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MILITARY LAW REVIEW

Volume 164 **June 2000**

WHERE THERE'S SMOKE . . . WHO SHOULD BEAR THE BURDEN WHEN A COMPETING CONTRACTOR HIRES FORMER GOVERNMENT EMPLOYEES?

LIEUTENANT COLONEL RICHARD B. O'KEEFFE, JR.[1]

The federal government's procurement system should be protected from both the corrupting influence of actual impropriety, and the corrosive effects of procurements tainted by the appearance of impropriety.

The current rules governing the hiring of a former government employee who, while he was in government service, had official duties involving a requirement satisfied by procurement through a contract, by a firm competing for award of such contract, do not adequately protect the integrity of the government procurement system, or the interests of other contractors.

The rules should recognize the full scope of government duties relating to a requirement that could confer an unfair competitive advantage upon the contractor employing a former government

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employee, and they should impose the burden of establishing the propriety of the hiring decision and duty assignment with regard to the former government employee primarily upon the contractor who hired him. Such a regime would best harmonize the government's interests in integrity, mission accomplishment, and competition.

I. Statement of the Problem

"Few men have virtue to withstand the highest bidder."

— George Washington[2]

Federal Acquisition Regulation (FAR) 3.101-1 General. Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. *The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government - contractor relationships*. While many Federal laws and regulations place restrictions on the actions of Government personnel, *their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.*[3]

A. An Illustration of the Problem: Timely as Today's Headlines

Energy Official Followed Line to Contractor, Insists He Didn't Cross It

When Thomas P. Grumbly was named an assistant secretary of energy in early 1993, he wanted quick results in the cleanup of the Cold War nuclear weapons facility at Rocky Flats, Colo. He presided over the award of the $3.5 billion contract.

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2. George Washington *quoted in* JOHN F. SCHROEDER, MAXIMS OF WASHINGTON: POLITICAL, SOCIAL, MORAL, AND RELIGIOUS 312 (1855).

3. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 3.101-1 (June 1997) [hereinafter FAR] (emphasis added).

> Today, Grumbly wears a different hat. Two years after the Rocky Flats contract was awarded, Grumbly announced that he would join ICF Kaiser International Inc., a partner in the joint venture that won the job. Federal ethics laws prohibit him from dealing directly with the Energy Department. But nothing in the rules restricts Grumbly in his current role: attending quarterly meetings of the joint venture and advising it on how to deal with his former employer on the Rocky Flats project.
>
> The hiring of Grumbly, a high-level political appointee, by ICF Kaiser, a company headed by a major Democratic fund-raiser, illustrates how a handful of huge engineering firms used every means at their disposal after 1993 to cultivate closer ties to the Clinton administration as they fought for a share of a huge new pot of federal dollars: $6 billion a year in contracts to clean up the nation's bomb-making facilities.[4]

B. What's the Problem?

Why does the circumstance of a former senior government official accepting employment by the awardee of a contract with which he was involved while in public service have the power to raise doubt regarding the former public servant's propriety, and generate sensational headlines?[5] Are the rules enacted to avoid impropriety and the appearance of impropriety unfair to persons leaving government service, and corrosive of the government's position in the market for the most highly qualified personnel?[6]

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4. Dan Morgan & David B. Ottoway, *Energy Official Followed Line to Contractor, Insists He Didn't Cross It*, WASH. POST, Dec. 12, 1997, at A12.

5. The "revolving door" is a pervasive and invidious metaphor applied to a wide variety of situations in American society and culture. For example, a 19 February 1998 LEXIS-NEXIS search of the *New York Times* database (NY;NYT, no date restriction) using the search request "revolving door," yielded 1108 stories employing the term. Searching the *Washington Post* (NEWS;WPOST) and *Wall Street Journal* (NEWS;WSJ) databases under the same circumstances yielded 1147 and 24 stories, respectively. A random survey of the results (every 75th story) disclosed an overwhelmingly sinister connotation associated with the term (e.g., referring to the suspicious or corrupt activities of lawyers, lobbyists, politicians, career criminals, health maintenance organizations, etc.). The most benign circumstances associated with the revolving door were contained in articles critical of the stability of professional sports teams' rosters or coaching tenure.

6. Concerns regarding the adverse effect of revolving door rules comes both from within and from outside of the government. *See* H.R. REP. NO. 115, 96th Cong. 1st Sess. 1979, *reprinted in* 1979 U.S.C.C.A.N. 328 (discussing the purportedly over-broad scope of

6. (continued) the principal revolving door statute: 18 U.S.C. § 207). Deputy Secretary of Defense Charles W. Duncan testified,

> The problems in the act have created an atmosphere in which senior government officials believe they must reevaluate whether they want to remain in government employment. The bill, in its present form, sweeps so broadly that it creates a basic uncertainty as to a senior government employee's capability to earn a living after leaving the government. The ability to earn a living and optimism about the future are so basic to job satisfaction that we simply cannot deal with the turmoil created when these fundamental factors are undermined. The Department of Defense relies heavily on a large group of talented scientists, engineers, and technical managers to carry out its mission.We cannot maintain the technological advantage that this nation now enjoys in its national defense without these people. We believe strongly that movement back and forth from private industry to government service is valuable to people in systems management and scientific and technical fields and that it is valuable to the department of defense. If this opportunity did not exist, we would quickly *see* the best minds move out of the government permanently and we would also find that promising young talent would move into nondefense fields where there were no such restrictions on their future professional development. We would also find ourselves stagnating as a permanent cadre of civil servants faced no fresh competition or infusion of energy from outsiders.

Id.

Evidently Deputy Secretary Duncan's concerns were not adequately addressed by the changes to 18 U.S.C. § 207 under consideration in 1979, at least in the opinion of some in the defense industry. *See* American Institute of Aeronautics and Astronautics (AIAA), *Procurement Integrity and the Revolving Door, November 1989* (visited Apr. 6, 2000) <http://www.aiaa.org/policy/papers/revolving-door.html>. Commenting on efforts then underway by Congress to control revolving door problems through the Procurement Integrity Act, 41 U.S.C. § 423, the AIAA paper intoned,

> There are myriad post-employment ("revolving door") statutes whose cumulative impact is also deadly. The latest is Public Law 100-679, which took effect in July of 1989. Adding restriction upon restriction has resulted in overwhelming, ambiguous, and vague guidelines and has merely served to confuse those most affected. The appearance of conflict of interest, rather than the fact, has now become the target of such measures. Senior government acquisition officials are unsure of how the new restrictions will affect them after they depart. The fear that their official actions may be misinterpreted later can inhibit their decision-making and slow the acquisition process. For those talented people asked to contribute in crucial government roles, the drawbacks of serving outweigh the incentives. The net result is that Congress has unnecessarily narrowed the field of good candidates.

Id.

Are the rules adequate to protect the integrity of the federal procurement system? Is there enforcement of FAR 3.101, which states that "[t]he general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships"?[7] Before examining these issues, consider the following hypothetical scenario.

1. The Setting

ABC Corporation, an experienced government contractor in the field of environmental remediation, just lost the competition for a $35,000,000 Army contract to perform the cleanup of the now defunct Toxic Gulch Ammunition Depot, in Badwater, Nevada. Two days following the announcement of contract award, ABC learns that the winner of the contract, Green Services, Inc., had employed a former Army employee who, while employed for the government, had been the contracting officer's representative for the predecessor remediation contractor. At ABC's debriefing, its general counsel (GC) asked the procuring contracting officer (PCO) about the former employee. The PCO assured the GC that the PCO had been fully aware that the former employee was hired by Green Services; that the former employee, an environmental engineer, had retired from government service, the Army, over fourteen months ago, and had taken only a limited role in the procurement while in the government's employ; that he would personally vouch for the honesty and integrity of the former employee (the PCO had worked with him for nearly ten years); and, that Green Services had reportedly not detailed the former employee to assist in preparing its proposal.

Upon returning to his office, the GC and the chief of the proposal preparation team discussed the matter. ABC's proposal, the GC was told, was very competitive in price with that of Green Services, but had been downgraded by government evaluators for a perceived lack of understanding of the requirement and other supposed technical deficiencies. The proposal team chief, however, stated that they could not evaluate whether the former employee had somehow given Green Services an unfair competitive advantage, without obtaining a great deal of additional information, including access to the Green Services proposal preparation team members.

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7. *See* FAR, *supra* note 3, at 3.101.

The GC researched bid protest cases in which a former government employee went to work for a successful offeror on a government contract with which he had been officially involved in some way while employed by the government. The results of his research were discouraging. Of the several dozen GAO cases fitting into this broad fact situation over the past decade, the GC found that the rate at which protests were sustained on procurement integrity or conflict of interest grounds was far beneath the overall sustain rate. The GAO employed a variety of ways to uphold contracting officers' decisions to award contracts to firms that had hired former government employees with official duties relating to contracts or procurements in which they had a competitive interest.

Researching bid protests in the courts yielded a smaller number of cases, but an apparently more sympathetic forum, based upon the rates at which revolving door protests were sustained. Nevertheless, the sample was too small, the decisions often confusing or difficult to reconcile, and the costs of federal court litigation too high, for the GC to recommend a judicial bid protest, especially when ABC did not have the kind of "hard facts" evidence of a violation of the procurement integrity and "revolving door" laws and regulations.

Further, those laws and regulations lacked clarity and precision, and covered a limited spectrum of post-government employment conduct. Moreover, even if a violation may have occurred, ABC, in order to prevail in a protest, would have to demonstrate that Green Services gained an "unfair competitive advantage" through its hiring of the former government employee—a nearly impossible burden in view of the limited discovery available before the GAO. In addition, the PCO had become increasingly reluctant to discuss the issue during the GC's conversation with him, and finally terminated the call by indicating that he wanted to consult with his lawyer before discussing the matter further. The GC's attempts to learn more by talking to other friends in the contracting activity were completely unavailing, as people either claimed poor memories, or simply refused to discuss the issue.

It appeared to the GC that it would be impracticable to get the specific facts from which a valid assessment of the competitive effects of Green Services' hiring of the former government employee could be made, especially given the short period during which an automatic stay could be obtained. In view of this circumstance and the protester's burden in such cases, the GC concluded that a protest should not be undertaken.

The GC met with the proposal team chief and the company CEO to discuss the matter, and presented the results of his research and analysis, recommending that they not protest the award to Green Services. The CEO was upset that there was no means of addressing what he believed was an injustice. In the end, the CEO saw the wisdom of just moving on to the next project. He did, however, resolve that, before the next important competition, they would hire their own government employee, and maybe things would be different.

