchored in four ideas that took the study of law beyond a Socratic classroom dialogue and connected it with the outside world.[13] First, Justice Brandeis drew upon his own pro bono experience to argue that lawyers should be imbued with a sense of public responsibility–not necessarily to become career public servants, but to become practitioners who would donate some time to worthy clients and causes without expectation of payment. The power of this idea is evidenced in the growing number of law schools, including the Brandeis School itself, that have mandatory public service programs. Students in these programs learn that giving something back to a community is as much a part of being a lawyer as drafting a contract or delivering an oral argument.

Second, Brandeis believed that the law was not quite what Langdell thought it was–an immutable set of principles to be discovered in the way a scientist discovers the natural order by observing phenomena in the field. Figuratively speaking, Langdell might hold up a crystal and say, "Look at this from different perspectives, experiment with it, discover its structure. This is the law." Brandeis, however, would say the law is not inert like a

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11. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1880).

12. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY (1914).

13. "The Brandeis Legacy," Catalogue of the Louis D. Brandeis School of Law, University of Louisville (1996-1998).

crystal, but is dynamic like a biological entity responding to its environment. In order to understand the law–to find the wellsprings of both its wisdom and its foolishness—the lawyer needs to be, in effect, a Renaissance person, journeying across disciplines into economics, sociology, and other fields. Brandeis put this idea to practice in his own career as a lawyer, pioneering the citation of non-legal authorities to support legal arguments in what we now call his famous "Brandeis Briefs." Today, at law schools engaged in interdisciplinary scholarship and teaching, students learn that broad-based learning increases a lawyer's capacity to understand a client's problems. It also enhances the lawyer's ability to serve the client by rendering an informed opinion about the future direction of the law.

Third, Brandeis thought law schools should be small in scale. This idea was an outgrowth of his general philosophy on the scale of any human enterprise. He thought that innovation and efficiency usually were stifled by large, centralized organizations.[14] He valued small-scale collegiality and collaboration. I think an institution like the JAG School would have impressed him, where the faculty-student ratio is relatively high, where students learn much from each other as well as from a highly accessible faculty, and where members of the faculty share the students' paths of professional development.

Fourth and finally, Brandeis urged law schools and universities to advance ideas for improvement in public policy. In this respect, Brandeis presaged the role of the lawyer as a public citizen, and he saw an opportunity for law schools to contribute to the dynamism of our federal system. Expressing a view closely akin to his fondness for creativity in small-scale organizations, Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[15] Brandeis thought that law schools and universities throughout the country could be the engines for such new ideas, that the states could experiment with them, and that the nation could emulate the most successful experiments. In advocating this connection between education and public policy formation, Brandeis placed a special responsibility upon law schools, not merely to teach the law, but to help make it better.

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14. *See* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS (1934).
15. New State Ice Co. v. Leibman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Taken together, these elements of the Brandeis model of legal education–public service, interdisciplinary study, collegial learning, and policy formation–have provided a framework for developing law students into public-spirited lawyers, aware of their responsibilities to our profession and of our profession's responsibility to society. The model implicitly moves law schools toward teaching values, without imposing any narrow orthodoxy of values. It gives the modern legal academy a service mission and a stake in professionalism.

III. Reclaiming Our Legacy: High Aspirations and the Lowest Common Denominator

The profession envisioned by Brandeis, and exemplified by his work, has no place for those who today are the strip miners of our heritage. These are the lawyers who stretch rules and ignore ethics, promote themselves while pretending to serve clients, try cases in the media while claiming to be courtroom lawyers, and engage in tasteless or predatory marketing of legal services–asserting, sometimes correctly, a First Amendment right to do so, but forgetting that professionalism means choosing a course of conduct higher than the minimum allowances of the law.

The strip miners also forget (or do not care) that all members of our profession, civilian and military lawyers alike, are bound together by a collective reputation. In a profession, unlike a business, one's reputation depends significantly on everyone else's conduct. In contrast, reputations in the world of commerce usually are specific to the individual or entity; indeed, damage to one firm's reputation actually may benefit another. Thus, if Chevrolet builds a defective car, Ford or Toyota products may become more popular; or if America On-Line goes off line, Prodigy or CompuServe may increase their market share. But in our profession, if any lawyer displays incompetence or engages in misconduct, then all lawyers are tainted. When such an incident is publicized, the media is likely to feature the story as one of wrongdoing by "a lawyer"–the individual's name will be secondary.

Perhaps we should take comfort that the media and the public still consider lawyer wrongdoing uncommon enough to be newsworthy. The fact remains, however, that when we look at ourselves in the media mirror, the reflection is not of our noble heritage, nor of our highest aspirations, but of the lowest common denominator in our profession. Today, as I speak, the least caring and least competent members of our profession are

making your reputation and mine. We may extol the best among us, but we are held hostage by the worst. This unfortunate dichotomy is one reason why society dislikes lawyers generally, even though clients usually respect their own lawyer.

Our task as a profession–including the legal academy–is to raise the lowest common denominator and to reinforce the highest aspirations that bind us together. This does not mean that we should engage in a contrived public relations campaign. Our task is to earn respect, not merely to claim it. Moreover, popularity for its own sake is a false goal. As Emile Fourget, the French essayist, once wrote: "The law should be loved a little because it is felt to be just, feared a little because it is severe, hated a little because it is always to a certain degree out of sympathy with the prevalent temper of the day, yet respected because it is felt to be a necessity."[16]

The true goal is to build, or to re-build, a culture of professionalism that legitimates this "necessity" of law. Within that culture, the lawyer pursues "a learned art in the spirit of public service."[17] Building upon this definition, Jerome Shestack, president of the American Bar Association, has enumerated the elements of professionalism:

> First is fidelity to ethics and integrity as a meaningful commitment . . . .
>
> Second is service with competence and dedication–but with independence . . . .
>
> Third is meaningful legal education–not as a chore to meet some point system but as a means for growth and replenishment . . . .
>
> Fourth is civility and respect for authority. Let us resist the Rambo-type tactics in which civility is mocked and ruckus is routine. Civility is more than surface politeness; it is an approach that seeks to diminish rancor, to reconcile, to be open to non-litigious resolution. It modifies the antagonisms and aggressiveness of an adversarial society. . . .

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16. ELBERT HUBBARD, ELBERT HUBBARD'S SCRAPBOOK 38 (1923).

17. Roscoe Pound, *quoted in* Jerome Shestack, *President's Message: Defining Our Calling*, 83 A.B.A. J. 8 (Sept. 1997).

> Fifth is a commitment to improve the justice system and advance the rule of law. The justice system is our trust and our ministry. And we bear the brunt of public dissatisfaction with the justice system's flaws and deficiencies . . . . To make that limping legal structure stride upright is the obligation of every lawyer.
>
> . . . .
>
> The final element of legal professionalism is pro bono service. . . . Much has been given to our profession; it seems right to give something back–indeed, it is an ethical obligation . . . .[18]

Unfortunately, most members of the general public doubt that we really stand for these things. They hear about lawyers whose words and actions impugn professionalism. Within the legal community, we even hear some lawyers attack professionalism as political correctness or a threat to freedom. Needless to say, the First Amendment, which we all cherish, protects the expressive rights of those who disavow professional duty while trading on professional privilege. But the rest of us have First Amendment rights, too. We can and should speak up when someone in our profession's lowest common denominator brings core values into disrepute.

One voluntary association doing so is the Federal Bar Association (FBA), which recently adopted standards of civility. Lawyers who do not behave civilly are no longer welcome in that organization. In words that military lawyers can appreciate, FBA president Robert Mueller recently made this observation:

> Make no mistake. If the profession truly is to shed its image of excess in the adversary process, it is nothing less than an entire subculture that will have to get that message. Too many among us not only do not conduct themselves civilly but do not want to do so. They wear their discourtesies and their offensiveness in tone and tactics the way warriors wear their campaign ribbons. While the latter reflect honor and courage, the former do not.[19]

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18. Shestack, *supra* note 17.

19. Robert L. Mueller, *President's Message: Standards of Civility–A Lesson in Good Manners*, THE FED. LAW. 2-3 (Jan. 1998).

We in legal education should support the profession's effort to reclaim its heritage. The American Bar Association's Task Force on Law Schools and the Profession: Narrowing the Gap (sometimes called the "MacCrate Commission") has made a number of recommendations on which law schools are now working. The Commission has urged law school deans, professors, administrators, and staff "to convey to students . . . the need to promote justice, fairness, and morality . . . ."[20] The Commission envisions professional development occurring throughout an educational continuum that begins in law school (or perhaps even earlier) and extends over an entire career. Professionalism is viewed as a life's work.

At the front end of this educational continuum, law schools are ill situated to produce professionalism for life; but we can provide a "values inoculation" against the diseases of rule-skirting behavior and purely market-driven practice. To be sure, there is nothing wrong with a lawyer providing services in a market that rewards high standards of performance; but the lawyer also must exhibit high standards of conduct, even though the market may not require or reward them. If we give students such a "values inoculation," the profession–throughout its broad part of the educational continuum–must provide periodic "booster shots" by vigorously disciplining those who engage in misconduct and by speaking out, as individuals or through voluntary associations, whenever our lowest common denominator demeans us.

Because we are a profession, not a mercantile occupation, we should not shrink from espousing values, so long as we focus on foundational elements of professionalism–as Shestack has done–and do not become self-righteous or attempt to prescribe wholly private conduct. We also need to back up what we say with what we do. We are being watched. Our actions convey our values to students, to each other, and to members of the general public–who logically believe our profession is entitled to no greater respect than we ourselves show it.

Although professional responsibility is taught in every accredited law school, the real lessons in professionalism are taught every day in courtrooms, conference rooms, lawyers' offices, even on the telephone. Whether we are professors, judges or practitioners, all of us are teachers; we simply provide instruction in different venues. Together, we should

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20. American Bar Association, *Task Force on Legal Education and the Profession: Narrowing the Gap*, LEGAL EDUC. & PROF. DEV.: AN EDUC. CONTINUUM 333 (1992).

strive toward education in the sense described a century ago by John Ruskin:

> Education does not mean merely teaching people what they do not know. It means teaching them to behave as they do not behave. It is a painful, continual and difficult work to be done by kindness, by watching, by warning, by precept, by praise, but above all by example.[21]

Accepting responsibility for setting an example means that we cannot disregard the values expressed in the jobs we are trained, and that we train others, to do. Unfortunately, as a profession, we may have diminished our own perception of values when we made a transition from the aspirational Canons of Ethics to the partly aspirational and partly prescriptive Code of Professional Responsibility, and, more recently, to the entirely prescriptive Rules of Professional Conduct. To young lawyers who lack their own moral compass, reducing ethics to a set of presecriptive rules may send a message that professional responsibility consists simply of knowing what you can, and cannot, get away with.

Here is an example. Last year, the *Arizona Republic*, a newspaper in Phoenix, carried a criminal defense lawyer's advertisement enumerating mistakes that cause some drug dealers to get caught. An ensuing controversy caused the newspaper's business office to terminate the advertisement. A newspaper columnist, however, contacted the lawyer and later reported the following colloquy:

> "Your ad tells bad guys how to avoid getting caught," I said.
>
> "I'm exercising freedom of speech. I'm not telling anyone how not to get caught. I'm telling how some people get caught."
>
> "Same thing, isn't it?"
>
> "No, it's different. I can't advise people how not to get caught. Lawyers can't be doing that."
>
> "Think your ad might bother people?"
>
> "I don't care. They don't have to do business with me."[22]

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21. HUBBARD, *supra* note 16, at 17.

In that exchange, we see a lawyer invoking the First Amendment and disavowing any professional obligation to operate above the minimum level of legal protection. We also see a failure to distinguish between a profession and a business, with an accompanying disregard for the collective reputation of all lawyers. Indeed the newspaper columnist concluded his story with the observation, "Attorneys can advertise all they want. If they sound more like used-car salesmen than legal professionals, fine by me . . . . [They] have enough problems with public approval these days. They don't need to take out ads to create more."[23] This is the lowest common denominator at work.

We cannot raise the bottom of the profession by rules alone. Legal educators, lawyers, and judges, joined in common cause, must teach and display the virtues that characterized the ideal lawyer a century ago. Anthony Kronman, dean of Yale Law School, described this ideal lawyer in his book, *The Lost Lawyer*, as "a devoted citizen[, one who] cares about the public good and is prepared to sacrifice his own well-being for it, unlike those who use the law merely to advance their private ends."[24] Elsewhere, Dean Kronman has warned:

> If the legal profession is to retain its moral stature (the only thing that can justify the influence lawyers possess), everyone in it–lawyers, judges, and legal educators–must now act to recapture the ideals of citizenship and public service that have been the pride of the profession in the past.[25]

If we heed this warning–if we teach values in all venues where professional behavior is shaped–we can reclaim a heritage that was noble once, and could become so again.

IV. The Other Side of Professionalism: Answering Unfair Attacks

If we have a high calling to recapture the historic ideals of our profession, we also have a daunting task in combating the cynicism of the late twentieth century. The corrosive effects of this cynicism are evident in

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22. Steve Wilson, *Lawyer's Ad May Hit a New Low*, ARIZ. REPUBLIC, *reprinted in* LOUISVILLE COURIER-J., Oct. 24, 1997, at B-3.

23. *Id.*

24. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 14 (1993).

25. Anthony T. Kronman, *Letter to the Editor*, WALL ST. J. (Oct. 1, 1995).

today's lawyer-bashing, a national sport that has dispirited many of our most idealistic lawyers and, I fear, is now deterring many idealistic young people from considering careers in law. The sheer meanness of our times is apparent in a modern cultural icon–the lawyer joke.

I do not wish to make too much of a seemingly narrow subject, but I must disclose that I am no longer as tolerant of lawyer jokes as I once was. Like many lawyers, I used to laugh at such jokes, even re-telling them, as a way of getting along, showing a lack of pretense or undue sensitivity, and mollifying people who harbored bad feelings (sometimes justifiably) toward our profession. But now I have come to view the casual cruelty of lawyer jokes as a means by which negative stereotypes are perpetuated and positive aspirations are discredited.

Today, if I hear the beginning of a familiar lawyer joke, I may interject something like, "Sorry, I've heard this one, so I already know the punchline. It's a joke that hurts the best people in my profession and makes no difference to the worst." The response, after an awkward moment, usually is a disclaimer against wanting to hurt anybody–sometimes followed by an apology or by a reminder that "it's just a joke." Of course, not every situation calls for being a killjoy, and you may not feel comfortable playing that role. But I urge you to ponder what we convey about our high calling whenever we nod and laugh appreciatively at a story that mocks the values of our profession or denigrates the humanity of lawyers as a group.[26]

Misinformation also buffets our profession, much of it reflecting what I call the "little truth/big truth" dichotomy. Permit me to go outside the legal profession, for a moment, to illustrate this dichotomy with a story. A rural county sheriff was besieged with negative stories in the local newspaper; anything that went wrong in his office, any allegation of wrongdo-

26. In my presentation of the Young Lecture, I distinguished between stories that attack lawyers' values and those that merely poke fun at individual foibles. As an example of the latter, I recalled a purportedly true (although probably apocryphal) account of a deposition in which a lawyer asked a medical examiner whether the patient was dead when the autopsy was performed. When the doctor said "yes," the lawyer asked how he could be sure. "Because," the doctor replied, "the patient's brain was in a jar on my desk." When the lawyer, persisting, asked if it was possible that the patient was alive nonetheless, the exasperated doctor reportedly said, "Well, yes, I suppose he could have been practicing law somewhere." I characterized this story as funny because it was so extraordinarily silly, and suggested that any objection to it would be sanctimonious. After the lecture, however, an earnest young judge advocate officer told me he felt the story was hard to distinguish from many offensive lawyer jokes he had heard. His observation shows how thin the line is between humor that entertains and humor that denigrates.

ing, was reported on the front page. Meanwhile, good works performed by the sheriff's employees went largely unreported. When the sheriff complained about the coverage, the newspaper editor replied simply, "Have we written anything that is not true?" Some time later, the editor decided to visit a South American country that required, as a condition for issuing a visa, a letter of good character from a law-enforcement official. The sheriff duly obliged, writing that the editor "is a citizen of this community and, so far as our records show, has never been convicted of a felony or crime of moral turpitude. However, our files are very incomplete." The sheriff sent a copy to the editor, with a hand-written note at the bottom: "All of this is true, too."