The essence of the above scenario is a fair depiction of events in a significant number of cases.[8] The specific situation, which is the subject of this article, is one in which a non-clerical federal employee leaves government service and accepts employment of some type with a contractor. The contractor is competing for a contract to be awarded to fulfill a requirement with which the former government employee had substantial involvement while in public service, either in the instant procurement or in the administration of a predecessor contract (the "FGE case" scenario).[9]

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8. The author's views are informed by study of the nearly 80 revolving door bid protest cases extant, and five years' experience with and substantial participation in government procurement, as an attorney-advisor, at two Department of Defense contracting activities, including two years as a Deputy Ethics Counselor appointed pursuant to the Department of Defense Joint Ethics Regulation. *See* DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (JER) (30 Aug. 1993) [hereinafter JER].

9. Although beyond the scope of this article, other related revolving door and conflict of interest scenarios, such as when a former contractor employee enters government service, or when a current government employee is related in some way to a competing contractor, may assist in understanding the way in which protest fora have decided these cases. Agencies and the General Accounting Office, however, appear to be more sensitive to improprieties in such situations. *See, e.g.*, Applied Resources Corp., B-249258, Oct. 22, 1992, 92-2 CPD ¶ 272 (sustaining a protest where awardee's president was married to the contracting officer's supervisor); Childers Serv. Ctr., B-246210.3, June 17, 1992, 92-1 CPD ¶ 524 (upholding termination for convenience in a case where the husband of alternate contracting officer's representative for a predecessor contract was hired by the awardee); Huynh Serv. Co., B-242297.2, June 12, 1991, 91-1 CPD ¶ 562 (upholding termination for convenience where the husband of awardee/protester's president was a former employee of a competitor; the husband, while employed by the competitor, had assisted in the preparation of the competitor's bid; awardee's bid was just barely lower than that of the competitor).

2. So What?

(a) A Statistical Disparity

The FGE case scenario has been the subject of at least sixty-six protests litigated before the GAO since 1976.[10] The rate at which such protests (against awards to contractors that have employed such former government employees) have been sustained is more than seventy-five percent below the overall sustain rate.[11] This circumstance is ground for concern and closer scrutiny. Admittedly, it would be unreasonable to demand perfect congruity among the sustain rates for all protest grounds

10. *See infra* Appendix A. In addition, these cases decided by the courts and by the General Services Board of Contract Appeals (GSBCA), though far fewer in number, will be considered and analyzed as appropriate.

11. Revolving door protests are sustained by the General Accounting Office at a rate of about 3% (2/66), whereas the annual rate for all General Accounting Office protests has fluctuated between 9% and 16% from 1987 through November 1999. The ten-year average is 14%. Sustain rates were calculated based upon searches conducted in the WESTLAW WESTMATE 6.3 (Law School Edition), CG database, using the search requests: "WE SUSTAIN THE PROTEST" & DA(AFT 1/1/19XX & BEF 12/31/19XX), and "WE DENY THE PROTEST" & DA(AFT 1/1/19XX & BEF 12/31/19XX), for the years 1987 through 1996. The results reflected below appear to track with a longstanding trend in sustain rates in the middle to upper teens percentages. *Competition In Contracting Act of 1984: Hearings Before A Subcomm. of the Comm. on Government Operations*, 98th Cong. 42 (1984) (testimony of Hon. Charles A. Bowsher Comptroller General of the United States) (noting a 15% sustain rate for years 1981-1984).

General Accounting Office Bid Protest Results 1987-1999

Year	Sustained	Denied	Total	%Sustained
1987	106	544	Total	0.16
1988	78	541	650	0.13
1989	75	597	619	0.13
1990	109	581	672	0.16
1991	95	504	690	0.16
1992	98	573	599	0.15
1993	77	521	671	0.15
1994	50	477	598	0.09
1995	55	451	527	0.11
1996	56	357	506	0.14
1997	6	200	413	0.03
1998	31	176	206	0.18
1999	17	89	207	0.19
Total	**853**	**5611**	**6464**	**0.15**

on pain of condemning such inequality as evidence of sinister motives. Nevertheless, the General Accounting Office's sustain rate has remained remarkably consistent over 6000 randomly reviewed cases throughout a thirteen-year period, and the number of FGE cases is substantial and apparently significant.[12] What legitimate reason could explain this difference?

(b) Possible Explanations

There appear to be two primary alternative explanations for this disparity.

Explanation Number One: The rules are sufficiently responsive to the reasonable expectations of the public regarding the conduct of former government employees, and they are properly interpreted and applied by the protest fora. Protesters who challenge the award of contracts to such businesses are irrationally willing to squander substantial resources in obviously futile litigation. The protest fora cannot do otherwise than to repeatedly dash such quixotic protests.

Explanation Number Two: Perhaps, however, the rules do *not* address the range of conduct that should be proscribed to avoid impropriety and the appearance of impropriety. Further, perhaps bid protest proce-

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12. Economist and mathematician Mary M. O'Keeffe analyzed a portion of these outcomes and found the results very significant indeed. She wrote:

> As a general rule of thumb, statisticians consider a discrepancy to be "statistically significant" if there is a less than 5% chance that such a discrepancy could have arisen by chance. The "revolving door" sample easily meets this criterion.
>
> Given the population probability of 13.34% derived from your overall dataset, there is less than a 1% chance that you would observe as few as two cases sustained in a sample of 66. Thus statisticians consider the "revolving door" subsample to be significantly different from the overall population of protests. To be precise, the chances that no more than 2 out of 66 cases would be sustained in a random sample drawn from the overall population is 0.00900617 [.9%].
>
> Thus it is very unlikely that the 66 case "revolving door" subsample is different from the overall sample as a mere artifact of chance.

Electronic Correspondence from Mary O'Keeffe, Ph.D., to LTC Richard B. O'Keeffe, subject: It is Indeed a Highly Significant Difference (May 31, 1998) (on file with author).

dural rules do not place the burden of explaining such impropriety or appearance of impropriety on the parties in the best position to do so, namely, the agency, the former government employee, and the contractor that hired him. Finally, perhaps the shortcomings of these procedural and substantive rules have encouraged the protest fora to adjudicate revolving door protests in a significantly less rigorous manner, legally and intellectually, than they decide and explain protests in general.

This article argues that the latter explanation better describes the reasons for the disparate treatment of revolving door protests, and that this circumstance is a problem. It is reasonable to observe that, when confronted with a disparity in results of the magnitude that presents itself in this case, the burden for identifying a benign reason for the disparity should fall upon those advocating the status quo. A more compelling and substantive argument, however, is that successful enterprises do not remain in business by wasting money on vain efforts to seek redress for wrongs that the law clearly does not recognize. Yet why do disappointed bidders continue to protest even in the face of such odds? There may well be other classes of protest grounds that suffer results as discouraging as the revolving door.[13] There is, however, probably no other protest ground subject to such a unique collection of obstacles to full and fair adjudication and vindication. To begin the inquiry into the reasons and character for the marked relative lack of success of revolving door protests, potential sources of disparity must be sought.

(c) Sources of Disparity

Several factors depress sustain rates in FGE cases. First, the rules governing post-government service employment, although greatly simplified by the Federal Acquisition Reform Act of 1996 (FARA),[14] have in the

13. Protests of best value procurements likewise have very low sustain rates. Carl J. Peckinpaugh & Joseph M. Goldstein, *Best Value Source Selection—Contracting For Value, Or Unfettered Agency Discretion?*, 22 PUB. CONT. L.J. 275, 277 (1993) ("GSBCA and the GAO have deferred to the virtually complete discretion of an agency to pay immense cost premiums for higher technical ratings, or to award to a lower rated, lower priced offeror notwithstanding the solicitation's emphasis on technical considerations over cost.") However, as will be discussed, *infra*, Section I.B.2.(d), revolving door protests are different.

14. Pub. L. No. 104-106 §§ 4000-4402, 110 Stat. 186, 642-679 [hereinafter FARA]. *See* Frederick M. Levy et al., *A Contractor's Guide to Hiring Government Employees*, FEDERAL PUBLICATIONS BRIEFING PAPERS (Second Series), No. 96-8, (July 1996). "Among other

past been viewed as inconsistent and confusing.[15] This lack of clarity could in turn lead to faulty analysis and resolution of revolving door protests. The FARA reforms, moreover, were not directed at the problem central to this article, but rather were focused on freeing the government from burdensome rules, rather than on addressing the apparent anomaly of results in revolving door bid protest cases.[16] There are still issues regarding coverage, (arguably a common defect in any rule that attempts to balance and harmonize vigorously competing interests). The most significant limitation, however, is the lack of a prescribed civil or administrative remedy for violations of the rules, and a standard to guide agencies and the protest fora regarding the circumstances under which violations should result in remedial action.

Into this vacuum has flowed, from the closely related field of organizational conflicts of interest,[17] the concept of unfair competitive advan-

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14. (continued) reform measures, FARA significantly revised the OFPP Act § 27 procurement integrity provisions, eliminates most certification requirements, and imposes uniform restrictions on post-government employment. Some of the FARA changes became effective immediately when the law was signed on February 10, 1996." *Id.*

15. *See* Kathryn Stone, *The Twilight Zone: Post-Government Employment Restrictions Affecting Retired and Former Department of Defense Personnel*, 142 MIL. L. REV. 67, 68 (1993) (noting that the conflict of interest laws are "obscure, confusing, overlapping, often unnecessary, and difficult to explain"); *see also* United States v. Nofziger, 878 F.2d 442, 445 (D.C. Cir. 1989) ("[W]e are dealing with a statute [the Ethics in Government Act, 18 U.S.C. § 207] that is hardly a model of clarity.").

16. President Clinton, upon signing the FARA, stated:

> And this legislation makes important strides in the area of procurement reform, which will help produce a better-equipped military for less money. The legislation gives agencies enhanced authority and flexibility in their use of computers and telecommunications, while insisting on accountability. Consistent with the Administration's efforts under the National Performance Review to create a Government that works better and costs less, the Act encourages the purchase of commercially available goods and services, *to streamline and clarify procurement integrity laws*, and to substantially improve the process for resolving bid protests for information technology.

William J. Clinton, Statement by President William J. Clinton upon Signing S.1124, *reprinted in* 1996 U.S.C.C.A.N. 468-1 (emphasis added).

17. *See* 48 C.F.R. subpt. 9.5 (2000). Organizational conflict of interest rules (seeking to mitigate the unfair competitive effects of contractor incumbency or participation by a contractor in the development of a requirement, 48 C.F.R. § 9.502(c) (2000)), though closely related to the revolving door scenario, present distinct issues that are beyond the scope of this article. *See* Aetna Gov't Health Plans, Inc., B-254397.16, B-254397.17,

tage.[18] When conflicts of interest or procurement integrity rule violations have been found or suspected, the protest fora have typically required, in order to sustain the protest, that the procurement violations have *prejudiced* the protester by affording the proposed awardee an unfair competitive advantage.[19]

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17. (continued) B-254397.18, B-254397.19, July 27, 1995, 95-2 CPD ¶ 129 (describing the three types of situations in which organizational conflicts arise).