As the story suggests, a little truth is an assertion that seems plausible when viewed in a narrow context, but which is revealed to be inaccurate or misleading when all relevant information is considered. A big truth withstands the broader inquiry. Many lawyers, in the role of advocates, are tempted to use little truths; but they are (or should be) restrained by their duty of candor as officers of the courts and legal system, and by their obligation of leadership as public citizens. Thus, it was disheartening several years ago when a national political figure, a lawyer, asked, "Does America really need seventy percent of the world's lawyers?" The question fueled a public outcry about "too many lawyers." The little truth was that if all lawyers in the world are measured by American legal educational standards, then we do indeed have approximately seventy percent of the world's "lawyers." But the big truth was that if legal service providers are counted according to the legal education standards of their own countries, then–according to a study by a business law professor at Washington State University–the United States actually ranks about thirty-fifth among the nations of the world in "lawyers" per capita.[27]

Another commonly expressed little truth is that the legal profession is a burden to the economy because lawyers are all litigators or "deal breakers." It is true, of course, that litigation resolves many disputes in our society, and that some contemplated business transactions founder upon problems that a lawyer has raised. But the big truth is that, to an increasing extent, litigation these days follows concerted efforts to resolve disputes by negotiation, mediation, or other alternative means. Moreover, the lawyer who "breaks a deal" by saying "no" or by asking hard questions is serving society, and probably is protecting the parties' long-term interests as well.

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27. Ray August, *The Mythical Kingdom of Lawyers*, 78 A.B.A. J. 72 (Sept. 1992).

In addition, the little truth about "deal breakers" ignores a big truth about the broad and constructive role that modern lawyers play in legitimate business transactions. I was reminded of this growing role two years ago when I was part of a University delegation visiting Pacific Rim countries. One of our delegates asked a businessman in South Korea what kind of higher education was most needed to promote economic development, and his answer was "law." My colleagues were stunned; they never had thought of "litigators" as the enablers and organizers of transactions, or as the community leaders who could marshal resources necessary for investing in economic development. Limited experience and little truths had cramped how they perceived lawyering.

Some little truths, of course, are hardly truths at all. I acknowledged a moment ago that we may rely too much on litigation as a way to resolve disputes in this country. But popular rhetoric about a "litigation explosion" has greatly exaggerated the problem in the public mind. For example, if asked how many tort jury trials are held in the nation's state courts every year, people are likely to imagine such trials occurring in thousands of courtrooms across the country every week–hundreds of thousands of trials in a year. But the answer is fewer than 25,000 per year in all the state courts.[28] Or, if asked how often plaintiffs receive jury awards in tort cases, including medical malpractice claims, people are likely to surmise that plaintiffs usually get *something*. But the truth is that just under half receive anything, and the fraction is less than one-third in medical malpractice cases.[29] If asked to estimate the median damage award in those tort cases where juries actually do find for plaintiffs, people are likely to envision lottery-level figures because those are the outcomes reported in the media. The truth, though, is that the median award is about $51,000.[30] Providing the public this kind of factual information and debunking harmful myths–whether in a conversation at a coffee shop or in a speech to a local service club–is part of a lawyer's function as a public citizen. It is part of our professionalism.

Finally, I invite you, as officers of the courts and legal system, to consider the harm done by public misperceptions about the role of the judiciary in a democratic society. Lay-people do not grasp intuitively the concept that one of our three branches of government should implement

28. Brian Ostrom et. al, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233 (Mar.-Apr. 1996).

29. *Id.*

30. *Id.*

the rule of law, even when unpopular, rather than following the majority impulse. Many citizens grow angry when judges do not follow the "will of the people." Yet that, precisely, is what our Constitution demands.

The signing of the Constitution in Philadelphia represented a turning point in history. Government then ceased to be merely the product of raw political will and became instead a force controlled by a written charter. If the idea of a charter was unique, the document itself was truly remarkable. Our Constitution dispersed authority among three branches of government and provided that the third branch, the judiciary, would be profoundly different from the other two. Unlike Congress, which would consist of representatives elected by the people and of senators elected (in those days) by state legislatures, and unlike the President, who would be chosen by the Electoral College reflecting the vote of the people, the judiciary would be insulated from elective politics. Federal judges, appointed by the President with the advice and consent of the Senate, would serve for life or good behavior. The judiciary would be independent–a branch of government beholden to no special interest and charged simply, but inspiringly, to uphold the laws and the Constitution of the United States.

This idea of an independent judiciary, responsible for upholding the rule of law and for protecting constitutional rights, even when disfavored by the politics of the moment, is one of America's most fundamental contributions to the cause of liberty. It is still an idea in need of nurturing. Wherever we see power abused elsewhere in the world–whether in the suppression of dissident views in China, or in the jailing of journalists in Turkey–we see judicial systems succumbing to political control. Indeed, reflecting on our own nation's history, one might wonder when, if ever, a politicized Supreme Court would have held that the Constitution forbids racial segregation, that every person's vote is entitled to equal weight, or that every person charged with a serious crime has a right to counsel.

This does not mean that judicial independence should translate into lack of accountability. Federal judges can be impeached, or they can be disciplined within the judicial branch. State systems also have mechanisms to remove judges for cause, such as incapacity or conduct prejudicial to the administration of justice that brings judicial office into disrepute. These are important but narrowly tailored forms of accountability. Many states have gone beyond accountability, however, and have created elective systems in which judges must compete for the voters' favor, in much the same manner as candidates seeking office in the other two branches of government. Sometimes the judicial candidates run as Republicans or

Democrats, sometimes there are no party labels; but the bottom line for all of them is that they must engage in elective politics. Even if they receive an initial appointment to judicial office, they must think immediately about waging a campaign at the upcoming election, strategically situating themselves in the voters' minds for approval at the ballot box, and finding a way to raise money for a contested campaign. Unfortunately, such judicial electioneering undermines judicial independence, both in fact and in public perception, thereby eroding the capacity of our third branch of government to protect the rule of law and to uphold constitutional rights when the political tide is flowing against them.

My object here is not to lobby you about appointive or elective systems, or about the impact of campaign finance upon judicial independence and integrity–although I hope you will think about those issues. Rather, it is to remind you that we as lawyers, possessing a special understanding of the judicial function, have a duty to defend judges–especially those facing elections–who make courageous and legally principled, but unpopular, decisions. We can educate the public about that great American innovation–the independent judiciary–and in so doing, we can reaffirm the values of the legal profession itself. They are woven from the same fabric.

V. Conclusion

Washington Irving told us that "great minds have purposes, others have wishes."[31] The essence of professionalism is to dedicate oneself to a purpose higher than any personal wishes. What, then, is your purpose? Is it to be a contractual "attorney?" Is it, instead, to be a lawyer who pursues justice while exercising independent judgment, honoring duties to the courts and legal system, and earning respect as a public citizen? Is it to become a teacher in every professional venue, demonstrating by word and example your dedication to ethics above minimal rules and marketplace rewards? Is it to raise our profession's lowest common denominator and to defend the profession against unfair attack? These questions demand answers that will give genuine meaning to your career now and, perhaps, to a second career later. The answers must come from you, from your values—inspired, we hope, by a lifetime of legal education, but sustained ultimately by your character and your sense of justice.

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31. DAVID KIN, DICTIONARY OF AMERICAN MAXIMS 219 (1955).

George Eliot, the nineteenth century novelist and essayist, once asked, "Who shall put his finger on the work of justice and say it is there?" Then, answering her own question, she observed, "Justice is like the kingdom of God. It is not without us as a fact; it is within us as a great yearning."[32] In that spirit, I beckon you to join the lawyers who love this country, founded upon legal principle; who are called to a profession, troubled yet restorable; who claim no perfection, but are the keepers of the flame; and in whom justice, now and forever, resides as a great yearning.

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32. HUBBARD, *supra* note 16, at 14.

THE FOURTH ANNUAL HUGH J. CLAUSEN LEADERSHIP LECTURE: SOLDIERING TODAY AND TOMORROW[1]

GENERAL FREDERICK M. FRANKS, JR.[2]

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1. This is an edited transcript of a lecture delivered by General Frederick M. Franks, Jr. to members of the staff and faculty, their distinguished guests, and officers attending the 46th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on 23 March 1998. 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 Officer 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.

2. United States Army, Retired. During his active Army service, General Franks commanded Armored Cavalry units at the platoon, troop, squadron, and regimental levels in the 11th and 3rd Armored Cavalry Regiments in periods from 1960 to 1984. General Franks served in combat in Vietnam as S-3, 2nd Squadron, 11th Armored Cavalry Regiment from August 1969 until being medically evacuated to Valley Forge General Hospital in May 1970 after being wounded in action in Cambodia. He also commanded the Seventh Army Training Command in Germany from 1984-1985, 1st Armored Division from 1988-1989, and VII Corps in Germany from 1989-1991. As VII Corps Commanding General, General Franks commanded the United States and British forces of VII Corps during Operations Desert Shield and Desert Storm in the main ground attack that as part of the Coalition liberated Kuwait in February 1991. He concluded his active service as Commanding General, United States Army Training and Doctrine Command from 1991-1994. He was primarily responsible for the Army's total school system and for formulating concepts and requirements for future land warfare. Other key assignments were as the Deputy Commandant U.S. Army Command and General Staff College at Ft. Leavenworth, Kansas from 1985-1987, and as the first J-7, director of Plans and Interoperability on the Joint Staff in Washington, D.C. from 1987-1988.

General Franks holds two Masters Degrees from Columbia University in New York City. He is a graduate of the National War College. Since retirement, he wrote a book with Tom Clancy, *Into the Storm*; serves as a senior Observer/Controller in the U.S. Army's Battle Command Training Program; serves on the Board of Directors, OshKosh Truck Corporation; and works as a consultant.

General Franks' military awards include the Defense Distinguished Service Medal, the Distinguished Service Medal, Silver Star, two Purple Hearts, and numerous other decorations. He is a graduate of the U.S. Army Airborne School, and Ranger training. He has received individual decorations from the governments of South Vietnam, France, Germany, and Spain.

I. Introduction

I want to talk about soldiering, today and tomorrow, in the context of command in three major areas, as is the spirit of these General Clausen lectures. The first area is in the form of a war story from Desert Storm that opens the way to the other two areas. The second is command. Specifically, your place in command and balancing choices between some enduring truths of land warfare with needed changes. Finally, I will give some thoughts on being a soldier.

II. A War Story from Desert Storm

First, the war story. My aide during Desert Storm, then Major Toby Martinez, kept an impeccable log of all our command activities. An entry on 14 March 1991 states, "Had a long session with Staff Judge Advocate (SJA) Colonel Huffman." The SJA was in fact then Colonel (COL) Walter B. Huffman, now Major General Huffman, The Judge Advocate General.

That was as important a meeting as I ever had as a commander. You see, that was about the time that XVIII Corps units had redeployed from Iraq back into Saudi as part of the "first in-first out" policy. We in VII Corps were ordered to remain in essentially what was occupied-Iraq until the United Nations (UN) passed the resolution that sealed the battlefield victory on Desert Storm. As you know, the UN passed Resolution 687 on 3 April 1991. At the time of the meeting, however, we did not know how long we would be there or when the resolution would be passed.

You might recall that the pressure was really on at that time to get our troops out of Southwest Asia and back home. In addition, there was an understandable feeling in the Theater Command, Central Command (CENTCOM), and from Washington that we were to do nothing to signal a long-term stay or a permanent occupation. There was command guidance to avoid doing anything, to include establishing refugee camps, that would suggest a permanent presence or cause onlookers to deduce from our actions that we were there for the long haul. The feeling was to get out of Iraq as rapidly as possible after the Iraqis agreed to abide by the UN sanctions and permit inspectors into their facilities.

There were problems, however. While the negotiations dragged on into the middle of March, we were faced with: a growing population of refugees who were fleeing the brutality of the Iraqi government; civilians

returning home challenging law and order (Safwan, for example, a small village, was deserted on 28 February 1991 and was about 12,000 population by mid-March 1991); acute food and water shortages; severe health problems among the population; closed schools; and unexploded munitions all around re-populated civilian areas. How we handled these problems would define who we were and what we stood for as Americans. In the absence of orders, we decided to do what was right and deal with the situation. Without announcing what we stood for, our actions spoke louder than anything we could have said.

What to do was simple in my judgment: Do what was right and do what the law requires. Normally those two are not in contradiction. I called COL Huffman forward to our tactical command post (TAC CP), and we talked about the problems and solutions for some time. He was a friend, legal counselor, combat veteran from Vietnam, and a soldier with a total appreciation of the problem. He was also an American with a sense of what was right. I asked COL Huffman to fast forward to the day we were to leave Iraq, whenever that might be, and tell me what we should have done between then and now to comply with the Laws of Land Warfare. Without any other official orders, COL Huffman's description of that end-state became our plan for the remaining month we were in Iraq. We owed all that to each other, to our soldiers who also knew what was right and had fierce pride in their conduct as American soldiers, and we owed it to our country to obey international law. We had no official authorization, although when I informed my Third Army commander, Lieutenant General John Yeosock, what we were going to do, he told me to use my judgment and to do what I thought was right.

That session with Walt Huffman gets very little attention in the history books but was crucial to our mission accomplishment. We went on to establish two refugee camps, provide medical treatment to over 30,000 Iraqi men, women, and children, distribute an enormous amount of water and food (to include baby food, not exactly a class of supply readily available to a tank corps), clean up unexploded munitions at no small risk to our soldiers, establish law and order in towns being reoccupied, open schools for Iraqi children to include providing text books and school lunches, and even collect evidence of Iraqi atrocities committed against their own people by interviewing refugees.

There continue to be many lessons for us. A quick review reveals that the strategic environment continues to resemble in many ways the one that we faced in southern Iraq and that others faced in Provide Comfort in

northern Iraq. Our 1993 *U.S. Army Field Manual (FM) 100-5* doctrine laid out this changed environment and ways to think through the use of forces in operations other than war (OOTW). Yet, there are additional demands on commanders and units today that did not exist even a few years ago. As we speak, our Army continues to do its duty in Bosnia at a sustained standard of excellence that our nation can be proud of in a tough OOTW environment. We have a brigade deployed to Kuwait ready to fight if that is necessary. Our Army has proven to be remarkably adaptive in executing the wide variety of operations from those days of the early 1990s until now. Success, however, is anything but automatically assured. You have to work at it.

In your future duties you will continue to encounter situations where there is no clear precedent to guide you, situations where you will call on your education and your considerable ability to think, situations where you have to use your own wits and your knowledge of the law to help your commanders sort their way through conditions or scenarios hard to predict much in advance. But you have something else. You know who you are and what you stand for. You are lawyers, but you are also American soldiers and stand for something. We as Americans are not alone in this of course, but we must use those values as a basis for our actions for which little or no precedent or orders exist. You must also bring that to bear with your commanders just as my friend COL Walt Huffman did in VII Corps seven years ago. You will make a difference. I know you will.

III. Command and Your Place in the Command

How our Army trains and educates commanders, and the climate of command that those commanders create will affect the success of missions in these new situations that are difficult to predict far in advance. This challenge of soldiering today and tomorrow. I believe in this world of challenging and largely unpredictable scenarios with its varying uses of force and forces, there are three parts to being a commander in the U.S. Army that remain relevant: character, competence (to include balancing choices between enduring truths of land warfare and where there must be changes), and leadership.

A. Character

Who we are and what we stand for really matters. Sun Tzu advised us of the secrets in battle, "Know the enemy and know yourself; in a hundred battles you will never be in peril." Values and principles, like integrity, honor, physical and moral courage, duty, loyalty, make a difference for soldiers and in the tenor or climate of the command. They make a difference in situations where little to no precedent exists but choices must be made. They make a difference on the battlefield when you order soldiers and units into tough situations where some of them will not return. Soldiers need to know that we will be there for them when they need us during the battle and later. To fulfill this trust as commanders, we must know ourselves and what we stand for and what our command stands for.

Who are we? What do we stand for? These are two questions leaders must ask themselves before they accept command of American soldiers. Do we have the courage then to be who we really are? The courage to ensure the command is a reflection of those beliefs in all things? Do our values, our principles, transcend the competition for advancement, for schooling, for command itself, transcend possible public or private criticism, or even a place in history? When we stumble, because no one is consistently perfect, or our command fails to live up to our own expectations, can we square-up and face-up to those situations, fix what needs fixing, learn, and be stronger for it? What are our own litmus tests for our own character and that of the command?

Character to me is one of the bedrocks of a successful military commander. It is a good idea to see how well we know ourselves by making an inventory, asking ourselves some basic questions. Write it out. Do a personal after action review (AAR). Match your deeds with the inventory. Do the two match personally and in the command? If not, why not? Can we do something about it if the two do not match? Of course, we can. Character is not some predisposition given to life's genetic lottery and we get stuck with it. By and large, we can shape our own character. We can choose and change to embrace and live values and principles and have those values also guide our commands to give our commands character. In the U. S. Army, commanders are given wide discretion in their command prerogatives to accomplish the mission. We are not powerless in all this at all. We have choices.

Let me briefly mention a few elements of character. Make your own list. Character includes integrity. We could spend a whole lecture on

integrity, having honor. I mean being honest with yourself and with others in word and deed. This is what I would call intellectual honesty and honesty of actions. The harder right versus the easier wrong. Commanders creating a climate of integrity, where candor and disagreement flowing from honestly held opinions is tolerated: where there is a healthy openness of communication and trust; where there is total and complete mutual respect; where the system of administrative actions and administration of military justice are carried out with impeccable integrity, openness, and equal application. Honesty has a clarity and steel endurance all its own. You must help ensure this happens.