18. 48 C.F.R. § 9.505(b) (2000). The term, "unfair competitive advantage" has been defined by the Office of Federal Procurement Policy, as follows:

> An "unfair competitive advantage" exists, in addition to the situations addressed in FAR Subpart 9.5, where a contractor competing for award of any federal contract possesses
>
> (1) proprietary information that was obtained from a Government official without proper authorization, or
>
> (2) source selection information that is relevant to the contract but is not available to all competitors, and
>
> (3) such information would assist that contractor in obtaining the contract.

Office of Federal Procurement Policy, Policy Letter on Consultants and Conflicts of Interest: Invitation for Public Comment, 54 Fed. Reg. 51,805, 51,808 (1989). This definition applies to proprietary and source selection information. The decisions employing the unfair competitive advantage concept, however, as will be discussed in greater detail in Section III, tend to focus too heavily on source selection information (i.e., rankings of competing bids/offers, competing costs, etc.) to the prejudice of full and fair consideration of the competitive advantage afforded by proprietary information, learned during the course of performing contract administration functions, regarding other competitors.

19. Keco Indust., Inc. v. United States, 492 F.2d 1200 (1974); *see also* Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 ("Our general interest, within the confines of a bid protest, is to determine whether any action of the former Government employees may have resulted in prejudice for, or on behalf of the awardee during the award selection process."). *See also* Physician Corp. of America, B-270698.5, B-270698.7, Apr. 10, 1996, 96-1 CPD ¶ 198; Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

Prejudice is required for relief on any other type of protest ground before the General Accounting Office. The prejudice requirement, however, is itself subject to criticism. *See* Alexander J. Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 22 PUB. CONT. L.J. 636 (1993) ("The notion of allowing a federal agency to proceed with a procurement that fails to comply with applicable statutes and regulations on the grounds that no prejudice to other bidders occurred violates the express language of CICA."). *Id.* at 637.

Although imposing a heavy burden on protesters to demonstrate prejudice is the norm, there are reasons to believe that doing so in revolving door cases may suppress the discovery of all the facts necessary to fair, open, and just resolution of the issues in such cases. As in most protests, however, the government or the awardee in a revolving door protest enjoy superior knowledge of the material facts. Further, it is understandable in any case that obtaining evidence from competitors and adverse parties may be very difficult.[20]

Why should protesters in revolving door cases need special treatment? As recognized by the U.S. Supreme Court, in its 1961 decision in *Mississippi Valley Generating Co. v. United States*, to justify remedial action regarding a contract tainted by corrupt practices, there need not be any "actual loss" to the government.[21] Such precedent alone does not justify abolishing the prejudice requirement in revolving door bid protest

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20. *See* Centel Bus. Sys., VABCA No. 2079, 86-3 BCA ¶ 19,120 ("While it certainly would have been helpful to the Board to have had such additional evidence presented, we recognize the realities in the business world and the potential difficulties involved in obtaining favorable testimony from one's competitors."). In *Pinkerton Computer Consultants, Inc*., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694, the Comptroller General acknowledged the difficulty a revolving door protester may face, but asked us to take it on faith that all is well:

> We understand that Pinkerton was somewhat hindered in its attempt to show a conflict of interest, because some of the materials concerning the evaluation of proposals were withheld from it by NHTSA under Freedom of Information Act exemptions. However, we have examined the record of proposal evaluations and discussions, and we have discerned no evidence of bias in the award of this contract.

21. Mississippi Valley Generating Co. v. United States, 364 U.S. 520 (1961). In ruling that a federal employee had illegally acted in his official capacity while under a conflict of interest in violation of 18 U.S.C. § 434 (a precursor to the present 18 U.S.C. § 208) Chief Justice Warren, writing for the Supreme Court, stated:

> It is also significant, we think, that *the statute does not specify* as elements of the crime that there be actual corruption or *that there be any actual loss* suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, *regardless of whether there is positive corruption*. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor.

Mississippi Valley Generating Co., 364 U.S. at 549 (emphasis added).

cases. It does, however, acknowledge that ethical rules violations raise unique issues demanding different remedies.

(d) The Revolving Door is Different

A salient distinction in revolving door cases is that, unlike in "garden-variety" protests,[22] the specter of actual, intentional wrongdoing, the scent of scandal and dishonor, and ultimately, the threat of criminal prosecution, are ever-present just beneath the surface in revolving door cases. No one ever went to jail because he mistakenly evaluated a technical proposal, erroneously determined contractor responsibility, or incorrectly added up a cost proposal. For violations of revolving door statutes, however, people can and have been convicted and sentenced to substantial fines and to confinement.[23] Garden-variety protest grounds do not merit law enforcement investigation, yet criminal investigation is a common and sometimes a required response to revolving door allegations.[24]

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22. By the term "garden-variety," it is intended to refer to protests on grounds not implicating any party's honesty, integrity, or ethics. For example, challenges to the adequacy of discussions, to the makeup of the competitive range, or to the efficacy of the specifications, would be garden-variety protest grounds.

23. *See, e.g.*, United States v. Baird, 29 F.3d 647 (D.C. Cir. 1994); United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991); United States v. Hedges, 912 F.2d 1397 (11th Cir. 1990); United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989); United States v. Gleason, 39 M.J. 776 (A.C.M.R. 1994), *reversed* 43 M.J. 69 (1994); *see generally* James S. Roberts, Jr., *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343 (1992).

24. A random sampling of 565 General Accounting Office bid protest decisions over a twelve-year period disclosed no referrals to criminal law enforcement agencies for garden-variety procurement irregularities. Sampling was conducted WESTLAW WESTMATE 6.3 (Law School ed.) using the CG database and the search request "MATTER OF" (to isolate bid protests from other actions) & "DA(AFT 1/1/19XX & BEF 2/1/19XX)" for the years 1997, 1995, 1993, 1991, 1989, 1987, and 1985.

By contrast, of the approximately 80 revolving door/conflict of interest cases analyzed for this article, six protest decisions reported that criminal investigations were conducted into revolving door issues. IGIT, Inc., B-271823, Aug. 1, 1996, 96-2 CPD ¶ 51; General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196; Childers Serv. Ctr., B-246210.3, June 17, 1992, 92-1 CPD ¶ 524; Compliance Corp., B-239252, B-239252.3, Aug 15, 1990, 90-2 CPD ¶ 126; Holmes & Narver Servs., Inc./Morrison-Knudsen Servs., Inc. (JV); Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379; Chemonics Int'l Consulting Div., B-210426, Oct. 7, 1983, 83-2 CPD ¶ 426.

(e) How Does the "Difference Make a Difference"?

The stigma attached to revolving door violations manifests itself at several levels. It is likely that source selection officials, procuring contracting officers, and their counsel are more timid in addressing actual or apparent revolving door improprieties early on, when remedial action would be most effective and least disruptive to the parties and the process. This timidity may stem from a natural desire to avoid action that implies criminality, dishonesty, or, at a minimum, grossly bad judgment, on the part of former colleagues or contractors with whom the government decision-makers may have dealt for a long period of time. Further, such action, involving misconduct, rather than mere error or negligence, would tend to reflect especially adversely on the leadership and management abilities of the government decision-makers. In addition, unlike cases involving only garden-variety allegations, in conflict of interest cases, the agency is required to air its "dirty laundry" outside of agency and bid protest channels.[25] Finally, taking remedial action that explicitly or implicitly accuses others of criminal, or at least morally and legally ambiguous conduct, invites retaliation in kind by persons whose prior association puts them in an excellent position to do so.[26] The ancient Romans had an apposite saying: *"quid de quoque viro, et cui dicas, saepe caveto."*[27]

There are other factors, unrelated to the "seamy" side of the law implicated by the revolving door, which influence government decision-makers to draw unjustifiably benign conclusions with regard to the actions

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24. (continued) Further, under the Department of Defense Joint Ethics Regulation, ethics counselors who suspect that a violation of the Ethics in Government Act, *see infra* Section II.C.1., must report the matter to his component's criminal investigative commend. 32 C.F.R. § 84.38(B)(3)(i) (2000); *see* JER, *supra* note 8.

25. 5 C.F.R. § 2637.212(a)(2)(i) (2000) (noting that an agency is required to report substantiated information of violations of Ethics in Government Act, 18 U.S.C. § 207 (1994), to the Criminal Division, Department of Justice).

26. The adage, "when accused admit nothing, deny everything, and make counter-accusations," is ingrained in American culture and society, and it is very pertinent to this situation. *See, e.g.*, Graham v. Wyeth Lab., 760 F. Supp. 1410, 1420 (D. Kan. 1991). Tod Linberg, *Guilty is as Guilty Does*, WASH. TIMES, Mar. 11, 1998, at A19; Georgina Wroe, *Blake's Heaven on Golden Pond*, SCOTSMAN PUB. LTD, Mar. 8, 1998, at 18; Joe Giuliotti, *Sox All Wet on Coach's Demotion*, BOSTON HERALD, May 1, 1996, at 88.

27. "Take special care what you say of any man, and to whom it is said." Horace *quoted in* GEORGE MACDONALD FRASER, FLASHMAN AND THE ANGEL OF THE LORD 55 (1995)).

of former government employees and the contractors who employ them.[28] Nevertheless, the cloud of criminality that hangs over the revolving door applies powerful pressure in its own right upon government decision-makers. The results are that timely, effective remedial actions are not taken; and dubious decisions are made to overlook, justify, or minimize revolving door improprieties.

When such decisions are challenged in bid protests, it appears as if the protest fora are likewise influenced by revolving door stigma. The reluctance of the General Accounting Office[29] to deal with conflict of interests allegations is demonstrated by its repetition of the mantra: "conflict of interests allegations (primarily those involving the applicable criminal provisions) are not for us to deal with, they are a matter for the procuring agency and the Department of Justice."[30] As will be discussed in Section III of this article, this distaste for allegations involving possible criminal

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28. For example, as discussed in Section III, decisions by the protest fora requiring "hard facts" to support remedial measures such as disqualification also exert a powerful influence, depressing the likelihood that government decision makers will take strong action against firms employing former government employees. In addition, government decision-makers may also believe, quite sincerely *and correctly,* that the contractor that hired the former government employee offers the government the best value.

29. As the General Accounting Office has written the vast majority of the decisions in this field, its protest decisions are the main focus of this article. The decisions of the courts, especially the Federal Circuit, and the GSBCA, will be considered as they advance the understanding of the issues bearing on the problem.

30. *See, e.g.*, PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115; Physician Corp. of America, B-270698.5, B-270698.7, Apr. 10, 1996, 96-1 CPD ¶ 198; Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61; Cleveland Telecomm. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105; Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30; Science Pump Corp., B-255737, Mar. 25, 1994, 94-1 CPD ¶ 246; FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366; Central Texas College, B-245233.4, Jan. 29, 1992, 92-1 CPD ¶ 121; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132; MDT Corp., B-236903, Jan. 22, 1990, 90-1 CPD ¶ 81; Joseph L. De Clerk & Assoc., Inc.—Request for Reconsideration, B-233166.3, Apr. 6, 1989, 89-1 CPD ¶ 357; Mariah Assoc., Inc., B-231710, Oct. 17, 1988, 88-2 CPD ¶ 357; The Earth Tech. Corp., B-230980, Aug. 4, 1988, 88-2 CPD ¶ 113; Regional Envtl. Consultants—Reconsideration, B-223555.2, Apr. 21, 1987, 87-1 CPD ¶ 42; Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 87-1 CPD ¶ 254; Space Sys. Tech., Inc., B-220935, Nov. 6, 1985; Wall Colmonoy Corp., B-217631, Jan. 8, 1985, 85-1 CPD ¶ 27; D. J. Findley, Inc., B-213310.2, Nov. 30, 1984, 84-2 CPD ¶ 588; Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422; Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290; Sterling Medical Assoc., B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60; Bray Studios, Inc., B-207723, Oct. 27, 1982, 82-2 CPD ¶ 373; Polite Maintenance, Inc., B-194669, May 10, 1979, 79-1 CPD ¶ 335.

conduct appears to have several results: (1) unduly cursory review and analysis of the facts (and omission of essential facts from decisions), (2) uncritical acceptance of uncorroborated or lightly corroborated testimony by parties with obvious interests in the outcome, and (3) inability to discern relationships among the facts and the various protest grounds that

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30. (continued) It is also noteworthy that the General Accounting Office's robotic repetition of its policy against applying and interpreting the criminal conflict of interest laws has no statutory basis. To the contrary, the House Conference Report on legislation amending 31 U.S.C. § 35 (to strengthen General Accounting Office bid protest procedures), while acknowledging that the General Accounting Office's jurisdiction was not exclusive on all protest matters, did not designate conflicts of interest based upon violations of revolving door criminal statutes as matters outside its protest purview. "The Comptroller General is not given exclusive authority to hear protests. The conferees do not intend, for example, that the GAO decide matters dealing with the Small Business Administration's responsibilities under the Small Business Act to establish industry size standards or to issue certificates of competency to small businesses." H.R. CONF. REP. 98-861.

Further, the General Accounting Office's prudent policy against enforcing criminal conflict of interest statutes over-emphasizes the punitive nature of such laws at the expense of the protective. Such prudence is thus inconsistent with the opinion of the U.S. Supreme Court in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), in which the court, in construing 18 U.S.C. § 434 (a precursor to the present 18 U.S.C. § 208), stated:

> Although nonenforcement frequently has the effect of *punishing* one who has broken the law, *its primary purpose is to guarantee the integrity of the Federal contracting process* and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction.

Mississippi Valley Generating Co., 364 U.S. at 564-65 (emphasis added).

This policy also overlooks the reality that, in conflict of interest cases, non-criminal action based upon actual *or apparent* ethical violations, may be the government's sole effective remedy. As the Supreme Court, in *Mississippi Valley Generating Co.*, stated:

> [T]he primary purpose of the statute is to protect the public from the corrupting influences that *might* be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. *If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution* against its agent, as the respondent suggests, *then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent*.

Id. at 316 (emphasis added).

bear on the existence of actual impropriety or the appearance of impropriety.[31]

Admittedly, the General Accounting Office is also influenced by valid prudential considerations favoring the decisions of the agency.[32] There is reason, however, to question the need for deference to the agency in revolving door cases. Such deference is clearly warranted when applied to issues over which an agency's expertise can be fairly deemed to extend (that is, the statutes it is specifically charged with administering, or technical or scientific issues relating to agency requirements).

There is, however, no reason to believe that any agency has special expertise worthy of deference from the General Accounting Office on the matters of ethics and conflicts of interest.[33] Although the typical agency does not possess unique ethical expertise, there will always be issues, related to the existence of impropriety, or its effects, which are within the agency's area of technical expertise.[34]

Nevertheless, in view of the potentially explosive nature of ethical issues, standard deference to the agency's technical expertise should be tempered when ethical and technical issues are intertwined.[35] There is,

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31. *See infra* Section III.B.3.(e).

32. *See, e.g.*, Acton Rubber Ltd.—Reconsideration, B-253776, Sept. 27, 1993, 93-2 CPD ¶ 186 ("Where an agency's interpretation of a statute it is charged with administering is reasonable and has been consistently held, we will defer to the agency's interpretation unless it is clearly erroneous."); Sellers Eng'g Co., B-218062.2, Apr. 29, 1985, 85-1 CPD ¶ 483 (holding that the agency has the expertise to determine its needs and to that expertise, the General Accounting Office will defer). *See also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (holding that courts should respect an agency's reasonable interpretation of the laws that the agency is charged with administering); *see generally* 2 AM. JUR. *Administrative Law* § 528.

33. An obvious exception is the Office of Government Ethics. 5 U.S.C. app. 4 §§ 401-402 (1994). Admittedly, responsibility for administration of issues of government ethics is committed, not only to OGE, but also to Congressional bodies, to the Office of Personnel Management, to the Department of Justice, and to individual agencies, *see, e.g.*, 5 U.S.C. app. 4, §§ 111, 402. There are, however, no agencies other than the Office of Government Ethics that have such a singular focus on ethics that normal agency deference from the protest fora is warranted.

34. For example, the magnitude of the competitive advantage afforded by a former government employee's access to the agency's technical approach to the requirement that is the subject of the contract. *See* 5 C.F.R. § 2637.201(e) (2000) (detailing deference to agency expertise in certain complex cases).

35. *See* Express One Int'l, Inc. v. United States Postal Serv., 814 F. Supp. 93 (D.C. 1993). In this case, the District Court for the District of Columbia rejected a deferential

moreover, even less reason to defer to the agency regarding a decision in which the government decision makers have personal relationships or at least substantial acquaintance with the persons over whose apparently improper actions they must rule.[36] Regardless of the degree to which such deference is warranted, however, deference is an undoubtedly powerful influence on the protest fora.

In addition, the protest fora have also been heavily influenced in their adjudication of revolving door protests by the Federal Circuit's seminal decision in *CACI, Inc.–Federal v. United States*.[37] Nevertheless, the evidence suggests that the criminal undertones always present in revolving door cases are powerful factors leading to unusual decision-making and skewed results as compared to bid protests in general.

The third level on which the criminal stigma attached to the revolving door distinguishes such cases, and explains the marked difference in protest sustain rates, is the unique difficulty facing the protester in his attempt to obtain the material facts necessary to support his allegations of impropriety. Admittedly, the streamlined discovery and hearing procedures available to the parties in a garden-variety protest represent a judicious bal-

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35. (continued) approach to agency discretion in regard to ethical issues, stating:

> The court finds that special deference to the Postal Service's determination on the issues reached by the court is inappropriate. In this case, the composition of the evaluation team was within the personal discretion of Mr. Maytan, the contracting officer. The primary issue is whether Mr. Maytan rationally applied the simple ethical principles proscribed [sic] by the Postal Service (through the persons of Mr. Vandamm and Mr. Maytan himself); interpretations of technical regulations and complicated evaluation procedures are not implicated.

Id. at 97.

36. Such rulings are inherently suspect. In the case of *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988), the U.S. Supreme Court, when analyzing the appearance to the public of one judge ruling of the propriety of a brother judge's conduct, stated, "A finding by another judge–faced with the difficult task of passing upon the integrity of a fellow member of the bench–that his or her colleague merely possessed constructive knowledge, and not actual knowledge, is unlikely to significantly quell the concerns of the skeptic." *Id.* at 865.

37. 719 F.2d 1567 (Fed. Cir. 1983) (ruling that disqualification of an offeror based upon an apparent impropriety must be based upon "hard facts" rather than "mere suspicion and innuendo"). *CACI, Inc.–Federal* will be analyzed in detail *infra* Section III.B.

ancing of the protester's due process rights against the government's interest in timely accomplishment of its missions.[38]

There is, however, reason to believe that such procedures uniquely and unduly disadvantage the protester in its effort to fully investigate the appearances of impropriety resulting from the employment of a former government employee by a successful competing contractor. The burden of establishing an actionable appearance of impropriety entails a showing that a reasonable person, with knowledge of all of the relevant facts, would doubt the actual propriety of the official action being challenged.[39] The revolving door protester thus has an even more compelling need to gather all of the relevant facts. Yet its task is extremely difficult.

Extracting evidence from a competitor or opposing party is always difficult.[40] When questions of ethical misconduct arise, however, the courts have long recognized the inherent difficulty of bringing the facts to light.

In *Hazelton v. Shackels*,[41] a 1906 case, the U.S. Supreme Court declined to enforce a contract for the sale of land. The contract was tainted, the Court opined, by an illegal contingency requiring the plaintiff to obtain passage of legislation by Congress, Justice Holmes wrote for the Court:

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38. *See generally* 4 C.F.R. ch. I, subch. B, pt. 21 (2000); Roger J. McAvoy, *Bid Protests–Balancing Public and Private Interests*, 34 A.F. L. REV. 227 (1991) (discussing that protest regulations are to aid the General Accounting Office in its investigation, not to afford the protester due process).

Consistent with the need for speed in resolving protests, the process is streamlined. Protesters have a right: to the contracting agency's report to the General Accounting Office, and all supporting documents, 4 C.F.R. § 21.3(c-e) (2000); to request additional relevant documents, 4 C.F.R. § 21.3(g); to make comments on the agency report and request that a decision be made on the written record 4 C.F.R. § 21.3(i); to request orders protecting its proprietary information, 4 C.F.R. § 21.4; to request a hearing, 4 C.F.R. § 21.7(a); to request the non-compulsory appearance of witnesses whose attendance is on pain of an adverse inference regarding the factual issues to which the witness would testify, 4 C.F.R. § 21.7(f); to file post-hearing comments, 4 C.F.R. § 21.7(g).

39. *See Liljeberg*, 486 U.S. at 860-61 (holding that a U.S. District Court judge who unwittingly had a personal fiduciary interest in a matter pending before him should have recused himself). In *Liljeberg*, however, the Supreme Court applied the judicial disqualification provisions of 28 U.S.C. § 455, a similar but not identical ethical issue to that posed in revolving door contracting cases.

40. *See supra* note 20.

41. 202 U.S. 71 (1906).

> The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. *The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear.*[42]

Fifty-five years after *Hazelton*, in *United States v. Mississippi Valley Generating Co.*, the U.S. Supreme Court again had occasion to comment on the unique challenge of unearthing evidence of ethical misconduct.[43] The Court, through Chief Justice Warren, wrote: "*It is this inherent difficulty in detecting corruption* which requires that contracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent."[44] The court further noted that an ethical issue pertaining to a federal contract "might lie *undetectable* beneath the surface of a contract conceived in a tainted transaction."[45]

In 1966, the U.S. Supreme Court again remarked on the inherent difficulty of detecting corruption. In *United States v. Acme Process Equipment Co.*,[46] in ruling on the validity of a government contract tainted by a kickback, the Court stated:

> Kickbacks being made criminal means that they must be made—if at all—in secrecy. Though they necessarily inflate the price to the Government, this inflation is *rarely detectable*. This is particularly true as regards defense contracts where the products involved are not usually found on the commercial market and where there may not be effective competition. . . . Kickbacks will usually not be discovered, if at all, until after the prime contract is let.[47]

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42. *Id.* at 79 (emphasis added).