Integrity is one of those principles continually put to the test. When integrity is challenged there must be an answer right then, not later. Integrity requires constant vigilance both personally and in the command. Integrity in command is the province of the commander. And there are litmus tests. Do we mean what we say? Does say equal do? Do we accept responsibility for our actions no matter the consequences, or in these days, the media pressure, or the instant historical reputation? Where are our loyalties? Do we return loyalty to our subordinates? Do we look mainly internal to our people and our own organization or external to check the winds of opinion? Do we share hardships with our troops? Do they see us and hear from us when the going really gets tough? Do we square up to the really tough calls? Do we shine the spotlight of inquiry into any area that is called for no matter the consequences?

In your duties as legal advisors to ensure the right tenor of command, this command climate that has character, you will be called on to recommend courses of action that sometimes your commander might not want to hear. But you must do it. I am confident that they will listen and do the right thing for the command. You play a key role for your commander in the integrity of the command. I know my SJAs did.

All this has to do with integrity—commanders either earn trust or they do not. Trust matters on the battlefield, and in other situations where choices must be made often at very junior echelons of command and by individual soldiers.

A few days before we attacked into Iraq, I was talking to a group of soldiers in the Third Armored Division, forcefully and at some length explaining that our scheme of maneuver would catch the Iraqis by surprise. Midway through an altogether too long explanation a soldier stopped me and said, “Don’t worry, General, we trust you.” In an instant that soldier

captured the essence of what we are trying to do as commanders: establish and maintain trust. I got a little weak in the knees and I vowed then to do everything I could, as Corps Commander, to fulfill that trust. If we as commanders gain and maintain that trust in our words and deeds, we will do our duties to our mission and our soldiers.

A sense of duty also is part of character, and it too builds trust. Duty is a tough value. Duty to our mission, to our soldiers, to our Army, and to our Nation takes the best we have. It leaves little room for much else, sometimes little room for families and always little room for self. Our first duty I believe is to ensure that our soldiers and units are prepared for their mission. I hold with Field Marshal Rommel who said, "The best form of welfare for the troops is first class training." When units are not getting that kind of training what does the commander do? The answer is an issue of character in command.

In addition, a sense of humility and focus on the people in the organization is part of the leader's character, as well as the organization. Each individual member of the organization is important. He who would be first in the organization must also be last. To lead is also to serve. The goal of the leader should be to make the members of the organization grow, to be famous if that presents itself, to be a teacher and coach, to feel that their most important legacy is the development of people. If leaders believe in their people and establish trust, mutual respect, and loyalty, there is no limit to what the organization can accomplish.

Character. Leaders of character and commands with character have always made a difference for our Army and our Nation in peace and war. They continue to do so today and must in the future. You must help see to that.

B. Competence

The second area for commanders is competence. I believe our soldiers have every right to expect that we as commanders will know what we are doing.

After going over the battleground where the Second Armored Cavalry Regiment's Battle of 73 Easting had taken place late the afternoon of 26 February 1991, I asked H.R. McMaster, who had courageously commanded Troop E in the fight, how long his troop battle has lasted. He said

the sharp fight lasted twenty-two minutes. Joe Sartiano, who had courageously commanded Troop G in the same battle, said his part of it had gone on for about two hours. What commanders do is spend their professional lifetime in study and practice so that during those twenty-two minutes, or two hours, or two days, or longer, we are ready to accomplish the mission at the least cost to our soldiers. At each echelon of command or in other positions, we have to work hard to know what we are doing. Know your stuff, someone once said. That about sums it up. It is not easy work, especially these days in the set of strategic conditions you find yourselves in where force, war, and forces are used in widely varying ways to accomplish strategic objectives. Look how long we wait until we entrust our major tactical organizations to commanders. Fifteen to seventeen years for battalions, twenty or more years for brigades, twenty-five plus years for divisions, and longer for corps. And for good reason–being a military professional is hard work and takes constant study and practice to get it right.

I need not lecture you endlessly on competence, except to remind you that the failure of commanders to be competent has for our soldiers the severest consequences. We have many areas of competence we call technical and tactical competence: reading maps, tank gunnery, maintenance, technology literacy, maneuver formations, fires, aviation, and so forth at each echelon of command. For you it is the law: military and international, treaties, local law and custom in places you never heard of before, administrative procedures, rules of engagement, legalities involved in the United States commanding units of other nations and other nations in command of U.S. troops. None of this should be ignored or given a back seat. It takes continuing study and practice to attempt to master. Professional competence is the continuing goal of a professional lifetime. "Continue to grow," one of my early mentors said so well. Much of competence, however, is an acquired and learned art over years of practice, with commanders who often make choices derived from intuitive sensings gained from those long years of practice and study.

Rather than talk anymore about competence from a technical and tactical standpoint, I want to insert some thoughts about the future of land warfare. I believe that part of today's and tomorrow's competence requires commanders to balance the choices between enduring truths of land warfare with needed change so that they are prepared to fight and win present and future battles. It is not an easy balancing act. It never was with any generation of our Army.

Commanders in our Army have a big challenge because anyone who is speaking about the future and the conduct of future wars must tread carefully. In times of transition, as we are in now, such choices are always present. Although our recent track record is good in making the right choices to stay prepared, nothing ensures it will always be so. As a matter of fact, some might think we have such a legacy in our Army of fighting the last battles of the last war or of unpreparedness that we might overcompensate and ignore past experience.

In the book, *America's First Battles*, there is ample evidence of past failures in first battles to support such opinions. I would hasten to add that book was published in 1986, before Panama, Desert Storm, and before Bosnia. Our recent record is excellent. But success in the future is anything but automatically assured. In a book published last year, *The Rules of the Game: Jutland and British Naval Command*, Andrew Gordon cautions, "In times of peace, empirical evidence fades and rationalist theory takes its place. The advent of new technology assists the discrediting of previous empirical doctrine. The purveyors of new technology will be the most evangelizing rationalists." What I believe we need is balance.

Sometimes we even "out-future" ourselves in our intensity to describe a future that will have little probability of happening, or worse, give our critics an excuse to ignore resources for near term modernization requirements and wait for the future to arrive that we have just so clearly described to occur. As a matter of record, most changes in land warfare are evolutionary, the result of experimentations, trial and error. Yet, the choices do remain difficult and the resources to fulfill choices more and more elusive to our Army–falling to less than half of what is required to modernize the force.

I of course have no more the key to these enduring truths than anyone does. But I can offer an opinion from a whole lifetime of empirical evidence and as one who in his last assignment, along with a lot of others in the Training and Doctrine Command (TRADOC), was responsible for moving the Army toward the future.

Last year, 1997, the strategic environment required that on any day there were in excess of 30,000 soldiers deployed from home station into training centers or into operational environments. Soldiers were in operational environments such as Kuwait and Bosnia. Soldiers were deployed to various places teaching, training, countering drugs, doing civic action, or humanitarian work to include de-mining operations. Since the end of

the Cold War our Army has been ordered again and again into operations in this strategic set of conditions. Over eighty percent of the time that forces are used, our Army has been there. It is a proud legacy of service since the end of the Cold War.

A few years ago, some of us thought, we should separate operations according to what their intended use was in conjunction with other elements of national and international power to gain strategic objectives. We made a distinction between the use of force and the use of forces. When force is the primary method, we call that *war.* The military is the only part of our government to do that and must be ready on short notice to execute to standards that our Nation has every right to expect from her military. Force remains a legitimate method of exercising national and international will. The other operations are when forces are used to coordinate with and normally subordinate to other elements of power to achieve the strategic aim. The strategic method used is neither force nor war, but might on occasion result in isolated combat actions. So we called these OOTW to clearly distinguish the two and to remind our commanders that the methods in execution, and rules of engagement, have considerable differences.

That being so, then we must ask what will determine success in each to determine if resources and time are being spent in the right places. I will let the OOTW go for another day and focus on war.

What will be the means to win tactical battles and engagements on the way to campaign success, and success in achieving strategic goals? For now, it means land forces must control or dominate a particular area always as part of a joint team, usually combined with other nations, and normally at considerable distance from garrison locations. To do so requires getting there, then killing the enemy, capturing the enemy, destroying the enemy's equipment or physical ability to continue, destroying the enemy's will to continue, or running the enemy off the area you want to control.

To do those things requires that our land forces achieve a measure of lethality over the other side, protect our own side or be more survivable, and do all this at a tempo of operations that the other side cannot match or handle. Thus, I would conclude that lethality, survivability, and tempo are some enduring truths of land warfare. I would also add that lethality cannot be done at a distance without putting soldiers at risk who must close with an enemy to gain that control and do so in terrain that puts that enemy at ranges measured in feet or meters rather than kilometers.

Another truth, therefore, is that combat on land is not easy. It is hard, physically and mentally, to keep going day and night in the face of casualties, weather, terrain, and lack of sleep. It is tough, often brutally lethal, and calls on every bit of moral and physical fiber we have to succeed. It demands teamwork at the highest levels at every command echelon from small units to all the arms and services in major tactical formations like divisions and corps in a finely tuned orchestration of battle, with those battles fought where and when you want to fight them, with forces massed or dispersed as you need them to be for the mission on the terrain and against a particular enemy, and with weapons systems operated skillfully and with the lethality necessary to accomplish the mission at least cost to our own soldiers. It may go fast, but it is *never* easy. There may be some battles fought at long range, but there are still those fought where you can see the enemy clearly and they can see you, both day and night. We can never forget those enduring realities of land warfare and what that means for the training and the development of commanders and leaders. That of course does not meant that land warfare is not changing, but amidst that discussion of change we should also consider the following: what wins tactical battles and engagements, the nature of land warfare in the future, the warrior ethos so required of land warriors in the tough, brutally lethal arena that is land combat, and training soldiers and developing leaders for that reality. Such clarity is vital to making the right choices.

Let me just briefly touch on areas that got us started a few years ago and might help you understand where our Army is now and is headed in the future. After Desert Storm we had lots of meetings and reports about lessons learned to help us point the way to the future. At TRADOC, we had the dual responsibility to continue training to be relevant to the considerable needs of our Nation (recall the eighty percent participation by the Army since the early 1990s) in the current and foreseeable future, while also beginning to experiment into where land warfare was changing. We wanted to begin to experiment with ideas, and not focus exclusively on technology.

The first area was to expand the battlespace where landforces operate. We thought we could dominate the expanded battelspace with fewer of our own forces. We saw this in Desert Storm and in our early experiments at Fort Benning and Fort Knox.

The second area was that instead of distinct close, deep, and rear battles as was the case in our Cold War doctrine, we could now attack the enemy throughout the depths of his formations and land area in what we

referred to as "depth and simultaneous attack." No place was safe from continuous land attack, air attack, or attack from the sea. The enemy had no sanctuary on the battlefield. No longer were we fighting deep to shape the close battle. We would be doing all this simultaneously. We saw that first in Panama in 1989, then in Desert Storm from 24-28 February 1991. Experiments with the Fourth Mechanized Division last year gave additional insights into this possibility as well as expanding the battlespace.

The third area was in battle command–to increase the ability of commanders and units in an attack to operate at a tempo that no enemy could handle. As mentioned earlier, land warfare is highly lethal and battles and engagements are brutal and short. It was here that we thought we needed to focus on what commanders do, on battle command. How do commanders think? How much analysis and how much synthesis form a minds-eye picture of what is going on? How do they decide? How do they and their staffs and subordinate commanders interact in both planning and execution? Where do they decide as they move about the battlefield? How are orders communicated and understood? What is the difference in tactical problem solving in planning and in fighting? How to achieve faster and more focused horizontal integration of arms and services at each echelon of command to include other members of our joint team?

We wanted to focus on the heart of what makes that integration happen, that is, battle command. By experimenting with varying sizes of staffs, sizes of tactical formations, mixing and matching arms and services together rapidly, physically massing when necessary to close with and destroy the enemy, then dispersing again quickly, we might discover where we could alter doctrine, change organizations, adjust training, and even experiment with some new and emerging technology.

To do these experiments we formed five battle labs in TRADOC in 1992, each headed by a major general and a small dedicated team, who began experiments that have a direct line to the advanced war-fighting experiments concluded at the National Training Center a year ago and at Fort Hood last Fall.

The payoff during this six years of experiments was to make us wiser in making choices between retaining the enduring truths of land warfare while adopting changes that allow us to be more lethal, survivable, and operate at a greater tempo than our enemies now and in the future. That means seeing ourselves better, seeing the enemy better, seeing the terrain better, and having the ability to integrate arms and services–in the right

place, at the right time, in the right combination. It also means remembering what and who wins, our soldiers, and how to get them and their commanders ready to win. Those experiments continue. My generation thought what we needed to do was set up this process of experimentation so that the generation that would execute the answers, you, could discover those answers.

The choices are not easy. You can help. But the key question I would urge you to ask continually is what are the enduring truths of land warfare and are we paying the right attention to those? Then, the other question is where is land warfare changing and are we making the right changes in equipment, organizations, doctrine, and training, so that our future soldiers will have the same edge on the battlefield in lethality, survivability, and tempo as we had during Desert Storm and since? It is a tough balance to achieve.

C. Leadership

The third area of command is leadership. It quite simply is providing purpose, direction, and motivation to our organization. It is building effective teams. Sometimes in battle leadership is necessary to get units to go in directions and over terrain that their natural inclinations would not allow them to go. Sometimes in OOTW leadership means entrusting decisions to the individual soldier, and then supporting them in following those decisions.

I would advocate what has been called an inclusive leadership style. One that says almost everyone in the organization wants it to be the best. No one these days normally joins an organization and deliberately seeks to make it worse because they are there. No one wants to be part of a losing team. In today's military, individuals are both well informed, talented, and want to be part of the team. It seems to me the tank gunner, legal assistant, truck driver, medic, or infantry squad leader are all as interested in the success of the organization as the commander. They know. In this information age they are informed. They notice. They pay attention to not only what they are doing but what is going on around them. They communicate with fellow soldiers about the mission, training, and the organization. They have opinions and ideas. We must use that energy and talent. The key is making all soldiers, to include the commander, equally motivated for success and willing to share in that success. I always felt that there

were many men and women in the organization who wanted us to succeed. All I had to do was let them help.

As with many others, I learned throughout a lifetime of Army service about the young men and women of America, about the untapped potential that is there if only you give them a chance. I learned of their potential, their selflessness, toughness, sense of duty, and desire to put their team before themselves. In a chamber of commerce speech in Atlanta a few years ago when I was Commanding General of U.S. Army Training and Doctrine Command, I described the talented men and women who I saw personally in our training base. I explained their enormous potential if we gave them a chance, essentially "To be all they could be." After the speech one of the members asked me how I could reconcile the many reports of troubles with our young people with the glowing terms I had used to describe them. After all, they were the very same men and women. I said simply that it showed me the untapped potential of these young people. There is enormous talent there. All we have to do is find it, give it a chance to develop, and give it a chance to work for us. Focus on our own team. Develop their talents. Free their talents to work for a common goal. Put the spotlight squarely on the led, not the leader. The mission is important but so is our team. Have an inclusive style of leadership, not an exclusive one.

That also means building teams where all team members are vital to success. You form teams here with your classes, seminars, and groups, both informal and formal. Where each member of the team feels and knows their contribution is vital to the overall success. Where there is intense loyalty to team members. The epitome of such loyalty was Specialist Ardon "Brad" Cooper who on 21 February 1991 while in a combat action with the First Cavalry Division died as a result of shielding his fellow soldiers from Iraqi mortar and artillery fire. Brad Cooper was awarded the Silver Star posthumously for his actions. Teamwork where Major General Butch Funk, commanding the Third Armored Division, sent over 25,000 gallons of needed fuel to his flank unit, the First Armored Division, without any orders. Where Major General Tom Rhame said to me, "Hey, boss, don't leave us behind" after the Big Red One's successful breach. The Big Red One gave us the third division of our VII Corps fist for our attack on the Iraqi Republican Guard. Teamwork. It counts and it is combat power.

Commanders are responsible for providing direction. Usually we call that "intent"–a vision of where we want the organization to go. It need not

be long and should not be complicated. I believe the best vision or intent statements are short, easily understood, and embraced by the whole organization. It needs to be taught by the leader, and is usually better if the organization had a role in devising it. One major factor at work with us in VII Corps in Desert Storm was that we shared a common vision of the battles and the campaign, our collective vision or commander's intent. Such a short statement explains to the entire organization the vision for the operation and allows for and even demands initiative in parts of the organization to achieve that intent. It allows members of the organization to operate freely within the intent to accomplish their part of the campaign. It liberates talent by giving subordinates operating room. It serves as a unifying idea, rather than a restrictive measure. Intent allows for movement of the organization forward toward the strategic objective while also paying attention to the day-to-day operation. Formulation of the intent or vision, modifying or adjusting it as conditions change, and teaching it to the organization is a leader's business.

There are some litmus tests where leadership shows its true identity.

How do the leaders and organizations work in crises? Can they rise to the occasion and go about their duties without a sense of panic or strained communication between leader and led? Do they pull together? Is there teamwork without asking? Can the leader see what to do immediately but also the wider or strategic issues so the crises are resolved in a way that allows the organization to move toward its goals and keep functioning?

How do organizations and units learn? This is especially important when those organizations will be placed in situations where there is little to no precedent and they have to get it right. What do leaders do when things do go wrong? An early mentor of mine, General Bruce C. Clarke used to say, "When things go wrong look for reasons why starting in concentric circles around your own two feet." Do we learn from setbacks? Certainly we would like to learn from others' failures and not our own but that is not always possible. The AAR is perhaps in my own judgment as important a process as ever instituted by the U.S. Army. It allows us to learn, to be bold without arrogance, to listen to the organization, to get the whole organization to participate. Many failures come from arrogance or failure to listen. Lack of communication between leaders and their organization is often fatal. Good communication with an organization produces success. Look at the way information flows in high performing units and you will see what I mean.

So, there you have it. Challenges for your generation in service to our Nation. Soldiering, today and tomorrow. Challenges while reminding yourselves of the major elements of command: character, competence to include balancing those enduring truths with needed changes when making choices, and leadership.

IV. Being A Soldier

Let me end with some brief thoughts about being a soldier. Someone asked me a few years ago why I wanted to be a soldier. I thought a few seconds before answering. Then I said:

> If you like what our country stands for and want to serve those ideals you ought to be a soldier. If you want to be around a lot of other people who feel the same way about that as you do, you ought to be a soldier.
>
> If the sound of the National Anthem, and the sight of our flag stirs something inside you then you ought to be a soldier.
>
> If you like a challenge, are not afraid of hard work, and think you are tough enough to meet the standards on the battlefield you ought to be a soldier.
>
> If you and your family are strong enough to endure the many separations often on a moment's notice and can live that kind of life, then you ought to be a soldier.
>
> If the thought that at the end of your life you can say I served my country and that appeals to you then you ought to be a soldier.

You could even summarize all this in what I used to call the "T" words: trust, training, toughness, troops, and teamwork. Trust for character. Training and toughness for competence and enduring truths of land warfare. Troops and teamwork for leadership. It really matters. A mother of a cavalry trooper said it best after Desert Storm, "It was training and teamwork that kept my son alive." The mother of a soldier killed in action, said in a recent letter in response to our scholarship program in honor of those soldiers killed-in-action in VII Corps during Desert Storm, "Honoring the memory of our departed loved ones lets us know they will not be forgotten." All this really matters, before, during, and after the battle.

It was the blessing of a lifetime for me to have had the honor and privilege to serve in peace and two wars with such magnificent Americans as our soldiers.

Thank you for the opportunity to share these thoughts with you this morning. Thank you for what you are doing in service to our Nation. You will continue to make a difference. I know you will.

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND DEPARTMENT OF DEFENSE EDUCATIONAL PROGRAMS : DDESS CASE NO. 97-001 (MARCH 24, 1998)

WILLIAM S. FIELDS[1] AND CAROL A. MARCHANT[2]

I. Introduction

The passage in 1975 of the Education for All Handicapped Children Act[3] (EAHCA) marked the beginning of special education as a rapidly growing and evolving area of the law. The EAHCA established a comprehensive system to provide a free appropriate public education to students with disabilities through individualized programs in the least restrictive educational environment. The EAHCA also mandated procedural rights provisions for parents of children with disabilities. These rights include: the right to written notice of the initiation or change or the refusal to initiate or change the identification, evaluation, or placement of their child; the right to examine their child's records; and the opportunity to ask for an impartial due process hearing to challenge the appropriateness of the educational program offered by the public school. In 1990, Congress amended the language of the EAHCA and renamed it the Individuals with Disabilities Education Act (IDEA).[4]

The provisions of Parts B and C of the IDEA are applicable to all schools the Department of Defense (DOD) operates[5]–including the requirement that children with disabilities be provided with a "free appropriate public education" (FAPE).[6] When due process hearings are requested under the IDEA, the DOD's regulations that implement the

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3. Pub. L. 94-142, 89 Stat. 773 (1975).

4. Pub. L. 101-476, sec. 901, 104 Stat. 1103, 1142 (1990); 20 U.S.C. §§ 1400-1487 (1994).

5. The DDESS serve approximately 35,000 students located in seven states, Puerto Rico, Guantanamo Bay, and Panama. The DODDS serve approximately 48,000 students in Europe and 24,000 students in Asia. The DOD is also responsible under IDEA for providing early intervention services to infants and toddlers with disabilities and their families.

IDEA provide that the Defense Office of Hearings and Appeals (DOHA) counsel shall normally appear and represent the DOD dependent schools (DODDS) and Defense Domestic Elementary and Secondary Schools (DDESS) when the proceeding involves a child aged three to twenty-one.[7] In proceedings that involve an infant or child under age three, the military department responsible for delivering early intervention services may provide its own counsel or request counsel from DOHA.[8]

Civilian attorneys and judge advocates who represent the DOD's educational programs must be well informed of the case law that interprets the DOD's obligations to provide special education to children with disabilities. Special education litigation is on the rise across the nation. In the past two decades since the passage of the EAHCA, the number of special education lawsuits against public school systems has increased six-fold.[9] This dramatic increase is evident in the number of published court decisions on special education in the public schools: 104 cases in the 1970s, 547 cases in the 1980s, and 623 cases between 1990 and October 1997.[10] Because the number of published cases does not include unreported decisions and disputes resolved through administrative proceedings, settlement, or mediation, the true volume of conflicts is conceivably greater.

The number of requests for due process hearings within the DOD mirrors this nationwide trend. Before 1997, litigation involving the provision of special education and related services to children in DOD programs was rare. Between 1978 and 1996, parents of students enrolled in DOD educational programs filed only seven due process hearing requests. Since 1997, however, a dramatic change has occurred. Between 1997 and 1998,

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6. 20 U.S.C. § 927(c). With the exception of the funding and reporting requirements set forth in that section, the provisions of Part B and Part C of the IDEA apply to all educational programs the DOD operates. Part B of the IDEA sets out the state formula grant program that requires each state receiving federal financial assistance under the IDEA to develop a state plan to ensure provision of a FAPE to all disabled children residing within the state, aged 3 through 21, and contains a series of procedural safeguards designed to protect the interests of children with disabilities. *See* 20 U.S.C. §§ 1411-1419. Part C of the IDEA, known prior to the 1997 Amendments to the IDEA as Part H, is a discretionary program that authorizes federal formula grants to states for development and implementation of statewide systems to provide early intervention services for infants and toddlers with disabilities, under 3 years of age. *See* 20 U.S.C. §§ 1431-1445.

7. 32 C.F.R. pt. 57, app. F, § C.3 (1998); 32 C.F.R. pt. 80, app. C, § B.3.

8. Id.

9. Perry Zirkel, *Tipping the Scales*, The American School Board Journal, at 36-37 October 1997.

10. *Id.*

DOHA received five due process hearing requests–a number nearly equal to the number of requests made in the preceding eighteen-year period.

Because of these due process hearing requests, the DOHA Appeal Board announced important first impression rulings that will affect all future special education litigation in the DOD and all DOD programs that provide educational services to children. This case comment examines the factual background of the DOHA Appeal Board decision, its legal underpinnings, and its likely effect on the future operation of DOD educational programs.

This case originated as a request for a due process hearing under the IDEA.[11] Parents of a child attending a DOD operated school made the request. In accordance with the applicable regulations, the hearing occurred before an administrative judge of the DOHA who issued a decision favorable to the parents. The DDESS appealed to the DOHA Appeal Board.

II. Factual Background

Parents of a five-year-old child with autism, who is eligible for education and related services provided by the DDESS, made a due process hearing request.[12] The child attended DDESS preschool programs in which he received special education and related services from September 1994 to May 1996. Without notice to the DDESS, the parents unilaterally began providing the child in-home Lovaas therapy in August 1996.[13] The child was present in the DDESS school briefly in late August and early September 1996 and was absent thereafter.[14] After making two unsuccessful attempts to get the child's parents to return the child to the school, the DDESS school administratively withdrew the child from its programs in October 1996.[15]

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11. 20 U.S.C. §§ 1400-1487.

12. DOHA Appeal Board Decision, DDESS Case No. 97-001 (March 24, 1998) at 2. DOHA decisions are available on the DOHA internet web site located at <http://www.defenselink.mil/DODgc/doha>.

13. *Id.* The Lovaas therapy was based on a program of behavioral therapy for autistic children developed by Dr. O. Ivar Lovaas of the University of California, Los Angeles.

14. DOHA Appeal Board Decision, DDESS Case No. 97-001 (March 24, 1998) at 2.

15. *Id.*

In November 1996, the child's parents contacted the DDESS and requested that it assume responsibility for providing the Lovaas program at home. They also requested an Individualized Education Program[16] (IEP) meeting. Beginning in January 1997, the case study committee[17] (CSC) met several times with the child's parents to draft new IEP goals and objectives, and to consider placement issues.[18]

In April 1997, the parents rejected a CSC proposed an IEP for the child proposed by the CSC because it did not provide the child with a year-round program of Lovaas therapy. After a failed attempt at mediation, the child's mother petitioned for a due process hearing in May 1997. A DOHA administrative judge held a hearing in September and October of 1997.[19] In December 1997, the judge issued a decision concluding that the DDESS denied the child a FAPE, and that a complete program of Lovaas therapy would provide the child with a FAPE.[20] He also granted the parent's request for reimbursement of some, but not all, of their expenses, and directed the DDESS to pay for continued Lovaas therapy through the end of July 1999.[21] The DDESS appealed the judge's decision.[22]

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16. The IEP is a written statement for each child with a disability. It is developed during a meeting of school administrators, teachers, other service providers, and the parents. The IEP includes, but is not limited to, a description of the child's current performance, the child's annual goals and short-term instructional objectives, the specific educational services needed, and the objective criteria and evaluation procedures to determine whether the objectives are being achieved. *See* Mark C. Weber, *Special Education Law and Litigation Treatise* 7 (LRP Publications 1997); *see also* 20 U.S.C. § 1401(a)(11); 32 C.F.R. pt. 80, app. B, § C.1 (1998). Special educational services include both special education defined as "specially designed instruction . . . to meet the unique needs of a child with disabilities," and related services, defined as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with disabilities to benefit from special education." *Id.*

17. A CSC is "[a] school-based committee that determines a child's eligibility for special education, develops and reviews a child's [IEP], and determines appropriate placement in the least restrictive environment." 32 C.F.R. § 80.3(e). "A CSC is uniquely composed for each student." *Id.*

18. DOHA Appeal Board Decision, DDESS Case No. 97-001 (March 24, 1998) at 2.

19. *Id.*

20. *Id.* at 3.

21. *Id.*

22. *Id.*

III. Decision on Appeal

In a unanimous decision, the three-judge DOHA Appeal Board reversed the decision of the administrative judge with respect to most of the DDESS raised issues. In doing so, the appeal board made first impression rulings that relate to the applicability of the IDEA to DOD operated schools.

A. Preliminary Matters

As a preliminary matter, the appeal board noted that neither the IDEA nor its implementing regulations specifically state who bears the burden of proof in special education hearings.[23] The board adopted the consensus view that "the party alleging a denial of FAPE or challenging the adequacy of an IEP bears the burden of proof"[24] and that failure to meet that burden would result in the denial of relief.[25] Before this ruling, which party has the burden of proof in DOD special education cases was unclear. In this case, the DDESS had presented its case first at the hearing.

The appeal board adopted the general principle that, on appeal, there is no presumption of error and "the appealing party bears the burden of raising claims of error and demonstrating that such errors were committed."[26] The board made this ruling in the absence of specific guidance from either the statute or implementing regulations. The appeal board adopted a de novo standard of review on appeal because the issue of whether the school had provided a FAPE for an eligible student was a mixed question of law and fact. By adopting this standard, the appeal board followed the established case law trend.[27] The appeal board stated that it would apply this same standard of review to an administrative judge's interpretations of statutory authorities and DOD regulations.[28]

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23. *Id.* at 4.

24. *Id. See generally* Salley v. St. Tammany Parish School Bd., 57 F.3d 458, 467 (5th Cir. 1995); Amann v. Stow School Sys., 982 F.2d 644, 650 (1st Cir. 1992); A.E. v. Independent School Dist., 936 F.2d 472, 475 (10th Cir. 1991); Cordrey v. Euckert, 917 F.2d 1460, 1469 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991).

25. *See generally* Cypress-Fairbanks Independent School Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997); Dreher v. Amphitheater Unified School Dist., 22 F.3d 228, 234 (9th Cir. 1994); Doe v. Board of Educ. of Tullahoma City Schools, 9 F.3d 455, 460-61 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994); Hampton School Dist. v. Dobrowolski, 976 F.2d 48, 52 (1st Cir. 1992); Hudson v. Wilson, 828 F.2d 1059, 1063 (4th Cir. 1987).

26. DOHA Appeal Board Decision, DDESS Case No. 97-001 (March 24, 1998) at 5-6.

Lastly, the appeal board decided as a preliminary matter that the 1997 Amendments to IDEA "[did] not have retroactive application to matters that occurred before their effective date."[29]

B. Issues Raised By the DDESS

On appeal, the DDESS argued that the administrative judge erred when he concluded the following: (1) state law was applicable to the case, (2) the child had been denied a FAPE, and (3) the child was entitled to reimbursement and other relief.[30] The appeal board agreed with DDESS with respect to the core aspects of these issues.

1. State Law Inapplicable to Department of Defense Schools

Cognizant of the constitutional underpinnings of the doctrine of federal immunity, the appeal board noted that "absent a clear, unequivocal federal statutory requirement to the contrary, the federal government is not required to comply with state law requirements."[31] The board's ruling carefully examined the statutes that the administrative judge cited. Based on their examination, the board concluded that none of the statutes in question "set[] forth a clear, unequivocal statutory requirement that DDESS must comply with state law."[32]

The appeal board's ruling that federal law alone binds the DDESS schools is significant in two respects. First, it alleviates the necessity that

27. *Id.* at 5. DODDS Case No. 97-E-001 (December 2, 1997) at 4 (citing federal cases); Soe v. Board of Educ. of Oak Park & River Forest High School Dist., 115 F.3d 1273, 1276 (7th Cir. 1997); JSK v. Hendry County School Bd., 941 F.2d 1563, 1571 (11th Cir. 1991).

28. DDESS Case No. 97-001 (March 24, 1998) at 5. DODDs Case No 97-E-001 (December 2, 1997) at 4; Carlisle Area School Dist. v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

29. DDESS Case No. 97-001 (March 24, 1998) at 5. Fowler v. Unified School Dist. No. 259, 128 F.3d 1431, 1434-36 (10th Cir, 1997); K.R. v. Anderson Community School Corp., 125 F.3d 1017, 1019 (7th Cir. 1997); Cypress-Fairbanks Indep. School Dist. v. Michael F., 118 F.3d 245, 247 n.1 (5th Cir. 1997).

30. DDESS Case No. 97-001 (March 24, 1998) at 3.

31. *Id.* at 6. Hancock v. Train, 426 U.S. 167, 179 (1976); EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 211 (1976).

32. DDESS Case No. 97-001 (March 24, 1998) at 6. The administrative judge cited the following statutes: Section 6 of Pub. L. 81-874, Section 23 of Pub. L. 102-119, and 10 U.S.C. § 2164(f).

the DDESS design and maintain multiple programs to meet procedural requirements that may vary from state to state. Second, it allows the DDESS to avoid some of the legal problems that can occur when state laws enacted to implement the IDEA impose substantive standards exceeding the requirements of federal law.

2. Receipt of a Free Appropriate Public Education

The appeal board examined a number of distinct issues when they determined that the administrative judge erred in concluding that the DDESS denied the child a FAPE. The appeal board dealt with most of those issues expeditiously on procedural grounds. The board concluded that the administrative judge's finding that DDESS had not provided the child with a FAPE during the 1994-1995 and 1995-1996 school years served no legally useful purpose because the parents did not seek relief with respect to the alleged denials.[33] Because the DDESS did not challenge it, the appeal board left undisturbed the administrative judge's finding that the child's May 1996 IEP was inadequate.[34] The administrative judge's finding that DDESS failed to evaluate the child promptly for deficits that might require occupational therapy was deemed "legally irrelevant" by the appeal board as a result of its findings with respect to other aspects of the case.[35] Lastly, the appeal board found that DDESS' objection to the administrative judge's finding that Lovaas therapy at home was a proper placement for the child had, for practical purposes, been rendered moot by the board's ultimate conclusion that the child had been offered a FAPE.[36]

The appeal board's key finding, underlying its ultimate conclusion that the DDESS had proposed a FAPE, was that it determined that the administrative judge erred in finding that the child's 21 April 1997 IEP was inadequate.[37] In reaching this conclusion, the board applied the standards set forth by the United States Supreme Court in *Board of Education of Hendrick Hudson Central School District v. Rowley*.[38] Under *Rowley*, an IEP is considered appropriate if: (1) it is developed in accordance with procedural requirements of the IDEA, and (2) it is reasonably calculated to confer some educational benefit.[39]

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33. DDESS Case No. 97-001 (March 24, 1998) at 8.