43. 364 U.S. 520 (1961).

44. *Id.* at 565 (emphasis added).

45. *Id.* (emphasis added).

46. 385 U.S. 138 (1966).

47. *Id.* at 144 (citation omitted, emphasis added); *see* United States v. Medico Indus., 784 F.2d 840, 843 (7th Cir. 1986) (holding that it was irrelevant that the former government employee did not actually use any inside information in obtaining a contract). Further, 18 U.S.C. § 207(a) "avoids any reference to *such difficult to prove events.*"

It is just such undetectability that explains why General Accounting Office revolving door bid protest decisions so frequently cite a dearth of evidence supporting the protester's allegations of impropriety, thereby enabling it to denigrate the protester's case as being built upon "suspicion and innuendo."[48]

(f) The Result?

In revolving door cases, factors such as under-inclusive rules, deference to the agency, and obstacles to discovery of the facts, lead to protest decisions that neither address all ethical issues arising in such cases, nor adequately disclose the material facts necessary for the public to evaluate the correctness of the decision. This, coupled with the marked disparity of outcomes between revolving door cases and bid protests overall, could result in increased cynicism regarding the integrity of the government procurement system, and the scandalizing of contractors believing themselves to have been wronged by competitors clever and unscrupulous enough to hire the right former government employee. The message is: if you really want to win an important contract, hire someone who has inside information; not necessarily source selection information on the current procurement, but information relating to the predecessor contract or the incumbent contractor. In a close competition, it may prove critical to success, and the risk of adverse action if anyone protests is minimal.

But what really promotes such a view? Former government employees, at least those in the learned professions and technical fields, especially those with ancillary contract administration responsibilities, bring something valuable with them when they retire. When they go to work for competitors for contracts with which they have had official involvement—they

48. *See, e.g.*, Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 (finding *no evidence* that the former government employee influenced the decision of the technical evaluators or participated in awardee's proposal preparation); Stanford Telecomm., Inc., B-258622, Feb. 7, 1995, 95-1 CPD ¶ 50 (finding *no evidence* that the former government employee provided any proprietary information to awardee); Cleveland Telecomm. Corp., B-25794, Sept. 19, 1994, 94-2 CPD ¶ 105 (finding *no evidence* that government employees who had signed letters of intent to work for awardee if it received the contract participated in the preparation of awardee's proposal); Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694 (finding *no evidence* that the former government employees prepared the statement of work; finding *no evidence* that the awardee's best and final offer price proposal was only $260 (.007%) below that of protester's price proposal, after having been initially higher than protester's price proposal, was other than "coincidence").

bring something beyond mere expertise and know-how[49]—something that gives their new employers an edge, especially in a close, hotly contested competition.

A recent General Accounting Office bid protest decision, *PRC, Inc.*, is an apt example of this phenomenon.[50] TESCO, the proposed awardee of a test support services contract, had hired retired Major General Rosenkranz, the former commander of the requiring activity for the procurement under protest, to assist in the preparation of its proposal. In denying PRC's protest, the General Accounting Office accepted General Rosenkranz's word that he did not concern himself with matters, such as the test support services acquisition plan, among other items of information relevant to the procurement, if they did not directly relate to his command responsibili-

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49. *See* Thomas D. Morgan, *Appropriate Limits On Participation By Former Agency Official In Matters Before An Agency*, 1980 DUKE L.J. 1, 35-6 (Feb. 1980) (noting that former government employees bring expertise, knowledge of the way the agency works and, in a few cases, celebrity status and clout).

During 1981 hearings on the defense acquisition process, Senator Eagleton engaged in the following apposite colloquy with a witness before the Senate Governmental Affairs Committee:

> Senator Eagleton. I think it is generally known, and I think there have been some studies–I don't have one handy–that career military officers, especially in the procurement and R. & D. area, when they retire from the military, are absorbed by the major contractors throughout the United States. Doesn't the fact that a number of career military men retire into big defense businesses give those big companies unique access to the entire defense procurement process while a small company, such as yourself, without such access is disadvantaged?
>
> Mr. Julie. I'm afraid it does, Senator Eagleton, and I think that is an important part of the problem. Maybe that is what the Army refers to as a nonaggressive demeanor. Perhaps with that kind of interface you are nonaggressive.
>
> Senator Eagleton. You don't have to be very aggressive if Colonel *X* comes to defense contractor *A* and his previous deputy then gets promoted in a procurement position, and he is just a telephone call away. You don't have to shout or scream or in any way intimidate.

Acquisition Process in the Department of Defense: Hearings Before The Comm. on Governmental Affairs, United States Senate, 97th Cong. 1st Sess. 540 (1981) (colloquy between Senator Eagleton and Mr. Julie).

50. B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115.

ties.[51] Thus, for the purpose of upholding the award to TESCO, the General Accounting Office was willing to find that the General was too remote from the procurement, and too unfamiliar with the requirement, for his employment by TESCO to have given them an unfair competitive advantage. If this were the case, why then did TESCO hire General Rosenkranz, soon after his retirement, and immediately assign him to prepare its proposal? Obviously, the General had "a certain something."[52] Such a "certain something" may or may not meet the current definitions of source selection information[53] or bid and proposal information,[54] and thereby run the former government employee and his new employer afoul of procurement integrity or conflict of interest laws. In either case, it will be very difficult to prove, as the decision in the *PRC* case illustrates.

Current statutes in this area of law, are extremely narrow in the scope of the post-government employment conduct prohibited, and the nature of the "expertise" and information, acquired while discharging their official duties, that former government employees are permitted to peddle to the highest bidder.

In Section II, this article discusses procurement integrity rules[55] that focus primarily on information pertaining to a particular procurement, and do not clearly indicate the extent to which proprietary information obtained while administering a predecessor contract can be, or can become, bid and proposal information. Further, the revolving door conflict of interest statute covers and prohibits a very narrow band of conduct by former government employees.[56]

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51. The General Accounting Office was inexplicably uninterested in knowing how General Rosenkranz could consider the award of a $67,000,000 contract, by an activity under his command, as not in some meaningful way being within his command responsibility. It is understandable that the word of a retired general officer should carry great weight; however, no human witness should be beyond common-sense scrutiny of his testimony's plausibility.

52. It is possible that TESCO merely sought General Rosenkranz's views on the ways in which the command likes to see a project proposed, what the current buzz words were, or some other non-sensitive information that would assist in preparing the proposal. However, in view of the general's purported detachment from the procurement process, such a rationale for hiring him seems dubious. Further, if this was TESCO's rationale, why then did it not say so?

53. 41 U.S.C. § 423(f)(2) (2000).

54. *Id.* § 423(f)(1).

55. Primarily the Procurement Integrity Act, 41 U.S.C. § 423.

56. 18 U.S.C. § 207(a)(1-2) (2000). The statute prohibits former government employees from "knowingly mak[ing], with the intent to influence, any communication to

In Section III, this article discusses that the bid protest fora, primarily the General Accounting Office, are thus compelled to cull all protests not meeting the restrictive definitions of impropriety set forth in the statutes. After winnowing the field in this manner, those allegations arguably meeting the statutory requirements of impropriety are then subjected to an extremely demanding review for prejudice (that is, unfair competitive advantage)—a process in which the significance and competitive impact of the information available to the awardee through the former government employee may be overlooked or minimized.

Lack of evidence is invariably highlighted and held decisively against the protester. Remedial action based upon the appearance of impropriety, almost regardless of how egregious, is denied, paradoxically, because the protester has been unable to come up with "hard facts" to substantiate its presence.[57] The result of this process is the dramatically lower sustain rates for revolving door bid protests.

This article examines the root of the problem leading to such low sustain rates. The problem is the idea that the ability of the government to attract and to retain in public service the most qualified employees, and to acquire goods and services from the most qualified contractors, would be significantly diminished, if public procurements had to avoid even the

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56. (continued) or appearance before" a particular matter with which they were involved as a government employee. It does not, by its terms, prohibit them from assisting the contractor in developing its bid or proposal.

57. This myopic practice can lead to laughable results. The General Services Board of Contract Appeals may have missed the irony of its disqualification of a protester's law firm "on the ground that a partner in the firm had previously represented MTS and *might have acquired* confidential and privileged information relevant to the instant protest-in which Caelum's position is adverse to that of [the awardee]." Caelum Research Corp., GSBCA No. 13139-P, GSBCA No. 13155-P, GSBCA No. 13156-P, 95-2 BCA 27,733 (emphasis added).

The Board's scruples with regard to the ethics of the protester's counsel, however, did not profit the protester. The Board managed to overlook that the awardee hired, as its program manager, a former government employee (GM-15) who had substantial involvement in the predecessor contract, and was the head of the agency's requiring activity for the instant procurement, which position entailed access to the independent government estimate. *Id.* The fact that the former government employee *might* have used his inside information to the benefit of his new employer was insufficient to persuade the Board to overturn the award, because there was "no evidence of record that [the former government employee] remembered the PWS or the government estimate or any [of the predecessor contractor's] proprietary information or that he transmitted it to any member of the [awardee] team." *Id.*

appearance of impropriety.[58] The rigorous and definitive analysis of the validity of this notion is beyond the scope of this article. It is, however, subject to doubt, and this article, in Section IV, discusses several reservations in regard to it.

More importantly, the article takes issue with the idea that these underlying interests (that is, obtaining only the very best employees and contractors) should play such a predominant role in evaluating the eligibility of competing contractors who have hired former government employees under circumstances creating an appearance of impropriety. The undue importance of these concerns is manifested in the decisions of the various fora that consider the bid protests of competitors disappointed by the failure of the government: to recognize the threat posed by awardees who have hired former government employees under circumstances giving rise to appearances of impropriety; and, to protect the integrity of federal procurement system. Section III analyzes these decisions.

Among the obstacles to achieving the proper balance between the competing interests in this area are: the granting of *undue* deference to contracting officers' decisions, the employment of unwarranted intellectual gymnastics and strained logic to uphold such decisions, the inordinate difficulties of proof facing bid protesters, and agency officials' reluctance to make the tough calls when it comes to cases involving integrity and conflicts of interest.

It would be inaccurate, however, to lay the blame for this problem on contracting officers and the protest fora. They operate, after all, under the existing laws and regulations that permit them to proceed as they have. Errors in legal or factual analysis and misguided balancing of interests are merely the manifestations of a system that has imperfectly expressed its paramount desire for integrity in public procurement.

That's the problem.

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58. In his pocket veto message to Congress regarding amendments to the Ethics In Government Act, President Reagan stated: "This provision says: Warning, government service may be hazardous to your career. It's a warning that can only lead to a government that never feels the invigorating influence of new blood. The incentive is to leave government, not to join it. And that defies the principle of government of, by, and for the people." 24 Weekly Comp. Pres. Doc. 1563.

C. What's the Solution?

1. What's Really Important?

Zeal for actual and apparent propriety should dominate the thinking of all who participate in public procurement. Careful analysis of the ways in which contracting officers and protest fora have subordinated integrity to other interests is merely evidence of the deficiencies of the current system. It imposes a heavy burden on the innocent party: the disappointed bidder who did *not* (or, cynically, was unable to) hire a former government employee whose prior government service may have created an appearance of impropriety.

2. A Political Solution is Required

The problem is the result of the way in which the laws and regulations are currently written and the manner in which they have been applied for over twenty years. Balancing interests and adopting a solution to this problem cannot be accomplished by persuasion and argument before agencies and the protest fora. Significant changes will be required in the rules governing competition in government contracting, and in the assignment of the burden of proof in revolving door bid protests. The task must therefore be performed by the legislative and executive branches; then implemented through regulation; and, ultimately applied by agencies and protest fora.

3. The Solution

In arriving at a solution, this article, in Section II, first reviews the scope of the current laws and regulations addressing such situations. Section III analyzes the case law that has applied these rules over the past twenty years. Analysis focuses on whether the rules result in protest decisions that not only reach just results, but also set forth sufficient facts for the public to understand and believe in the justness of the result. Section IV balances four primary interests bearing on the problem: efficiency, the integrity and fairness of the procurement system, competition, and mission accomplishment. The solution to the problem is to adopt a regime that places the burden of proving the propriety of an award in a revolving door case on the parties in the best position to protect the integrity of the procurement system. The contractors who have chosen to employ former

government employees know the material facts bearing on propriety of their hiring decisions, and have the ability to avoid actual impropriety or the appearance of impropriety.[59]

Proper placement of the burden could be accomplished by enacting a law permitting or requiring agencies, when awarding high dollar value contracts, to disqualify a contractor from a competition, even without evidence of unfair competitive advantage, when the contractor has engaged the services of a former government employee who participated in the procurement, or in the administration of a predecessor contract for the same requirement. In addition, unfair competitive advantage could be presumed in such cases, and disqualification of the contractor required, unless the agency finds, by clear and convincing evidence, that the proposed awardee did not gain an unfair competitive advantage by virtue of its employment of the former government employee.

Section IV describes this regime in detail, and argues that it places the burden where it belongs (mainly on the proposed awardee, and to a lesser degree, the former government employee and the agency). In Section IV, this article argues that the proposed rule creates an incentive for the former government employee and the competing contractor that hires him, to be more aware of the ethical implications of their actions, and to contemporaneously document their efforts to act properly, avoid gaining an unfair competitive advantage over competitors. If this is accomplished, the agency in most cases should easily be able to make the required finding

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59. The U.S. Supreme Court, in *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847 (1988), the burden of demonstrating the propriety of apparently improper actions was effectively placed on the judge and the party whose interests depended upon the propriety of the judge's actions; the party challenging the propriety of the judge's actions was not forced to prove facts that were provable only through evidence within the exclusive control of the judge. In rejecting the notion that shifting the burden in this manner would work an injustice, the court found that, instead, the ruling would actually prevent injustice by encouraging greater circumspection and sensitivity to ethical concerns. The Court wrote:

> Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by *encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered*.

Id. at 868 (emphasis added).

that no unfair competitive advantage was obtained by its proposed awardee, thereby permitting award to the contractor the agency believes provides it the best value.

Where such a finding does not satisfy a disappointed offeror, and a protest results, the agency's finding of no unfair competitive advantage, along with its supporting documentation, will provide a ready-made basis for the protest forum to uphold the award. The essence of Section IV, ultimately, is that the regime proposed by this article will not impose undue burdens on either the agency or the proposed awardee, and will not sacrifice the government's interests in mission accomplishment and competition in the name of integrity.

4. Transparency and Accountability

Readers are cautioned that this article does not assume that former government employees who accept offers of employment from competing contractors are cheats or hustlers looking to sell their souls. To the contrary, the vast majority have labored long and hard for the good of the country, and have acquired valuable skills that they should be permitted to market.

The principal flaw with the current rules, however, is that they make it too easy for agencies and protest fora to condone post-government service employment, even where it creates an appearance of impropriety, and without the discovery and rigorous analysis of all material facts that would demonstrate the propriety of their actions. At the same time, the rules permit the few true cheats and wrongdoers to get away with their misdeeds, thereby tarring all former government employees who accept positions with contractors that have done business with their agencies.

In either case, the public cannot, from study of such protest decisions, decide for itself whether justice was done. This may be the most pernicious result of the current rules. Chief Justice Taft said, "Nothing tends to render judges more careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism."[60]

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60. DONALD E. LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED 144 (1990) (quoting Chief Justice Taft as *quoted in* Bruce Fein, 75 APR ABA J. (Apr. 1989) 56, at 59).

Taking Chief Justice Taft's remarks a step further, Donald Lively coupled judicial transparency and democratic values when he noted, "Because history evidences that even serious perversions tend to be self-correcting, any interest in optimizing accountability and enhancing democratic linkage should focus upon maximizing the potential for intelligent scrutiny of judicial performance."[61] The perversion of the few corrupt revolving door cases cannot be corrected unless the decisions of the protest fora are open to our "intelligent scrutiny." The current rules, as they have been applied, mask the facts from such scrutiny. For this reason, above all, the rules must change.

II. The Rules

Some things are easier to legalize than to legitimate.[62]

A. Introduction

Do the current revolving door rules adequately protect the integrity of the federal procurement system? The rules are, after all, the product, ultimately, of decades of evolution, debate, compromise, and the will of the people as expressed by their elected representatives. Moreover, there currently does not appear to be any widespread demand for reform. Should we assume that silence means that all is well?

On the contrary, the lack of call for change probably means that government decision-makers and contractors are happy with the status quo. Agencies appreciate it when their decisions are less subject to critical review and second-guessing. They quite naturally do not like rules that limit their discretion in selecting contractors, or that compel them to publicly disclose or litigate the ethical propriety of past employees, and the leadership and management abilities of current chiefs. Contractors have a similar stake in the way things are. Today's disappointed bidder, after all, may well be tomorrow's winner. Having accounted for the preferences of the key players, is our inquiry at an end? Or, on the other hand, perhaps the rules still have serious shortcomings that remain hidden below the surface, about which the public should be concerned.

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61. *Id.* at 144.

62. SÉBASTIEN-ROCH NICOLAS DE CHAMFORT, 1 MAXIMS AND CONSIDERATIONS 134 (1796).

In contrast to Section III, in which the article examines the application of the rules to the facts in specific bid protest cases, in Section II the concern is the sufficiency of the rules themselves to protect the integrity of the procurement system. There is, however, a significant connection between the two areas of inquiry, because the limitations of the current rules, primarily their narrow focus and vague stance against the appearance of impropriety, lead directly to poor analysis and unsatisfying resolution of revolving door protests. Section II examines the provisions of the Ethics in Government Act, and the Procurement Integrity Act that relate to revolving door cases, discussing the restrictions imposed by these statutes, as currently written,[63] on the conduct of former government employees.

The rules, written to protect the system from misconduct by former government employees, and the contractors who employ them, suffer from two major substantive deficiencies:[64] (1) the failure to squarely address the problem of the appearance of impropriety, and (2) the extremely narrow set of circumstances under which an actual impropriety may be found for purposes of obtaining relief in a bid protest. These failings make it easier to avoid taking a close, hard look at practices that should be more closely scrutinized, and they thereby make it harder to protect the system. There is a contrary argument to the effect that increased ethical regulation of public servants, by denigrating the "public service vision" is actually counter-productive to achieving greater integrity in public service.[65] The efficacy of further refining the rules, however, is a topic for discussion in Section IV. For the purposes of discussion in this section, however, the premise is that some post-government employment practices are truly easier to legalize than to legitimate.

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63. The focus is on the current rules. The evolution of revolving door law is beyond the scope of and not essential to this article. For general information regarding the development of conflict of interest rules in federal procurements, *see* Kathryn Stone, *The Twilight Zone: Post Government Employment Restrictions Affecting Retired and Former Department of Defense Personnel*, 142 MIL. L. REV. 67 (1993); James S. Roberts, Jr., *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343 (1992).

64. The rules suffer from a major procedural defect as well, namely, as was mentioned in Section I, and as will be discussed further in Section IV *infra*, the counterproductive imposition of the burden in revolving door cases upon the protester, rather than upon the competitor that hired the former government employee.

65. *See* Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417 (Feb. 1990).

B. Spectrum of Legal Theories

Former government employee-based protests are grounded on allegations of actual impropriety or the appearance of impropriety,[66] or a combination of the two. Actual impropriety and the appearance of impropriety are at opposite ends of the revolving door protest rule spectrum that classifies protest theories according to their level of legal development. Actual impropriety protest grounds rely upon well-developed, highly detailed, narrowly focused statutes; appearance of impropriety protests must rely upon vague, admonitory language contained in regulatory provisions. Neither theory, however, is well suited to protecting the integrity of the procurement system from improprieties in the hiring of former government employees.

1. Actual Impropriety

To prosecute a bid protest based upon an actual revolving door impropriety, the protester typically attempts to prove that a violation of the Ethics in Government Act,[67] or the Procurement Integrity Act occurred.[68] However, these are criminal statutes that were not necessarily intended to serve as bid protest grounds. They entail heavy penalties for violations,[69] and require proof beyond a reasonable doubt.[70] As a result, these statutes have quite properly been drafted with great precision, requiring proof of numer-

66. The terms "apparent impropriety" and "appearance of impropriety" are occasionally employed synonymously. *See* RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213. However, apparent impropriety, in bid protests, is more often employed to describe challenges to defects in solicitations and other protest grounds not related to the revolving door. *See* Paging Network of Washington, Inc., B-274052, Aug. 13, 1996, 96-2 CPD ¶ 63; ACR Elects, Inc., B-266201, Jan. 24, 1996, 96-1 CPD ¶ 19; Vertin Valuation Servs. Corp., B-260304, June 13, 1995, 95-1 CPD ¶ 271. The term "appearance of impropriety" will therefore be used exclusively in this article.

67. 18 U.S.C. § 207 (2000).

68. 41 U.S.C. § 423 (2000).

69. Violation of either statute is a felony. Persons found guilty of willfully violating 18 U.S.C. § 207(a) are subject to fine and/or imprisonment for up to five years under the provisions of 18 U.S.C. § 216(a)(2). Persons found guilty of violating 41 U.S.C. § 423(a) or (b) are subject to the same maximum punishment under the provisions of 41 U.S.C. 423(e).