34. *Id.* at 8-9; *see* DDESS Case No. 97-001 at 2 (re-addressing this issue and resolving it in favor of the petitioner).

When the appeal board evaluated the facts, they found that the administrative judge's findings and conclusions with respect to the adequacy of the 21 April 1997 IEP could not be sustained because they were based on several significant legal errors.[40] Specifically, the board found that the administrative judge had failed to give appropriate deference to the educational professionals who developed the IEP and were responsible for providing a FAPE.[41] As the Fourth Circuit noted in *Spielberg v. Henrico County Public Schools*, "[t]he primary responsibility for developing IEPs belongs to the state and local agencies in cooperation with the parents, not the courts."[42] In the instant case, both parties agreed that the goals and objectives set forth in the IEP were appropriate.[43] The instructional method to be used to reach these goals and objectives was at issue.[44] The appeal board concluded that it was the CSC members, by virtue of their judgment and experience, who were in the best position to evaluate the dif-

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35. *Id.* at 9-10. As part of their findings with respect to this issue, the appeal board acknowledged the important role that procedural safeguards play in the implementation of the IDEA noting that "[a] school's failure to comply with applicable procedural requirements may be sufficient to support a finding that a child was denied a FAPE." Buser v. Corpus Christi Indep. School, 51 F.3d 490, 493 (5th Cir. 1995), *reh'g denied*, 56 F.3d 1387 (1995), *cert. denied*, 116 S. Ct. 305 (1995); Tice v. Botetourt County School Bd., 908 F.2d 1200, 1206-07 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059, 1063 (4th Cir. 1987). They also noted, however, that "the federal courts have declined to hold every procedural defect requires a finding that a child was denied a FAPE." Doe v. Defendant I, 898 F.2d 1186, 1190 (6th Cir. 1990); Urban v, Jefferson County School Dist., 89 F.3d 720, 726 (10th Cir. 1996). Each court must make a case-by-case determination as to the extent to which the procedural defect "compromised or interfered with the child's right to FAPE, seriously hampered the parent's opportunity to participate in the decision-making process concerning their child's education, or caused a deprivation or loss of educational benefits." Heather S. v. Wisconsin, 125 F.3d 1045, 1059 (7th Cir. 1997); Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997); Independent School Dist. v. South Dakota, 88 F.3d 556, 562 (8th Cir. 1996); Tennessee Dep't of Mental Health & Retardation v. Paul B., 88 F.3d 1466, 1474 (6th Cir. 1996); Murphy v. Timberlane Regional School Dist., 22 F.3d 1186, 1196 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 484 (1994); W.G. v. Board of Trustees of Target Range School Dist., 960 F.2d 1479, 1484 (9th Cir. 1992). In light of the foregoing, the appeal board concluded that the administrative judge had "erred by using an impermissible per se rule in connection with evaluating whether a procedural violation constitutes a denial of a FAPE." DDESS Case No. 97-001 (March 24, 1998), at 9-10.

36. DDESS Case No. 97-001 (March 24, 1998) at 13-14.

37. *Id.* at 10-13.

38. 458 U.S. 176 (1982).

39. *Id.* at 206-07.

40. DDESS Case No. 97-001 (March 24, 1998) at 12-13.

41. *Id.* at 12.

42. 853 F.2d 256, 258 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989).

43. DDESS Case No. 97-001 (March 24, 1998) at 12 n.10.

ferent educational methodologies available and to select a pedagogical approach, which was appropriate for the child in question.[45]

In finding that the choice of educational methodology is a matter of discretion left to the expertise of the CSC, the appeal board again followed the consensus approach. The board joined with other jurisdictions in ruling that an administrative judge may not impose his own notions of what educational methodology was desirable.[46] The board also noted that the parents' preference for a specific program or for the use of a specific methodology does not bind either the CSC or administrative judges.[47]

The appeal board also found that the administrative judge erred in finding that the IEP in question was inadequate because it did not provide the child with the maximum or optimum educational benefit.[48] The board made clear that the DOD schools must adhere to the procedural and substantive requirements of federal law, as set forth by the United States Supreme Court in *Rowley*.[49] Courts have interpreted the second prong of the *Rowley* standard to require that while an IEP must be calculated to confer more than a trivial or meaningless benefit, it does not have to provide the child with the best possible education to constitute a FAPE.[50]

The appeal board's ruling is significant because it underscores the notion that the adequacy of an IEP is measured by the extent to which it is reasonably calculated to provide an educational benefit, not the extent to which it compares with an alternate methodology or placement. That a different methodology or placement may confer more or better educational

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44. The appeal board framed the issue as follows: "the heart of the dispute over the April 21, 1997 IEP was the insistence of the parents that DDESS provide complete Lovaas therapy for the Child and the decision of the CSC that complete Lovaas therapy was not required for the Child." *Id.* at 12.

45. *Id.*

46. *Id. See* Fort Zumwalt School Dist. v. Clynes, 119 F.3d 607, 614 (8th Cir. 1997); Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997); Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121 (2d Cir. 1997); Union School Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 428 (1994); Lenn v. Portland School Comm., 998 F.2d 1083, 1091 n.8 (1st Cir. 1993); Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991); Tice v. Botetourt County School Bd., 908 F.2d 1200, 1207 (4th Cir. 1990).

47. DDESS Case No. 97-001 (March 24, 1998) at 12. Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988).

48. DDESS Case No. 97-001 (March 24, 1998) at 13.

49. *Id.* at 12-13.

benefits upon the child does not mean that the existing IEP was inadequate or failed to provide a FAPE.[51]

3. Reimbursement and Other Relief

With respect to reimbursement and other relief awarded, the appeal board affirmed the administrative judge's decision in part and reversed it in part–largely in a way that was consistent with its resolution of the substantive issues of the case. The board's key finding in this part of the case related to the circumstances that parents were entitled to reimbursement for expenses relating to the unilateral placement of their child in the home-based Lovaas program. At the outset, the board noted that "parents who unilaterally change their child's placement without the consent of school officials do so at their own risk."[52] Further, the board noted that parents are entitled to reimbursement only when both "the public placement violated the IDEA and [] the private placement was proper under the Act."[53] The board also noted that many federal courts have held "that parents have the obligation to place a school on reasonable notice that they challenge the adequacy of an IEP or placement before they can expect to be reimbursed for unilaterally placing the child elsewhere."[54] The board viewed this approach as consistent with the emphasis that the IDEA places on cooperation between parents and schools.[55] In light of the foregoing, the board concluded that the parents were only entitled to reimbursement for costs incurred during the period between their 18 November 1996 letter inform-

50. The *Rowley* Court specifically rejected the proposition that the IDEA required a maximization of educational benefit standard. The Court concluded that the language of the IDEA, combined with its legislative history, showed that "Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Rowley*, 458 U.S. at 192. Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997); Lenn v. Portland School Comm., 998 F.2d 1083, 1086 (1st Cir. 1993); County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996); Carlisle Area School v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985).

51. DDESS Case No. 97-001 (March 24, 1998) at 11-12. Angevine v. Smith, 959 F.2d 292, 296 (D.C. Cir. 1992); Roland M. v. Concord School Comm., 910 F.2d 983, 993 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991); Hessler v. State Bd. of Educ. of Md., 700 F.2d 134, 139 (4th Cir. 1983).

52. DDESS Case No. 97-001 (March 24, 1998) at 14. School Comm. of Town of Burlington v. Department of Educ. of Mass., 471 U.S. 359, 373-74 (1985).

53. DDESS Case No. 97-001 (March 24, 1998) at 14. Florence County School Dist. Four v. Carter, 510 U.S. 7, 15 (1993).

ing DDESS that they were dissatisfied with their child's education and the DDESS proposal on 21 April 1997 of a new IEP.[56]

The appeal board's other finding of note with respect to reimbursement was that it determined that the administrative judge had erred when he ordered specific relief and reimbursement for prospective costs beyond the 1997-1998 school years.[57] The board noted that even where a party demonstrates that a denial of a FAPE warrants relief, applicable statutes and regulations limit an administrative judge's authority to fashion the relief.[58] The board concluded that the regulatory scheme of the IDEA requires that the educational experts of the CSC should develop and implement the details of an IEP. This process allows the CSC to exercise its authority and responsibility to periodically develop and review the child's IEP.[59] The board found that the administrative judge's ordered relief was contrary to established precedence.[60] The judge's decision provided not only specific directions for personnel and the use of funds, but also extended beyond the terms of the effective IEP and constituted the impermissible micro management of DDESS.[61]

IV. Conclusion

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54. DDESS Case No. 97-001 (March 24, 1998) at 16. *See* Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149, 159-60 (3d Cir. 1994); Ash v. Lake Oswego School Dist., 980 F.2d 585, 589 (9th Cir. 1992); Evans v. District No. 17 of Douglas County, 841 F.2d 824, 831-32 (8th Cir. 1988); Garland Independent School Dist. v. Wilks, 657 F. Supp. 1163, 1167-68 (N.D. Tex. 1987); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-34 n.4 (4th Cir. 1985); Rapid City School Dist. v. Vahle, 922 F.2d 476, 478 (8th Cir. 1990).

55. The appeal board based its decision to deny partial reimbursement on prior case law applying equitable principles of notice. The relevance of the board's analysis for future cases is affected by the 1997 Amendments to the IDEA. These amendments affirmatively obligate the parents to provide specific prior notice to the public school of the following: their decision to reject the public school placement, the nature of their concerns about the public school placement, and their intent to place the child in a private school at public expense. *See* 20 U.S.C.A. § 1412(a)(10)(C) (West 1998). The law grants hearing officers the authority to reduce or deny requested reimbursement if the parents do not provide the required notice. *Id.*

56. DDESS Case No. 97-001 (March 24, 1998) at 15-18.

57. *Id.* at 21-22.

58. *Id.* at 21.

59. *Id.*

60. *See* Timken Co. v. United States, 37 F.3d 1470, 1477 (Fed. Cir. 1994); *In re* Shoreline Concrete Co., Inc. v. United States, 831 F.2d 903, 905 (9th Cir. 1987); Seguros Banvenez S.A. v. S/S Oliver Drescher, 761 F.2d 855, 863 (2d Cir. 1985).

61. DDESS Case No. 97-001 (March 24, 1998) at 21-22. *See* Schuldt v. Mankato Indep. School Dist., 937 F.2d 1357, 1360 (8th Cir. 1991); Goodall v. Stafford County School Bd., 930 F.2d 363, 367-68 (4th Cir. 1991); Doe v. Defendant I, 898 F.2d 1186, 1192 (6th Cir. 1990).

This case is significant because of its first impression rulings relating to the burden of proof and the applicability of state law in IDEA administrative cases. This case also shows the DOHA Appeal Board's preference for following well-established judicial case law when dealing with new issues. Finally, the text of the decision contains an extensive review of special education case law as applied in the context of the DOD schools. Thus, it is a useful reference for civilian attorneys representing the DOD's schools and judge advocates representing other DOD components in early intervention cases before DOHA.

WARRIOR GENERALS

COMBAT LEADERSHIP IN THE CIVIL WAR[1]

REVIEWED BY MAJOR JOHN M. BICKERS[2]

"The tens of thousands of books written about the Civil War can daunt the researcher."[3]

Thomas B. Buell, author of *The Warrior Generals: Combat Leadership in the Civil War*, does not note them, but two other perils face such a researcher. Faced with yet another addition to those tens of thousands, a reader must inevitably ask what this book contributes. Specifically, one is bound to ask why this book was written, and how it differs from its myriad predecessors.

Buell answers the first question boldly. The quality of existing scholarship disturbs him: "[M]uch of the war's history is biased and distorted."[4] With an unfortunate tendency to broad generalization, he argues that the "misconceptions are pervasive and widespread, even among those who are in a position to know better."[5]

To right wrongs is a noble but difficult goal. A brief, narrative-heavy book will not end the battles that rage about the meaning of the Civil War. In his attempt to do just that, Buell adopts an unusual style for illuminating the war. He focuses on the lives and careers of six generals, three from each side. By limiting his inquiry to six men, Buell presents a microcosm of the conflict that he hopes will shine light into the darkness of historical error.

He chose his subjects well. In Ulysses Grant and Robert E. Lee, he has the obligatory presence of the senior military commander of each side. In the slightly less well-known George Thomas and John Bell Hood, he

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1. THOMAS B. BUELL, THE WARRIOR GENERALS: COMBAT LEADERSHIP IN THE CIVIL WAR (1997).

2. Judge Advocate General's Corps, United States Army. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BUELL, *supra* note 1, at 445.

4. *Id.* at xxviii.

5. *Id.*

adds officers at the tactical level who rose to operational command by the war's end. In the still less notorious Francis Barlow and John Gordon, he presents men without military background who rose to senior tactical commands on the basis of amply demonstrated ability.

To bring them into more stark relief, Mr. Buell then assigns these men to archetypes. Lest the reader misidentify them, he identifies the generals both in the introduction and in the captions to a series of portraits that open the book. Thus Grant becomes the Yeoman, while Lee is the Aristocrat; Thomas is a Roman, and Hood a Knight-Errant; and Barlow, the Puritan, squares off against Gordon, the Cavalier.

This series of mini-biographies provides *Warrior Generals* its greatest strength, and, paradoxically, its predominant weaknesses. Buell worked hard with original source documents to paint pictures of these six men, yet scholarly flaws haunt the book. He spends considerable effort to revise commonly held views, but he frequently misfires or overstates his case. His archetypes serve as effective and illuminating guides for the war, but several of them fit their subjects only through procrustean manipulations. Finally, these archetypes never illustrate anything important about the nature of leadership.

Buell researched diligently to construct his portraits. Yet that very research left him vulnerable to conspicuous errors and an undue trust in self-serving statements. Researchers must always account for the bias of their original sources. As an example, Gordon needed to obtain supplies for his hungry soldiers during the 1863 Pennsylvania offensive. *Warrior Generals* uncritically repeats the southern general's report that "under the orders of the Confederate commander-in-chief both private property and non-combatants were safe," and that his men would "give any price" for the bread, milk, and other supplies they needed from the local citizens.[6] Buell fails to note that the Army of Northern Virginia possessed no money of any value to the local citizenry. Gordon's men "paid" for supplies from Pennsylvania farmers with useless Confederate bills. Not the goodness of Gordon's soldiers, but the fear they inspired, was responsible for this commerce.[7]

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6. *Id.* at 226.

7. Professor Michael Jacobs, who taught chemistry and mathematics at Pennsylvania College in Gettysburg, described the Confederate looting of the countryside: "They there reenacted their old farce of professing to pay for what they took by offering freely their worthless Confederate scrip, which they said would, in a few days, be better than our own currency." RICHARD WHEELER, WITNESS TO GETTYSBURG 88 (1987).

Small–but distracting–errors abound. In one instance, Buell identifies both Joseph J. Reynolds and John F. Reynolds as the commander of the Army of the Cumberland's Fourth Division at Chickamagua.[8] Joseph commanded the division; John had died two months earlier at Gettysburg.[9] Interestingly, Buell attempted to inoculate himself from charges of slipshod scholarship with this rather remarkable manifesto:

> My approach to research on a given topic is to identify the *valid* sources of information, examine all of those I can readily access, and then draw reasoned inferences and conclusions from the data. My research on a topic ends under one or more of the following conditions: (1) when *creditable* multiple sources repeat themselves; (2) when *my intuition* tells me what to believe if sources are contradictory; (3) when I have a source which *I have come to consider as so consistently reliable* that I can use it repeatedly to the exclusion of others. I do not consult additional references ad infinitum simply because they exist, especially if I feel that I have learned what I need to know. I say this because some scholars find fulfillment in the act of research alone, and seem always in search of yet one more reference before they feel their study to be complete. In such cases nothing gets written.[10]

This paragraph will probably not protect his work from criticism.

Although the great purpose of *Warrior Generals* is worthy, Buell does not fulfill it. He sets out to rectify errors and correct myths. The myths that particularly interest him are that the eastern theatre was more important than the western, that Lee was a great general, and that his Roman, Thomas, was slow and defensively oriented.

Indeed, much Civil War literature treats the events in Virginia, Maryland, and Pennsylvania as the most important of the war. Perhaps, as Buell argues, scholars have neglected the western campaigns.[11] This book, however, does nothing to remedy that situation.

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8. BUELL, *supra* note 1, at 254, 267.
9. WHEELER, *supra* note 7, at 126 (1987).
10. BUELL, *supra* note 1, at 445-46 (emphasis added).
11. The current trend for Civil War historians does seem to flow in the opposite direction. For an example of overemphasis on the western theater, *see* Peter A. Young, *Rethinking the Civil War: Winning it in the West*, ARCHAEOLOGY, July/Aug. 1998, at 2.