70. *See* United States v. Baird, 29 F.3d 647, 652 (D.C. Cir. 1994); United States v. Schaltenbrand, 930 F.2d 1554, 1560 (11th Cir. 1991). However, administrative and civil penalties may be imposed based upon lesser standards of proof. 41 U.S.C. § 423(e)(2) (Procurement Integrity Act civil penalties upon proof of violation by preponderance of the evidence); 41 U.S.C. § 423(e)(3) (administrative actions, preponderance of the evidence);

ous elements, thereby requiring difficult-to-achieve legal syzygy[71] to establish a violation. This article does not advocate a reduction in either the burden of proof, or in the elements of offenses the conviction of which could lead to ruinous obloquy and substantial confinement. These statutes are designed to serve a distinct purpose that is alien to the world of bid protests: publicly punishing serious criminal behavior when evidence of felonious conduct is very strong. An effective alternative to these criminal statutes is needed to afford relief to aggrieved competitors and to promote public confidence in the integrity of the federal procurement system.

2. Appearance of Impropriety

At the other end of the theoretical spectrum in revolving door protests is the appearance of impropriety.[72] With regard to actual impropriety, the standards for finding a violation are set out in a minutely detailed statute, further elaborated by comprehensive regulations.[73] No such well-developed legal infrastructure supports the appearance of impropriety. The theory of appearance of impropriety has been criticized as a "vapid concept" and "virtually empty of intellectual content."[74] Indeed, in *NKF Engineer-*

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70. (continued) 5 C.F.R. § 2637.212(a)(7) (2000) (administrative enforcement of 18 U.S.C. § 207 through sanctions based upon substantial evidence).

71. "The conjunction or opposition of three heavenly bodies; a point in the orbit of a body, as the moon, at which it is in conjunction with or in opposition to the sun." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1444 (1969).

72. Although recognized as a revolving door protest basis (*see, e.g.*, ITT Fed. Servs. Corp., B–253740.2, May 27, 1994, 94-2 CPD ¶ 30), appearance of impropriety is recognized as a protest ground in other types of cases. *See, e.g.*, KPMG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272 (industrial espionage); P & C Constr., B-251793, Apr. 30, 1993, 93-1 CPD ¶ 361 (propriety of invitation for bids cancellation); Moniaros Contracting Corp., B-244682.3, Dec. 12, 1991, 91-2 CPD ¶ 537 (propriety of permitting a bidder to lower his price following bid opening). It can also be seen in other legal settings. *See, e.g.*, 28 U.S.C. § 455 (federal judge must recuse "in any proceeding in which [her] impartiality might reasonably be questioned"); Busby v. Worthen Bank & Trust Co., N.A., 484 F. Supp. 647 (E.D. Ark. 1979) (Arkansas bank trustee loan decisions); Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973) (disqualification of law firm in securities fraud case).

73. *See* 5 C.F.R. §§ 2637.201-.216 (2000) (implementing 18 U.S.C. § 207); 48 C.F.R. §§ 3.104-1 – 3.111 (2000) (implementing 41 U.S.C. § 423).

74. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 460-61 (1986). Professor Wolfram's critique addressed its purported methodological weakness, its irrelevancy or redundancy, and its amenability to misuse. *Id.* at 320-21. However, Professor Wolfram's analysis focused primarily on the use of the theory to support *disciplinary* action against *lawyers*, rather than as a basis for *disqualification* of *contractors*. *Id.* at 321-22.

ing Inc. v. United States,[75] the Claims Court grounded its approval of an agency disqualification based upon the appearance of impropriety on Federal Acquisition Regulation Section 1.602-2,[76] a provision setting forth the contracting officer's responsibilities for safeguarding the interests of the United States. This provision, however, does not even mention the term, "appearance of impropriety."[77]

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75. 9 Cl. Ct. 585 (1986), *rev' on other grounds*, 805 F.2d 372 (Fed. Cir. 1986). The Claims Court rejected the contractor's argument that the government was not authorized to disqualify an offeror in the absence of proof of an actual impropriety, as follows:

> Despite the seeming absence of any authority expressly authorizing the actions that were taken in this case, the court is of the view that the contracting officer's responsibility of "safeguarding the interests of the United States in its contractual relationships," is sufficient to support the exercise of authority that was asserted. What persuades us to this view is the latitude the courts have historically shown with respect to the contracting officer's basic authority to enter into, administer, or terminate contracts, and the overriding importance of the government's need to insure full and fair competition in the conduct of its procurements.

9 Cl. Ct. at 592 (citations omitted). A more detailed discussion of the decisions in *NKF* appears *infra* at Section III.B.3.(d).

76. 48 C.F.R. § 1.602-2 (1985).

77. *Id.* Section 1.602-2 provides:

> Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall—
>
> (a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;
>
> (b) Ensure that contractors receive impartial, fair, and equitable treatment; and
>
> (c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

Id.

Rather, in terms of explicit authority for the theory, the appearance of impropriety relies upon the nebulous and hortatory language in the FAR, Section 3.101-1,[78] as follows:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. *The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest* in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.[79]

Section 3.101-1, however, has several drawbacks as an instrument by which to promote public confidence in the procurement system. First, the theory is embodied in a regulation, rather than a statute, thus conveying less authority. Second, the section in which it is contained is a general provision, rather than one dedicated to the appearance of impropriety problem. Such provisions do not create "specific and precise standards justifying" decisive actions such as disqualification of a competitor from a procurement.[80] Third, the regulation is, at least superficially, directed at current, rather than former government employees.[81]

Fourth, the language of Section 3.101-1 itself saps authority from the warning against the appearance of conflicts of interest. Although government employees are "strictly" enjoined to "avoid" the appearance of con-

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78. *See, e.g.*, PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115; Guardian Tech. Int'l., B-270213.2, B-270213.3, Feb. 20, 1996, 96-1 CPD ¶ 104; Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52; Holsman Servs. Corp., B-230248, May 20, 1988, 88-1 CPD ¶ 484

79. 48 C.F.R. § 3.101-1 (2000) (emphasis added).

80. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983).

81. An argument could be made that Section 3.101-1 would prohibit a current government employee from conducting a procurement tainted by apparent impropriety by a former government employee. However, any need to "bootstrap" coverage in such a fashion must detract from the ability to employ the section in addressing revolving door appearances of impropriety affecting government contracts.

flicts of interest, they need only do so as a "general rule."[82] Further, although they must not favor any person with preferential treatment, or show impartiality, government employees are advised, at least implicitly, that such actions may be "authorized by statute or regulation."[83] Thus, Section 3.101-1 is meager protection from the problem of appearance of impropriety in government contracting. At best, the section sends a mixed message, oscillating between "an impeccable standard of conduct" and a suggestion that partiality might be condoned by statute or regulation.

C. What the Laws Say and Don't Say

1. *Ethics in Government Act*[84]

(a) General

Originally enacted in 1962 as the replacement for 18 U.S.C. § 284,[85] the Ethics in Government Act is the principal conflict of interest statute

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82. 48 C.F.R. § 3.101-1 (2000). These terms do not connote as strict a standard of scrupulousness as could have been demanded by, for example stating that "government personnel will not create an appearance of a conflict of interest." Use of the term "general rule" implies that there are instances in which it would be permissible to create an appearance of impropriety. However, there does not appear to be any statutory or regulatory authority for such an exception.

83. *Id.* Although preferential treatment is sanctioned in some cases (*see, e.g.*, 41 U.S.C. § 10a (2000) (Buy American Act of 1988)), there does not appear to be authority to conduct government business without impartiality, which is defined as "Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just." BLACK'S LAW DICTIONARY 752 (6th. ed. 1990).

84. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the United States Code); *see generally* Debasish Chakrabanti et al., *Federal Criminal Conflict of Interest*, 34 A. CRIM. L. REV. 587, 608 (1997); Office of Government Ethics Memorandum, subject: Revised Materials Relating to 18 U.S.C. § 207 (Nov. 5, 1992).

As currently written, the Ethics In Government Act covers several situations and classes of former employees that will not be discussed herein. Although Section 207(a)(1) is the primary focus of this portion of Section II, the statute also places restrictions upon former government employees whose connection to a matter is vicariously created through subordinates. *See* 18 U.S.C. § 207(a)(2) (2000); *id.* § 207(c) (former senior employees); *id.* § 207(d) (former very senior employees); *id.* § 207(e) (members of Congress). It also imposes restrictions upon former government employees' representation of foreign entities. *Id.* 207(f).

85. S. REP. 87-2213 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852.

applicable to *former* government employees.[86] Section 207(a)(1) permanently prohibits all former executive branch officers and employees from:

- knowingly making
- with the intent to influence
- any communication to or appearance before[87]
- any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia
- on behalf of any other person, other than the United States or the District of Columbia
- in connection with a particular matter
- in which the United States or the District of Columbia is a party or has a direct and substantial interest
- in which the person participated personally and substantially as such officer or employee; and
- which involved a specific party or specific parties at the time of such participation.[88]

The law sweeps broadly in one sense. It includes all executive branch employees, and it applies to actions before all personnel and entities of the federal and District of Columbia governments. On the other hand, the listing of offense elements demonstrates the statute's narrow, surgical focus. There are several features, beyond the statute's fundamental limitations based upon its criminal nature (as discussed in Section I.B.2) that limit the reach of the law in the revolving door context.

(b) Communications and Appearances

The law prohibits communications or appearances before an agency.[89] Thus, a former government employee is not prohibited, by the

86. 18 U.S.C. § 208 is the analogous provision applicable to *current* government employees. In addition, there are other criminal provisions that may bear on revolving door cases. *See* 18 U.S.C. § 201 (1994) (bribery); 18 U.S.C. § 203 (compensation of Members of Congress and others); 18 U.S.C. § 209 (salary of government employees payable only by the United States).

87. The scienter element applies to both communications and appearances. United States v. Nofziger, 878 F.2d 442, 446 (D.C. Cir. 1989) (applying Section 207(c), containing pertinent language identical to that of § 207(a)(1)).

88. 18 U.S.C. § 207(a)(1).

89. The communication and appearance clauses state separate offenses. *Nofziger*, 878 F.2d at 446 (applying Section 207(c), containing identical language to that of Section 207(a)(1)).

terms of the Ethics in Government Act, from assisting a contractor in the preparation of a bid or proposal, or the execution of a contract, so long as he does not communicate with or appear before the agency.[90] The term "appearance," moreover, has been strictly construed in bid protest decisions.[91] Whatever the merits of such construction, the result is that the opportunities for the transfer of competitively useful information, obtained while in federal service, are increased.

(c) Particular Matters

Further, the law requires that the communication or appearance must relate to a "particular matter" in which the former government employee "participated personally and substantially" while in federal service.[92] Again, the law appears to encompass a broad range of actions.[93] The "particular matter" element includes a contract and any modifications;[94] how-

90. Other laws, particularly the Procurement Integrity Act, 41 U.S.C. § 423, limit the assistance that a former government employee may provide. However, as will be discussed, these limitations are themselves inadequate.