Buell fails to solve the problem because he divides the war into segments: 1861 and 1862 form a section, then 1863, followed by 1864, and finally a "Finis" section that recounts the final months. Within each segment, the author considers the East first. The very size of these sections defeats Buell's purpose. The reader travels from the dawn of the war to Antietem before first encountering events in the West. Subconsciously, the reader must conclude that Virginia was preeminent.

This may not be a coincidence: Buell's "myth" may be historically correct. The eastern focus accounts for the military principle of centers of gravity. Centers of gravity are those points at which a force must defeat its enemy to win the conflict.[12] Early in the war, each side believed its capital was its center. Later, Grant came to view the Army of Northern Virginia, which operated only in the eastern front, as the South's center of gravity.[13]

Buell's failure to recognize the importance of centers of gravity leads to the harsh and sometimes unfair criticisms that make up the second, and most visible, revision of conventional wisdom in his book. He hopes to humble Robert E. Lee. Buell sharply identifies the problem: virtually all biographies of Lee are hagiographies.[14] To counter the bias he sees in these works, Buell finds fault with Lee's organization of the force, his logistical operations, and his planning of offensives. Oddly, he neglects the one extraordinary facet of Lee's character that even detractors must acknowledge: his enormous ability to lead soldiers.

Buell argues that Lee did not organize his force for success because he only planned for the short term. Believing in the superiority of Southern infantry, Lee kept as many men in ranks as possible by sacrificing staffs, engineering, communications, and intelligence. His cavalry never fought in a combined arms organization.[15]

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12. "Joint doctrine defines a center of gravity as: 'That characteristic, capability, or locality from which a military force, nation, or alliance derives its freedom of action, physical strength, or will to fight.'" THE JOINT CHIEFS OF STAFF, JOINT PUB. 1, JOINT WARFARE OF THE U.S. ARMED FORCES, 11 Nov. 1991, at 34 (quoting THE JOINT CHIEFS OF STAFF, JOINT PUB. 0-1, BASIC NAT'L DEFENSE DOCTRINE).

13. Thus McClellan aimed his 1862 Peninsular Campaign at *Richmond*; Grant's Overland Campaign of two years later bypassed Richmond because he was aiming at *Lee*. *See* BUELL, *supra* note 1, at 299.

14. *Id.* at 448.

15. *Id.* at 96.

Warrior Generals subjects Lee's logistics to a withering fire as well. The seceding states had less industry and wealth than those that remained loyal to the Union. Buell punctures the myth, however, that the United States won the war solely because of an advantage in materiel. Although the Confederacy had less to give, Lee neither asked of what they had nor did he organize what he received. In his first Civil War campaign, fought in what became West Virginia, Lee never sought supplies.[16] In his last, he was cornered at Appomattox Court House while trying to retrieve an ill-placed supply train on his way to a rendezvous with the forces of Joe Johnston.[17] At every campaign Lee's men went short of food, shoes, and equipment.

Buell especially faults Lee's weak mapping activity. Although Lee fought primarily in his home state, his forces were often mapless and lost. The Confederacy employed fewer cartographers than the Union. Lee exacerbated his difficulties by employing his mapmakers almost exclusively to make reports after battles, rather than to plan before them.[18] Even when the Army of Northern Virginia sat for months near what would be significant battlefields, such as Fredricksburg and the sites of the 1864 Overland Campaign, the United States Army consistently had the better maps.

In his attacks on Lee's offensives, Buell reveals something of his own view of military art that reappears with the treatment of each leader at the operational or strategic level: his dislike of the offensive. Buell takes Lee to task both for the 1862 invasion that culminated prematurely at Antietem,[19] and for the one the following year whose high water mark occurred at Gettysburg.[20] He argues that Lee had no business putting an army with questionable logistical support into hostile territory, and that by doing so he merely wasted the lives of men he led.

In Lee's defense, this is not only hindsight: it is unhelpful hindsight. True, the Union victory at Antietem allowed President Lincoln to publish the Emancipation Proclamation. True, also, the following year's triumph at Gettysburg provided a vital morale boost throughout the North. To

16. *Id.* at 49.

17. *Id.* at 420.

18. *Id.* at 212. Oddly, for an author so focussed on the role of the cartographer, Buell provides the reader with very few maps. Readers will quickly find themselves grabbing for a survey of the war just to follow the events on its maps.

19. *Id.* at 107-8.

20. *Id.* at 223.

claim that the campaigns were wrong because they ended in defeat, however, offers nothing positive. A fair critique would compare Lee's invasions to a better alternative. Buell does not do so because he simply does not believe in offensives. Lee took and lost two gambles. Their loss does not mean they were not worth taking.

George Thomas, on the other hand, never took any operational gambles. Buell lauds his Roman for his staff coordination, his logistical skills, and his emphasis on map-making. He rejects utterly the standard charge laid against Thomas: that he was ponderous and defense-oriented. Buell shares Thomas's rage over Grant's 1864 demand that he leave his Nashville defenses and attack.[21] Oddly, the reader understands why Grant insisted. Earlier, *Warrior Generals* recounts the Confederacy's use of its interior lines to transfer Longstreet's Corps from the front of an idle Army of the Potomac to reinforce the Army of Tennessee. That Corps then played the critical role in the battle of Chickamauga.[22] Grant must have realized that an idle Thomas would allow Hood to reinforce either of the other two major Confederate armies in the field. To end the war, Grant had to attack relentlessly on all fronts. This dire need to keep all northern forces moving at once contrasts sharply with Thomas's petulant refusal to attack.

Buell's defense of Thomas at his worst moment stems from the archetype itself. Having committed to the notion of Thomas as Roman, Buell must defend his decisions. But Thomas was no Roman: he had neither that society's cultivated stoicism nor its brutal savagery.[23] Twice the national authorities asked him to take command on the eve of battle. Twice he refused. Buell argues that this shows both an unwillingness to disrupt a unit during a time of crisis and a deep loyalty to his commanders.[24] That same behavior, however, demonstrates that Thomas was willing to put his own views ahead of those of higher headquarters. His refusal to accept the tendered commands left inferior officers in leadership positions, and cost his men dearly in blood. Despite having rejected it when initially offered, Thomas raged about promotion by the national government later than he felt he deserved.[25] One subordinate referred to Thomas as "morbidly sen-

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21. *Id.* at 399.
22. *Id.* at 258.
23. EDITH HAMILTON, THE ROMAN WAY, 154-56, 204-5 (1932) (discussing Roman savagery and stoicism, respectively).
24. BUELL, *supra* note 1, at 185, 275.
25. *Id.* at 407.

sitive."[26] Some Roman generals doubtless behaved in this way—but that is not the Roman archetype.

Therein lies the great weakness of the model. Lee was certainly an aristocrat, and Grant's dogged determination qualifies him for the title yeoman. The other men do not fit Buell's archetypes. Gordon appears, at first glance, every inch the cavalier. Fiery politician and proselytizer for slavery, he became the dashing, self-made leader of a dying cause. Yet Buell also faithfully records Gordon's religious fervor—a wrathful, righteous rage that ran from his near fatal wound in the Bloody Angle at Antietem. Such pious fury does not fit easily within the cavalier ideal. Likewise, Hood always viewed himself as a knight-errant. In pursuit of equal measures of righteous goals, personal glory, and fair maidens, the "Gallant Hood of Texas" studiously cultivated this chivalric view of himself. The wounds he suffered and defeats he led stripped from him the veneer of nobility. By the end of the war a brutal and brooding Hood stares out at us from *Warrior Generals*, blaming others for his failures and hating the misfortune that left him broken physically.

Barlow is the strangest of all. Although he shared their geographic origin, he was less a Puritan than many another senior officer of his generation. The Puritans sought to reform state as well as church;[27] Barlow, obsessed with the magnificence of his own performance as an officer, groused, "I hardly think this disgusting country is worth fighting for."[28] The Puritans' Calvinist tradition provided a wellspring for abolitionism and racial equality;[29] Barlow in his conversations relied on racial slurs.[30]

Two scenes especially reveal this odd man from New England. The first occurred on the sixth of the Seven Days, fought near Richmond in 1862. As the Army of the Potomac began its retreat, Barlow marched his men away. He wished one of his now-wounded officers well, before abandoning him to the enemy. Astonishingly, Buell is neither reproachful nor embarrassed.[31] An equivalent scene involving Lee is unimaginable.

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26. *Id.* at 408.

27. MICHAEL HALL, THE LAST AMERICAN PURITAN 13-14 (1988). The title refers to Increase Mather.

28. BUELL, *supra* note 1, at 63.

29. JAMES BREWER STEWART, HOLY WARRIORS 20-21 (1976).

30. BUELL, *supra* note 1, at 208.

31. *Id.* at 84.

The second incident took place after the death of his adoring wife, Arabella. She, like Fanny Gordon, had followed her husband from battle to battle, and nursed him back to health after he was critically wounded. After her death, a friend described that Barlow would soon marry "some young woman, who will share his glory."[32] A Puritan would not leave a close friend with such an impression.

These archetypes, then, are helpful, but have limitations. Ultimately, Buell never uses his six subjects to investigate the question that lurks just beneath the surface of *Warrior Generals*: What makes a senior leader successful in combat? He discusses six wildly different men: they have different backgrounds, different goals, different styles, and even different value systems. Lee had a courtly, non-confrontational style. Grant impressed his men with the sheer force of his will. Thomas planned steadily and carefully. Hood charged to the front, ever the paladin on his steed. Gordon the orator harangued his men to greatness. Barlow ruled through fear and violence, alternately praising his men and intimidating them. These men had little in common: yet all were successful leaders. Even Hood, militarily the most dramatic failure in the group, did not fail because his men would no longer follow him. Indeed, his failure is the more poignant because his men were perfectly willing to immolate themselves pointlessly at his command.

Yet not all leadership styles are effective. There wander through *Warrior Generals* some officers who could not lead: men like McDowell, Bragg, and Burnside. Something these men had—or lacked—made their men distrustful, unconfident, or openly rebellious. An archetypal study might provide great insights into why such differing styles can be effective, and why others cannot. Buell could have used his considerable research and writing abilities to illuminate the nature of leadership. Sadly, he chose to expend energy instead debunking the "myths" of the importance of the eastern theater, and of the relative talent of Lee, Thomas, and the others. These disputes are unquestionably interesting, but ultimately trivial. The misfortune of *Warrior Generals* is that a work that could have cast much light instead produces mostly the heat of controversy.

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32. *Id*. at 343. Barlow remarried three years later.

PRODIGAL SOLDIERS

How the Generation of Officers Born of Vietnam Revolutionized the American Style of War

Reviewed by Major C. H. Wesely[1]

Historians usually discuss military history in terms of battlefield conquests. Very few focus on the day-to-day decisions and peacetime victories that shape the military organizations that fight those battles. James Kitfield takes this unique perspective in *Prodigal Soldiers*.[2] He uses defining moments from the lives of several military leaders to explain the metamorphosis of the American military from defeated pariahs in 1972 to heroes in 1993. He starts with Vietnam era catastrophes, moves on to a discussion of the "dark ages" which followed that era, analyzes the policy and doctrinal changes that carried us to the end of the eighties, and finally discusses the success of Desert Storm. He closes on a note of caution: the leaders of tomorrow must learn from the experiences of the last generation, or we are destined make the same mistakes.

Do not view *Prodigal Soldiers* as a work of military history. Instead, read it for its insightful analysis of military leadership. Kitfield shows that evolution is impossible when leaders do not have the moral courage to expose and to correct institutional weaknesses; defeat is inevitable when any military organization is unwilling to evolve. *Prodigal Soldiers* is a valuable addition to your professional reading list.

As advertised, *Prodigal Soldiers* explains "how the generation of officers born of Vietnam revolutionized the American style of war." Kitfield supports this theme throughout the book with focused writing and tightly structured analysis. *Prodigal Soldiers* reads more like a novel than an academic treatise. Kitfield combines old-fashioned story-telling and blunt analysis in this tremendously readable illustration of the importance of moral courage to military failure or success. He takes you to the moment so that you experience it as it happens. For example: "Nights in the jungle were filled with such a cacophony of chirping, snuffling, and

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1. United States Marine Corps. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

2. James Kitfield, Prodigal Soldiers: How the Generation of Officers Born of Vietnam Revolutionized the American Style of War (paperback ed., 1997) 1995.

buzzing that sometimes the loudest noise, the one that woke you up wide-eyed with a catch in your breath, was the sound of silence."[3]

Kitfield illustrates his analysis with events from the lives of several top military leaders. General Barry McCaffrey receives the most attention, although Kitfield also highlights Generals Chuck Horner, Tom Draude, Mike Myatt, Jack Galvin, William DePuy, Colin Powell, and Admiral Stanley Arthur. Other analysts or historians may differ over which events really constitute turning points in this era of history. However, Kitfield's selections support his analysis and place the reader in the moments that define this generation of officers.

The story begins in the Vietnam era. Kitfield resists the temptation to dwell on the major battles of that well-documented conflict. Instead, he describes unheralded events that were vitally important to the survivors so early in their military careers. These events later helped the future generals avoid the same errors in their own decision-making.

In Part I, the collected stories illustrate how doctrine and policy conflicts led to command and control failures, which in turn destroyed morale and integrity. When the United States first became involved in the Vietnam conflict, doctrine called for overcoming an enemy by overwhelming force. In other words, doctrine required that we would bring to bear massive quantities of troops and equipment until we crushed the enemy; we based all of our tactics and training on this doctrine. Contrary to doctrine, politicians in Washington only allowed the Vietnam conflict to proceed as a "limited war." Political concerns overrode military concerns. As Kitfield demonstrates, the stage was set for failure.

Command and control failures flowed directly from the dissonance between doctrine and policy. While the Pentagon kept a tight reign on the scope of the conflict, General Westmoreland made company level command decisions from Saigon and would not allow local command discretion. For example:

> Not only was Washington sending down detailed target lists, but they were also specifying the day and sometimes hour of attack, the types of weapons that could be used, in some cases even the *approach* aircraft could take to the target! If a mission was canceled because of factors that Washington had somehow over-

3. *Id.* at 88.

> looked–like bad weather–then it could not be rescheduled without first clearing it with the Pentagon.[4]

The same tight grip on decision-making also affected operations in the bush and at sea. As the remote commanders were "blind to the realities of the field," operations suffered. General Westmoreland kept increasing the number of troops in the field, thinking he could break the enemy's will to fight. At the same time, he allowed political concerns to limit troop movements and operations. Meanwhile, the troops in the field saw the enemy's tenacity firsthand, and were frustrated by illogical operational limitations. In this section, Kitfield also highlights how the rotation policy caused unit cohesion problems, and ineffective training brought unprepared soldiers to the battle–both with tragic results. By 1967, "the war and the way they were fighting it had simply ceased to make any sense. And in the vacuum of logic, a certain lawlessness had crept in."[5]

Epidemic command and control failures effectively destroyed morale and integrity. In Kitfield's words, "the first casualty of a war that made no sense was integrity."[6] Mid-level leaders struggled through a quagmire of moral ambiguity as they tried to comply with illogical orders from above without needlessly killing the people in their command. Staff officers developed the practice of reporting statistics "construed to show marked progress in a war where none really existed" in response to the distorted command emphasis on body counts.[7] Officers in the field learned to develop their own tactics to survive. Sometimes this meant directly disobeying orders. One incident summarizes the depths to which the Army had fallen by 1970:

> [T]he green officer had only just taken command of a platoon and had ordered some recalcitrant troops to join the unit on patrol or spend time in the stockade. Four of the men, who ran drugs for the unit and happened to be black, pulled their weapons and gunned the lieutenant down in front of the entire platoon.[8]

Fraggings, epidemic drug use, and rising racial tension grew out of the utter failure of leadership during the Vietnam era. By the end of Part I, the reader can plainly feel the frustration, at all levels, of having no moral

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4. *Id.* at 46.
5. *Id.* at 82.
6. *Id*. at 84.
7. *Id*. at 73.
8. *Id*. at 121.

guidance. Morale is non-existent and accomplishing the mission is impossible.

Part II of *Prodigal Soldiers* takes the reader from the race riots of the early seventies to Desert One, the failed hostage rescue mission of 1980. During this period, the services also became an all-volunteer force. The reader follows the careers of Kitfield's focus generation of officers as their wartime wounds heal and they move into peacetime billets. They recognize the need for doctrinal change, realistic training, and public support. They try to incorporate the lessons learned in Vietnam, but rigid and narrow-minded leaders above them would have none of it. This is a depressing account of their repeated attempts to help their organizations move ahead despite frequently being slapped down for their efforts. Kitfield's narrative style is effective; you almost feel the sting of the slap yourself.

Part II illustrates how the senior leadership's rigid attachment to a misconstrued concept of tradition undermined integrity and subverted moral courage in the subordinate leadership. Decision-makers apparently believed that the tradition of loyalty to your service branch and your commanders meant that "bad news" could not be aired, even for the sake of fixing deeper problems. The leaders "still thought you could dictate readiness and morale . . . as if in punishing the officers whose units didn't measure up . . . you somehow got at the underlying problems, when what you really got were officers willing to bring you good news or none at all."[9] In the context of evolution, moral courage takes at least two players: someone must have the idea and the courage to present it, and someone must be willing to hear the idea and implement it. By this time, the "generation of officers born of Vietnam" had only risen to battalion level command. They could see the problems and the solutions, but did not have the authority to do anything about it, except speak their minds.

In this part of the book, Kitfield emphasizes the evolution of today's doctrine, training practices, and command and control philosophy. Kitfield does a great job of setting the stage for today's focus on "jointness," and discusses how each service developed realistic training, such as Top Gun, Red Flag, and the Army's National Training Center (NTC). He also provides some short, but dramatic, leadership essays. One noteworthy account describes how, as a battalion commander in South Korea, General Powell ended the race riots in his command.[10]

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9. *Id.* at 147.
10. *Id*. at 130.

In Part III, Kitfield continues the theme of introspection and evolution, from 1981 through 1986. The reader is finally treated to some successes, nicely contrasted to the failures so painfully described earlier in the book. In addition to realistic training, Red Flag and NTC created a new tradition of candor. Trainers and commanders concluded exercises with candid debriefings about battlefield decisions and actions. As Kitfield explains:

> Though they did not yet realize it, [the] willingness of junior officers to openly question their superiors, and of superior officers to admit mistakes in front of their subordinates, was beginning to fundamentally change the culture of the Army. An organization that would once have considered such behavior little short of insubordination began to encourage self-criticism in an effort to get at the truth. Officers who thrived in that environment were those who rededicated themselves to learning their craft, who liked to get down and mix it up with the troops intellectually, and who led from the front physically.[11]

All branches of the United States military enjoyed the benefits of this climate of candid self-analysis, and worked to apply the lessons they were learning to doctrinal and cultural change for the better.

In Part IV and the Epilogue, Kitfield relates events that happened from 1989 through 1993 back to those dark days of Vietnam. The Gulf War victory, in comparison, seems nothing short of a miracle. It was a highly successful mission, accomplished by an all-volunteer, well-trained, joint force. This portrayal is not hard to accept based on Kitfield's analysis of the preceding thirty years.

When he wrote *Prodigal Soldiers,* Kitfield apparently assumed his readers would already know of the events he describes. Whether he assumed too much or too little depends on who you think his intended audience is. It is certainly not readers just starting to learn about this period of history. Do not consider *Prodigal Soldiers* as a historical treatment; it is too superficial to serve that purpose. Instead, read it after a more in-depth study of modern military history, or as a supplement to your own military experience. The incident descriptions are no more than brief memory aids. They set the factual stage on which the analysis unfolds.

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11. *Id.* at 311.

Readers should look elsewhere for tactical analysis or detailed documentation of the era.

Perhaps the intended audience is Kitfield's friends at the Pentagon. He writes with the air of a Pentagon insider, tossing general officers' names around like drinking-buddies, and peppering his narrative with language from inside the beltway. As the profiled leaders make their marks, you can almost hear the band playing Sousa in the background. Most likely, this book is intended for mid-level leaders who have done some studying on their own, and who want to learn more about military decision-making. Kitfield uses plain language throughout and does not pull punches about what he sees wrong with the decision-making process, so there is much to learn here.

While most military writers focus on dramatic battlefield events, Kitfield's perspective is refreshing. He connects the dots between the battlefield, the conference room, and institutional thinking. He puts events into historical context. For example, the Marine Barracks bombing in Beirut is portrayed as a basis for tough rules of engagement negotiations at joint planning sessions for Desert Storm, ten years later.

Kitfield's analysis is credible. He is the Pentagon analyst for *The National Journal* and is a contributing editor for *Government Executive* magazine. *Prodigal Soldiers* is based on years of close observation and, when necessary, criticism of defense department policies and decision-makers. The stories in the book come from personal interviews, newspaper accounts made at the time, and more in-depth books of other authors.

Tomorrow's leaders can take many lessons from the failures and frustrations analyzed in *Prodigal Soldiers*. Kitfield uses both positive and negative examples to show that military institutions benefit from cultivating leaders who recognize the need for change, understand and develop solutions, and exercise the moral courage to effect the needed changes. He also shows the danger of ignoring this lesson.

The reader will see many parallels to service in today's military. The more things change, the more they stay the same. Kitfield's commentary ends in 1993. Since then, several widely publicized incidents have highlighted the need for continued vigilance. The sexual harassment cases at Aberdeen Proving Ground and the charges against the Sergeant Major of the Army demonstrate that leaders cannot allow institutional values and leadership principles to drift into the background. Budget cuts show a lack

of public support for the military; this declining support is uncomfortably similar to the public attitude of the 1970's. At the same time, force reductions keep the zero defect mentality alive. Strength reductions force the services to cut good soldiers, sailors, airmen, and marines from their ranks to meet congressional mandates. If the "zero defects" mentality becomes the rule of the day, leaders can forget about the self-analysis and honesty that has evolved at NTC and Red Flag. Without the ability to correct themselves, the services will begin to decay. Leaders will not be convinced of the need to change because no one will have the moral courage to point it out.

Most importantly, as Kitfield's focus generation retires, the United States military will become a peacetime force, with very few combat seasoned leaders. As world politics move into an era of peacekeeping, as opposed to war-fighting, the next generation must be ready to fight the conference room battles to prevent subjugation of command and control to political concerns. When recruits are issued "time-out" cards, leaders must stop and wonder whether we are providing the intensive training a person really needs to survive in combat. Questions like these will continue to come up; leaders must have the moral courage to confront them.

Prodigal Soldiers is a must-read for any military professional. As a compact summary of pivotal events between 1965 and 1993, the book pulls together the variety of military reading you may have done on this era. More powerfully, the book stands as an engaging treatise on military leadership, particularly as it highlights moral courage as a value.

JURISMANIA[1]

REVIEWED BY MAJOR J THOMAS PARKER[2]

The editor of a sports magazine recently noted that Formula One racing's rules prohibit, in four words, the use of traction control devices.[3] Apparently, there is an ongoing controversy surrounding whether or not one of the sport's top teams is benefiting from such a device or system. The controversy is unlikely to be resolved anytime soon since the rule on point is sparse, and since it will be impossible to truly determine whether any particular technological innovation adds traction control to a vehicle. The editor goes on, however, to compare Formula One's rule to the European Union's twenty-nine thousand word regulatory provision governing duck egg commerce. His obvious conclusion is that Formula One will probably need something more than four words to clarify what is prohibited, but something less than twenty-nine thousand.[4]

The call for more regulation for Formula One and the European Union's rule on duck eggs are both examples of what professor Paul F. Campos has termed "jurismania." The tenents of this general idea and Campos' comments on the law in the United States and on what the status of the law means to society in broader terms are all explained in his recent book *Jurismania: The Madness of American Law.*[5]

In order to understand what Professor Campos calls "jurismania," one must first grasp his notion that we, as a society, think and act in broad, legalistic ways. Professor Campos begins his discussion of this point with a story about how he was contacted by a reporter from the *New York Times*. The reporter had called about the Denver Nugget's Mahmoud Abdul-Rauf, a player who created quite a stir when he refused to stand during the playing of the national anthem, despite a National Basketball Association (NBA) rule mandating that its players do so.[6] In reply to the reporter's

1. PAUL F. CAMPOS, JURSIMANIA: THE MADNESS OF AMERICAN LAW (1998); 198 pages, $23.00 (hard cover).

2. Judge Advocate General's Corps, United States Army Reserve. Presently assigned as the Active Guard Reserve Judge Advocate for the 377th Theater Support Command, New Orleans, Louisiana.

3. Matt Bishop, *A Case of Working to Rule*, F1 RACING, Sept. 1998, at 6.

4. *Id.*

5. CAMPOS, *supra* note 1.

6. *Id.* at 3.

question about the First Amendment implications of this story, Campos comments that "there seems to be no issue of public life that can spend more than a few minutes on the national radar screen before legal modes of argument begin to take over."[7] He believes that the NBA's rules are "a prime example of an ongoing process we might think of as the juridical saturation of reality."[8] The NBA and other organization's detailed rules and regulations are an "example of both juridical saturation and of what might be called the Will to Process."[9] To Campos, the really interesting aspect of the NBA's rule concerns neither the First Amendment implications nor how the rule actually works. Rather, the answer to those types of questions "[are] . . . not as important or interesting as the mere fact of the [NBA's] provision itself."[10]

The general situation, as Campos describes it, is one where "the workplace, the school, and even the home mimic the language of the law, and as a consequence replicate its conceptual schemes."[11] We live and "move through a social space . . . with . . . regulations that attempt to control the minutiae of our social roles in ever more obsessive detail."[12] Additionally, the law has grown in more areas than just the regulatory and administrative. As to criminal and constitutional law, Professor Campos believes that the law has grown to such an extent that the full application of its rules in every court case would cause the system to collapse. It "doesn't collapse only because of a tacit understanding that its formal rules must never be followed."[13] Consequently, it is only the rich who can afford to bring the law's full panoply to bear on a given dispute.[14]

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7. *Id.*

8. *Id*. at 4. Professor Campos explains a bit later that "juridical saturation" is the substantial equivalent of "hypertrophy" which "is the name given to the anthropological concept that attempts to describe and explain such extreme process of ritualistic elaboration." *Id.* at 81. Thought of a bit differently, "'juridical saturation' . . . is a consequence of the belief that the best way to attack a problem is to inflict a comprehensive regulatory scheme on the social context in which the problem occurs." *Id.* at 82.

9. *Id*. at 8.

10. *Id*. at 4.

11. *Id*. at 5.

12. *Id*. As it turns out, "we all live in the midst of an *anarchic panopticon* . . . where[ ] cadres of technocrats . . . maintain . . . continual surveillance . . . ." *Id.* at 46-47 (emphasis in original). As to this point as well as to many of Campos' points, it should be noted, at least in passing, that other commentators have explained many of his ideas. *See*, PHILIP K. BROWN, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA, 5 (1995) (discussing the notion that the law is extending to control and cover more and more of our lives).

13. CAMPOS, *supra* note 1, at 21.

With this basic perspective in mind, Professor Campos moves on to discuss his primary ideas. The most unique of these revolve around what he calls "equilibrium zones." Equilibrium zones are basically those areas where subjective and objective decisional criteria reach a point of comfortable reconciliation. As an example, Campos describes how the gambler's point spread and the stock market work. In simple terms, gamblers and investors both take whatever relevant information is available assemble that information and arrive at a mathematical (monetary) point from which it is possible to gamble and purchase.[15] As to the law, we have "legal equilibrium zones." Unlike a stock price, "[a] legal equilibrium zone is a sort of negative analogue to an 'equilibrium price' . . . ."[16] One might say that in a legal equilibrium zone, equilibrium is reached at a point of uncomfortable irreconciliation.[17]

Within legal equilibrium zones reside some of the supposedly great legal questions of our time such as abortion and physician-assisted suicide. These questions are "legal" questions because we have chosen to refer them to the court system and not because they are inherently within the court system's purview. Unlike most questions that the law faces, these types of questions are ultimately irreconcilable since they "involve not only complicated empirical questions, but also problematic judgments . . . of moral value . . . ."[18] In other words, "[a] legal equilibrium zone develops whenever the materials of legal interpretation faithfully reflect this underlying cultural tension, by failing to resolve through formal rules social conflicts that are not otherwise usefully amenable to rational analysis."[19] Additionally, "[s]ocial, political, and legal equilibrium zones arise when-

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14. *Id*. at 24-25. Professor Campos believes that O.J. Simpson's case establishes this point. The Simpson case took a terribly long time to process because each potentially applicable rule was fully explored. Nonetheless, it is not always true that only the rich benefit from the tactic of employing the law to the fullest extent. Timothy McVeigh's Oklahoma City bombing trial took three months and cost nearly $10,000,000. *Id*. at 183. The ultimate question becomes one of whether "there [is] any good reason to believe the vast social resources being devoted to this and similar juridical inquisitions produce better (more just, more accurate) results than would a well-designed set of more modest proceedings each lasting, say, a week?" *Id*. at 183-84. *See*, HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE, 23, 222-34 (1996).

15. CAMPOS, *supra* note 1, at 50-57.

16. *Id*. at 62.

17. As Professor Campos says, "*our* law is always a contingent product of fallible human choices - choices that within interpretive equilibrium zones must remain essentially contestable." *Id*. at 116 (emphasis in original).

18. *Id*. at 63. *See id*. at 158-59, 167.

19. *Id*. at 89-90. In other words, "[i]t is when the law *cannot* give us an answer that we will demand it do so." *Id*. at 192 (emphasis in original).

ever public disputes implicate powerful competing ideological visions–visions that are themselves the product of axiomatic political and moral beliefs."[20]

With this notion of the legal equilibrium zone in mind, it probably goes without saying that cases with constitutional implications are among those cases that reside most assuredly within legal equilibrium zones:

> In the American legal system, to call something a question of constitutional law is not so much an act of formal categorization as it is a shorthand way of signaling that it involves the most intractable moral and political issues our society faces. Constitutional law is the categorical dumping ground for everything the normal political process can't digest: race and religion, sex and death.[21]

A legal equilibrium zone comes about when the parties to a question are unable to resolve the issues surrounding a dispute. As an important predicate, however, we have the idea that most of our law works, albeit in the background, to keep disputes from arising.[22] The process by which this occurs and by which the equilibrium zone is reached is what Professor Campos calls an "efficient process." His "efficient process theory," has three "propositions." First, "[i]n a legal system, efficiently processed disputes will be settled to the extent that the available information predicts a likely outcome."[23] The key word here is "settled." If it can be determined what the likely outcome will be, the controversy will not be litigated. With sufficient information in hand, people will choose to avoid the courthouse. Lawsuits will not be filed, guilty pleas will take place and settlements will be reached. On the other hand, "to the extent the process fails to produce a reliable prediction, the further the dispute will tend to travel through the dispute processing system."[24] Hence, Campos' second proposition that "[t]he further an efficiently processed dispute travels through a dispute processing system, the more firmly that dispute is lodged in a legal equilibrium zone."[25] As to this, it becomes clear that the dispute will not be resolved without resort to formal proceedings. Although there is no great

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20. *Id*. at 36. *See* BROWN, *supra* note 12, at 144.

21. CAMPOS, *supra* note 1, at 73.

22. *Id*. at 60. In other words, "[o]utside a legal equilibrium zone law tends to be both an invisible and powerful factor in the maintenance of social cohesion." *Id*. at 185.

23. *Id*. at 60.

24. *Id*. at 61.

25. *Id*.

new insight that comes with these first two propositions, there is something startling about Campos' third proposition.

In his third proposition, Campos states that "[i]n an efficient processing system the terminal decision making structures of the system will resolve disputes *arationally*."[26] Ultimately, Professor Campos' point about the legal equilibrium zone is that when a controversy reaches the zone, it will never be wholly and satisfactorily resolved. Thus, we come full circle and we are beset with the notion that our legal system is essentially not rational despite its nearly infinite attempts to regulate. In other words, despite our best efforts, some of the types of questions that reach the legal process are simply not designed to be answered by a formal system of rules, however detailed, and by resort to logical dissection based on that formal system and its compiled precedents.[27]

If one accepts the notion that our law does not work rationally, then one must also be concerned with why this is so. Professor Campos believes that there "are three major impediments to rational dispute processing: overgeneralization regarding the powers of rational analysis, professional vanity and fear."[28] Distilled down, overgeneralization takes place because it is not possible to know what to do with an intractable social issue. If an issue is intractable and yet it is processed, then the process must overgeneralize in order to fit the issue within the framework of those solutions that the process was designed to resolve.[29] Professional vanity has a role because attorneys believe that they are the ones destined to grapple with socially intractable issues.[30] Combined, overgeneralization and professional vanity lead to fear. As a society, we are afraid that if we did not have the process of overgeneralization and the process owners (attorneys), then we would have nothing else in their place and nothing left to do with socially intractable issues.[31]

What does this conclusion that our law and legal process are so terribly arational mean to our society as a whole? According to Professor Cam-

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26. *Id*. at 64 (emphasis added). *See*, BROWN, *supra* note 12, at 28.
27. CAMPOS, *supra* note 1, at 74-75.
28. *Id*. at 75.
29. *Id*. at 75-77.
30. *Id.* at 77-78. Professor Campos finds that "[t]he ideology of American law . . . encourages lawyers to imagine themselves as masterful technocrats or freelance philosophers, purveying 'rational policy solutions' or 'practical wisdom' to the culture as a whole." *Id.* at 77.
31. *Id*. at 78-80.

pos, it means several things. It does not mean, however, that "moral beliefs are merely subjective and therefore nothing more than manifestations of arational preference . . . ."[32] Instead, "in a society that doesn't feature enough widely held axiomatic moral agreement on fundamental ethical questions, there simply isn't any way of distinguishing between subjective or intersubjective preference and objective moral truth."[33] Second, fundamental rights, once they have been subjected to a continual process of elaboration, lose their meaning and applicability. As already noted, "it is simply impossible, as a practical matter, to actually carry out [all of] those generous procedures."[34] Next, the more regulated a system becomes, instead of being more predictable, it actually becomes less predictable.[35] Fourth, hypertrophy or continual elaboration makes it difficult, if not impossible, for one to actually know the law.[36]

An ultimate upshot to all of this is Professor Campos' conclusion as to the limits of reasoning. He finds, quite simply, that when we continue to use reason in instances when it "doesn't seem to help, . . .[that] what is called 'reason' soon turns into something that can be positively unhelpful: an elaborate form or rationalization."[37] Mired in complexity and rationalizing beyond its limits, the law, to Campos, no longer exists and it takes on a mythical quality. The law is, for example, like a unicorn and something we know does not exist. We nonetheless refer to it and discuss its attributes just as though it did exist.[38] Ironically, under the circumstances, the only "rational" thing to do is to come up with more law.[39]

In summation, what Campos gives us is a view of how the law works through his efficient process theory and how at least some of that law reaches legal equilibrium zones. From there, he takes us through what these concepts mean and why they do not work in rational ways. At this juncture, Professor Campos goes a bit further with his critique. What is ultimately at issue and worthy of consideration is not merely the law. Even

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32. *Id*. at 91.
33. *Id*.
34. *Id*. at 92.
35. *Id*. at 95. This is not a terribly unique idea and others have stated it, although in a somewhat different context. *See, e.g.*, HAROLD E. PEPINSKY, CRIME AND CONFLICT, 13-24 (1975). *See also* BROWN, *supra* note 12, at 10-22.
36. CAMPOS, *supra* note 1, at 95. *See* ROTHWAX, *supra* note 14, at 41-64; BROWN, *supra* note 12, at 30.
37. CAMPOS, *supra* note 1, at 98.
38. *Id*. at 104-21, 141.
39. *Id*. at 122-29.

though Campos obviously believes that the law plays a key, deterministic[40] role, he also believes that there is much more at work.

Again, the law fails to address what are intractable and fundamentally moral questions. As a consequence, "the modern law student is taught, either directly or by implication, that when the formal materials are indeterminate the outcome of a legal matter should be determined by the best policy . . . ."[41] When this happens, "the student is also trained to believe that the content of this policy can and should be determined through the proper use of legal reasoning."[42] Additionally, "this instrumental use of reason is supposed to achieve a level of scientific rigor; hence the contemporary conception of law as a kind of 'scientific policy making.'"[43] The law, however, as science or "[t]he reconceptualization of law as policy science is just one example of a more general trend" and "merely a prominent instance of how the cultural prestige of what is called the 'scientific'–that is, the materialist–world-view has come to play a crucial role in producing a kind of rational addiction . . . ."[44]

In the final analysis, after looking at how law operates, or fails to operate, and what this may mean on a deeper level, one would expect *Jurismania* to provide prescriptive guidance. Unfortunately, Professor Campos offers us very little in this regard. He even remarks that it is not his point to open up with solutions because that would be to commit the same sort of flawed overgeneralization and rationalization that is already taking place.[45] Still, he does offer at least some, minimal insight.

First, citing to the work of other scholars, Campos notes that it takes more than reason alone to change people's opinions on issues such as abortion.[46] As palpable as that notion is, Campos believes that "[t]he experiential and emotive side of the abortion question is just as ineluctably tangled as its rationalist and axiomatic cousin."[47] To Campos, the point we need to reach is one where we recognize that legalistic reasoning does not

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40. Professor Campos believes that the "Critical Legal Studies Movement's" point that "law is politics" must be considered. As to the Critical Legal Studies Movement, he finds that it held that law was ultimately referable to certain political considerations. *Id.* at 38-39. To Campos, though, the converse is just as plausible. In other words, "politics is law" and "political power is legitimate only to the extent [its] power is channeled through legal procedures, vocabularies and modes of thought . . . ." *Id.* at 39.

41. *Id.* at 136.

42. *Id.*

43. *Id.*

44. *Id.* at 136-37.

have to permeate and that it does not have to "be replicated in all other areas of social life."[48] More importantly, we should recognize the fallacy of "the widespread delusion that something called 'the rule of law' can succeed where politics and culture fail."[49]

These, then, are some of the major propositions brought out in *Jurismania*. At first blush, one might conclude that *Jurismania* amounts to a call for anarchy. Campos anticipates this claim, however, and denies it.[50] Notwithstanding his protests to the contrary, to the extent that the book tends to argue for less law, the anarchic label is apt to stick.[51] On the other hand, to accept that we suffer from juridicial saturation is to accept that our system is already anarchic.[52] A reader could also conclude that *Jurismania* is a treatise that argues against reason. On this point too, Campos anticipates his critics by stating that "this book . . . has also not argued against 'reason,' whatever that word might be thought to mean."[53] His argument is, of course, that reason simply has its practical limits.[54]

If nothing else were to be said about *Jurismania*, it is certainly full of provocative thought. It is, nonetheless, worth considering more specifically the implications of its major points. For the most part, it is difficult

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45. *Id*. at 188-89. In at least one passage, Professor Campos does, however, offer the following specific prescriptive idea:

> [I]magine a system of criminal trials in which juries were seated by picking the first twelve people in the pool who did not know the defendant or the victim. Imagine a system in which witnesses could say what they had to say in their own words, without constant interruptions for evidentiary rulings by control-obsessed advocates and decision-makers. Imagine a system where these advocates played a relatively minor, facilitating role in the proceedings. . . . Finally, picture a system of criminal justice where mixed panels of legal professionals and lay judges would engage in a pragmatic, mostly nontechnical dialogue in the course of deciding the fate of the defendant.

Id. at 23.

46. *Id*. at 160-61.

47. *Id*. at 162.

48. *Id*. at 176.

49. *Id*. at 181.

50. *Id*. at 178.

51. *See, e.g.*, George Woodcock, *Anarchism*, *in* 1 THE ENCYCLOPEDIA OF PHILOSOPHY 111 (1967).

52. *See, e.g.*, BROWN, *supra* note 12, at 173.

53. CAMPOS, *supra* note 1, at 185.

54. *Id*. at 185-86.

to dispute some of its fundamental notions. In fact, it is difficult to say that they are anything other than compelling. It is easy to conclude, in specific instances, that Professor Campos' primary ideas are appropriately descriptive. At least three "close to home" examples of this applicability come to mind.

Consider first the Lautenberg Amendment[55] to the Gun Control Act of 1968.[56] Basically, the Lautenberg Amendment makes it a felony for a person to possess a firearm after having previously suffered a conviction for misdemeanor domestic violence. On its face, this law seeks to prevent those who have committed crimes of domestic violence from having access to guns that they might use to commit further, and possibly more serious acts of violence. The military faces a great deal of challenge with this law because it loses its context and since it is, for example, of little rational value at a remote firing range.

Notwithstanding these types of immediate concerns, this law brings to the fore a deeper point. What is really at issue is whether the solution for domestic violence entails assigning another law to the books. No one would quibble with the notion that domestic violence is bad. As voters it is also comforting to know that our elected officials have, in some way, sought to address the problem. The greater issue, though, is whether the law really works to solve anything or whether it merely adds complexity and uncertainty to our existence.[57]

Next, as ethics counselors, military attorneys should think of the Office of Government Ethics Standard Form 278. Certain agency personnel must file this form on an annual basis.[58] On its face, the form is simple enough in design. It has one-page and only four attendant schedules that may or may not be used depending on the circumstances. Even though the instructions total eleven pages, they are quite straightforward. One's initial impression, after perusing the form and after reading the instructions, is that there is not a whole lot to the form. As it turns out, there is an entire manual,[59] totaling 336 pages, designed to assist reviewers and agency ethics counselors. This is not to say that this manual is bad or that it has no

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55. Pub. L. No. 104-208, Sec. 658, 110 Stat. 3009-371 (1996).

56. Pub. L. No. 90-351, Sec. 902, 82 Stat. 226 (1968) (codified beginning at 18 U.S.C. Sec. 921).

57. *See* CAMPOS, *supra* note 1, at 122-25 (providing a similar discussion concerning the addition of legislation to fight the war on already illegal drugs).

58. 5 C.F.R. Sec. 2634.101 (1998). *See* DEP'T OF DEFENSE REG. 5500.7-R, JOINT ETHICS REGULATION, para. 7-200a, para. 7-203 (30 Aug. 1993).

value or that it is poorly written. It is also not to say that it constitutes the law. More simply, however, the manual can serve to draw our attention to the complexity of something that does not appear at first to be so complicated.

In this area, it has to be asked whether we have gone too far. If we continue to stretch our ethical requirements, to include detailing financial disclosure statements, are we actually defeating ourselves? When we add enormous detail, will the audience of those whose conduct we wish to guide fail to understand the message we are trying to impart? Is it even possible to miss primary goals such as revealing conflicts of interest? On a broader scale, the study of and adherence to ethical principles is meant to result in and bring about a normative good. If those ethical principles are mired in complexity and divorced from their meta-ethical foundation, they become, in the end, unknowable and of little value.

As officers, and not just judge advocates, we can also relate to Professor Campos' message that our society has become accustomed not only to a bureaucratic mindset but also to a legalistic approach to problem solving. The Army publishes, beyond its regulations, a good number of pamphlets, field manuals, training circulars, messages, orders and the like. These documents are, for the most part, structured and worded very similarly to the regulations. In general, they start with a broad purpose and then provide more exacting detail. What is amazing though, is the level of detail involved. Consider as well that in some instances, the manuals have the same force and implications as the regulations. In *Army Field Manual 21-20*,[60] we find scripted directions on how to conduct the Army physical fitness test. The test is made mandatory by *Army Regulation 350-41*.[61] Thus, the field manual, when read together with the regulation, becomes a part of our regulatory law.

On a broader, philosophical plane, *Jurismania* may provide us with some insight, but what it really does is cause us to think. We should reply to Professor Campos and we should consider that our system works, in at least one subtle way, through a studied absence of rule making. In doing so it still leaves the doors to uncertainty open even as discretion is taken away. As to this, we should take note of the loosely defined doctrine of

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59. U.S. OFFICE OF GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE: A REVIEWER'S REFERENCE (1996).

60. U.S. DEP'T. OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING (30 Sept. 1992).

61. U.S. DEP'T. OF ARMY, REG. 350-41, TRAINING IN UNITS para. 9-8 (19 Apr. 1993).

justiciability. Under this general notion, controversies that do not flow directly from the facts of record, but that do flow, as a matter of logic, will be left undecided. These residual controversies are left open to be considered at another time. With this thought in mind, note that the law and our legal institutions are left in a situation where more questioning, searching, and lawmaking become necessary. Thus, even though continual rule making can result in more discretion, an absence of rule making–the decision not to decide–can work in the same way.[62] Justiciability is a doctrine of restraint. Yet it is, at one and the same time, a doctrine that invites the onset of uncertainty and continued rule making.[63]

Discussing further *Jurismania*'s broader meaning, at least two criticisms are possible. First, Campos' principle assertion is that only a certain category of case resides within an equilibrium zone and it is the moral nature of the issue that creates the tension that moves the case to equilibrium. Further, he is primarily concerned with appellate cases.[64] The reader must think that he considers all other types of cases frivolous since he says, "almost all nonfrivolous appellate court cases are litigated within what are both broadly social and narrowly legal equilibrium zones."[65] Apparently all other appellate cases are frivolous because they were tried despite the possibility that they could have been resolved without resort to the legal system or without resort to formal processing. This would apparently include, but not solely, those disputes that would be absolutely frivolous and distinct from those disputes that our law would not recognize as inherently cognizable.[66]

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62. Professor Campos does remark on our system's dialectical quality. CAMPOS, *supra* note 1, at 88-89. In fact, this "dialectical pattern, whereby a seemingly certain rule is eroded by the gradual accretion of standard-like exceptions to its application, until the increasing amorphousness of the exception produces a rule-like counterreaction, is probably an inevitable feature of any elaborate dispute processing system." *Id*. at 89.

63. As Professor Campos notes, "[i]n the actual practice of law new appellate court opinions redefine equilibrium zones, making some claims now 'obviously' right or wrong and creating fresh areas of ambiguity in the process." *Id*. at 77.

64. *See id*. at 58.

65. *Id*. at 96.

66. This may be an alternate interpretation of what Campos means by "frivolous." On the other hand, given the entire character of his argument it is not believed that he means to relegate to the category of "frivolous" only that category of case lacking objective veracity or legal efficacy. As he says, "the frivolous case isn't the case that isn't worth thinking about, but rather the opposite." *Id*. at 69. Thus, it would be dubious to expect that he means by "frivolous" merely those cases that go forward despite an apparent Rule 11 of 12(b)6) problem; that is, cases filed for an unwarranted purpose and those which fail to state a cause of action upon which relief may be granted. *See* FED. R. CIV. P. 11, 12(b)(6).

As a criticism, this view of what is a legal equilibrium zone is not complete. To follow through with what is really meant by the idea of a legal equilibrium zone is to conclude that all litigated cases do, in some way, or at some level, reach an equilibrium zone. Imagine a hypothetical case of a defendant charged with a minor felony. Next, consider that this defendant was previously convicted for other felonies and if convicted he will likely spend some time in prison. Let us assume too that the state's evidence is quite overwhelming and convincing, but that the defendant will not agree to a plea bargain with the state. Again, to Professor Campos this matter does not really reach an equilibrium zone. Even if the defendant knows that his defense will fall short, when he pleads "not guilty," he is saying, in a very basic ethical sense, that "It is not *good* for you to put me behind bars." The state is saying in response: "It is a *good* thing to place you behind bars."

Even when the facts change and the state's evidence is less compelling, the fundamental ethical dialogue remains. The defendant, who fails to take full note of the state's evidence, will, even when convicted, still hold to his viewpoint as frivolous as it may be. As surely as the opposing sides of the abortion controversy have irreconcilable viewpoints, so too do the defendant and the State in just about any contested case.[67] Consequently, the point is that Professor Campos should have accounted for this implicit dialogue. He should have tasked the paradigm that is his legal equilibrium zone and efficient process theory more fully. He has either missed or failed to clearly elaborate on an inherently valuable insight about our legal system.[68]

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67. Another way to describe this point is to consider that equilibrium is reached through three layers. First, even a defendant who faces overwhelming evidence, but who chooses to defend, will do so by employing any defense available. Although it might boarder on the specious, a defendant faced with a charge of shoplifting might respond that he was arrested without probable cause. Once that claim is dispatched, the case goes forward on the merits and the state presents its evidence that is convincing beyond a reasonable doubt. When that second layer of dispute is peeled away, the case is still left in fundamental equilibrium. That is, the tension between the defendant's rudimentary desires is never reconciled with that of the state's. He still does not want to go to prison and the state still wishes to send him there. The only real difference between the obstinate criminal defendant and the loser in an abortion case is that the criminal defendant's case involves solely his own personal desires that are not a broadly social issue.

68. Professor Campos does offer a couple of reasons for why cases get litigated when they should not be litigated. In both instances he finds, nonetheless, that the rationales are faulty. In any event, the reasons offered are likewise not fundamental social, ethical or moral concerns. *See* CAMPOS, *supra* note 1, at 66-67.

Finally, *Jurismania* is a book that suffers itself from a strain of the same infection that is said to permeate our law, society, and life. As to this, the reader has to object to its lack of prescriptive guidance. Again, Campos believes that our society fails to have "widely held axiomatic moral agreement."[69] If our society is truly in such a state and if "[t]he experential and emotive side of [questions such as] the abortion question" are "ineluctably tangled,"[70] then we are certainly mired in a vicious cycle. This is not to say that Professor Campos' argument is illogical. Instead, this line of thought should be further considered and developed. The problem is that if we agree that the capability of our legal system to reason through certain issues is limited, then the capability of other potential processes should not be so quickly overlooked. The alternate conclusion–that our legal system is fully capable of processing disputes with moral implications–is, despite *Jurismania*'s line of argument, equally plausible. Thus, to the extent that the author goes beyond his points that the law is logically dissonant and that we are overly regulated; he tends himself to hit some strange notes.

In summation, Professor Campos tells us that *Jurismania* is for "the general reader."[71] As many of the quotes from the work reveal, it is dubious that *Jurismania* will actually reach a broad audience. In fact, it makes for rather challenging reading. Nonetheless, whether or not one agrees with the arguments and insight that *Jurismania* brings out, the reader cannot dispute that it is a book that causes us to look at many of our juridical and philosophical notions in a new way. *Jurismania* will, at the very least, provide cause for serious reflection. It will hopefully, in a more ultimate way, serve to bring about more objective debate and discussion.

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69. *See supra* note 33 and accompanying text.
70. *See supra* note 47 and accompanying text.
71. CAMPOS, *supra* note 1, at vii.