91. Robert E. Direcktor of Rhode Island, Inc. v. United States, 762 F. Supp. 1019 (D. R.I. 1991) (holding that personal delivery of proposal by former high level procurement official not an appearance where former government employee was "a mere messenger"). *See also* Dayton T. Brown, Inc., B-231579, Oct. 4, 1988, 88-2 CPD ¶ 314 (General Accounting Office would not speculate, for purposes of its 18 U.S.C. § 207 analysis, that former government employee, who supervised proposal evaluation team for predecessor contract, and accepted employment as successful offeror's program manager, would be required to communicate with the government regarding the contract); Computer Sciences Corp. B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422 (holding that a former government employee with contract administration responsibilities for predecessor contract did not violate 18 U.S.C. § 207 because he did not participate on behalf of the contractor in the proposal conference, site visit, discussions, or negotiations).

92. 18 U.S.C. § 207(a)(1)(B) (2000). The requirement that participation be "personal and substantial" is valid in both the criminal law and bid protest contexts. In a revolving door case, we should be less concerned regarding the appearance or actuality of impropriety when the former government employee did not participate personally or substantially as a government employee in the procurement under protest. Further, unlike the regulatory definition of the term in the Procurement Integrity Act context, *see* 48 C.F.R. § 3.104-3 (2000) and as discussed *infra*, the regulatory definition of "participate personally and substantially" in the Ethics in Government Act context is reasonably straightforward and not rendered confusing and ambiguous by exceptions. The problem with this element, rather, is the manner in which it has been *applied* in bid protests. *See* Section IV *infra*.

93. "Particular matter" includes "any investigation, application, request for ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." 18 U.S.C. § 207(i)(3).

94. United States v. Medico Indus., 784 F.2d 840 (7th Cir. 1986).

ever, it has been held not to include predecessor contracts for the same or substantially similar requirements.[95] This is a significant gap in protection. For the purposes of avoiding impropriety, there is no logical reason for distinguishing the award of contract modifications from the administration of predecessor contracts. Both situations involve the same core of competitively useful information, primarily inside information regarding the government's procurement strategy and cost estimates, and contractor proprietary data pertaining to the action.

Moreover, if a choice *has* to be made as to which type of transaction should be protected, there are more compelling reasons to protect a competitive procurement from the disclosure of inside or proprietary information relating to a predecessor contract than there are reasons to protect a contract modification from the disclosure of procurement sensitive information. This is because, in the modification setting, although protection of the government's bargaining position is a concern, competition and fairness to other competitors are not at issue. This is not so in a competitive procurement, in which fairness to competitors and protection of the government's interests are both at stake.

In addition, the knowledge gained while administering a predecessor contract is likely to be at least of equal value to that obtainable while assisting in the conduct of a procurement. Contract administration typically takes place over a much longer period of time (that is, the life of the contract, potentially a period of years). Exposure to the proprietary information of the predecessor contractor and the government's cost experience, month in and month out, over a period of years would inevitably yield valuable insights that would be of great benefit to a competitor seeking to

95. The issue remains unresolved, although there are cases in which it is implied that a true predecessor contract might be deemed to be the same particular matter. The court in *Medico* wrote, that it was "'plausible' to read 'contract . . . or other particular' matter more broadly than the four corners of a single document, to treat the language as covering a 'nucleus of operative facts' . . . ." *Id.* at 843. However, the court was not specifically addressing a predecessor contract. Further, the court, in *Medico* also stated that the statute required that "[t]he parties, facts, and subject matter must coincide to trigger the prohibition of § 207(a)." *Id.* The requirement for identical parties would thus exclude from Section 207(a) coverage a predecessor contract involving a different contractor than the one that has hired the former government employee. *But see* CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1576 (Fed. Cir. 1983) (holding that a follow on contract that, although involving fundamentally the same services, is "broader in scope, different in concept, and incorporates different features," is not the same "particular matter").

unseat an incumbent.[96] The unfair competitive value of such experience was recognized by the Claims Court in its opinion in *CACI, Inc.–Federal v. United States*.[97]

Finally, the term "particular matter," as construed to exclude activities related to administration of predecessor contracts, artificially restricts the ambit of the Ethics in Government Act.[98] It discounts the fact that procurement activities requiring protection from improper revolving door influences commence when a requirement is first identified, continue through the initial procurement in satisfaction of the requirement, and end only when the requirement ceases to exist.

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96. Indeed, a substantial number of case protesters are incumbents who lost competitions for successor contracts after a government contract administrator went to work for a competitor. *See, e.g.*, Stanford Telecomm., Inc., B-258622, Feb. 7, 1995, 95-1 CPD ¶ 50; Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105; Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30; RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213; Sequoia Group, B-252016, May 24, 1993, 93-1 CPD ¶ 405; Person-System Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546; Holmes and Narver Servs./Morrison-Knudson Servs., Pan Am World Servs., B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379; Eagle Research Group, Inc., B-230050.2, May 13, 1988, 88-2 CPD ¶ 123; Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422.

97. 1 Cl. Ct. 352 (1983). In *CACI, Inc.–Federal*, the former head of the requiring activity for the protested procurement was vice president for a competitor in the procurement. In his former job "he became familiar with the pricing strategies of plaintiff and other incumbent contractors and with the people whose resumes could be used to support a technical proposal." *Id.* at 363. Although later reversed by the Federal Circuit, the higher court did not directly dispute the validity of the Claims Court's opinion on this issue. It found, instead, that the prior contract was not the same "particular matter," for the purposes of 18 U.S.C. § 207. *See* CACI, Inc.–Federal, 719 F.2d 1567, 1576 (Fed. Cir. 1983). Further, the Claims Court's opinion was very fact-specific, and not necessarily intended as a general pronouncement.

98. For examples of cases in which prior participation by former government employees in the administration of predecessor contracts was at least implicitly deemed inconsequential to the propriety of awards in subsequent procurements. *See* Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 (contracting officer's technical representative); Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 (contract administration of predecessor contract); RAMCOR Servs. Group, B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213 (program manager); General Elec. Gov't Servs., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196 (administrative contracting officer); Blue Tee Corp., B-246623, Mar. 18, 1992 (program manager); Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132 (program manager); Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422 (contracting officer's representative).

Acquisition planning is the driving force behind this circumstance. Federal agencies must conduct acquisition planning.[99] Although acquisition planning may appear superficially to be focused on discrete procurements,[100] under the Federal Acquisition Regulation System, it is in reality a continual process of fulfilling requirements as long as they exist.[101] "Acquisition planning is an expansive term that includes actions aimed at stating the government's needs, identifying potential sources, and determining the techniques to be used to satisfy those needs. It is the first step in the procurement process,"[102] and should "begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award is necessary."[103] For systems acquisitions, acquisition planning is "an iterative process that becomes increasingly more definitive

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99. 48 C.F.R. § 7.103 (2000) (general); 48 C.F.R. § 207.103 (military departments).

100. *See* 48 C.F.R. § 7.105(b)(18) (listing milestones from acquisition plan approval to contract award).

101. For acquisition of major systems, the approach taken by the Defense Department demonstrates the continuous nature of acquisition planning without regard to arbitrary demarcations between contracts. *See* DOD DIRECTIVE 5000.1, DEFENSE ACQUISITION (15 Mar. 1996) ¶ 4.1.1 which states:

> *All three systems* [requirements generation, acquisition management, and planning, programming and budgeting] *operate continuously and concurrently* to assist the Secretary of Defense and other senior officials in making critical decisions. The information derived from these systems permit senior DOD officials to plan for the future, allocate resources . . . and execute the current budget.

Id. (emphasis added). Paragraph 4.1.2 of DOD Directive 5000.1 further states:

> Integrated Product and Process Development (IPPD). PMs and other acquisition managers shall apply the concept of IPPD throughout the acquisition process to the maximum extent practicable. IPPD is *a management technique that integrates all acquisition activities starting with requirements definition through production, fielding/deployment and operational support* in order to optimize the design, manufacturing, business, and supportability processes.

Id. ¶ 4.1.2 (emphasis added). *See also* Federal Aviation Administration, Section 2: *Lifecycle Acquisition Management Policy*, § 2.1 Guiding Principles, *available at* <http://fast.faa.gov/v997/ams497/ams2-1.htm> (acquisition management "starts with the determination of agency needs and continues through the entire lifecycle of a product or service").

102. RALPH C. NASH JR. & JOHN CIBINIC JR., FORMATION OF GOVERNMENT CONTRACTS 261 (3d ed. 1998).

103. 48 C.F.R. § 7.104(a) (2000).

as the system progresses from the initial stages of advanced research to production."[104]

Planners are required to "[e]nsure that *knowledge gained from prior acquisitions* is used to further refine requirements and acquisition strategies."[105] The acquisition planning team should include contracting, fiscal, legal, and technical personnel.[106] These employees, especially, technical personnel, are likely to be drawn from the ranks of those already employed in various contract administration functions. It makes common sense to draw personnel already working on a contract to acquire the follow-on goods or services. Who, for example, is in a better position to estimate the costs for successor contracts, to discern flaws or gaps in prior statements of work or unique contract clauses, and to learn the ways in which evaluation criteria employed in predecessor procurements failed to result in selecting contractors who offer the best value to the government? Thus the personnel involved in the day-to-day tasks of administering a contract are necessarily intimately involved also in planning for successor contracts.[107]

Because the contract administration and procurement functions are so inextricably intertwined, there is no valid means of compartmentalizing

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104. NASH & CIBINIC, *supra* note 102, at 266.

105. 48 C.F.R. § 7.103(q) (emphasis added); *see also* DOD Directive 5000.1, DEFENSE ACQUISITION (15 Mar. 1996), ¶ 4.2.9 ("Continuous Improvement. The Department shall continuously focus on implementing major improvements necessary to streamline the acquisition process, reduce infrastructure, and enhance customer service through process reengineering and technological breakthrough.").

106. *Id.*

107. The program manager in particular has his feet planted in both worlds (administration and procurement). In the Defense Department, for example, the program manager is explicitly assigned overall responsibility for acquisition planning for requirements within his bailiwick. 48 C.F.R. § 207.103. The program manager is also responsible for developing the acquisition strategy and other important procurement tasks, such as acquisition risk management and development of acquisition strategy. 48 C.F.R. § 34.004; DOD DIRECTIVE 5000.1, *supra* note 101, paras. 4.1.4, 4.3.1, 5.1.13; DOD 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS, para. 3.3 (23 Mar. 1998) ("Each PM shall develop and document an acquisition strategy that shall serve as the roadmap for program execution from program initiation through post-production support."). *See also* 48 C.F.R. § 434.003(e) (Department of Agriculture program managers responsible for planning and executing major systems acquisitions); 48 C.F.R. § 3507.103(f) (Panama Canal Commission program managers responsible for acquisition planning for their requirements); U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP., § 6.303-91 (Dec. 1, 1984) (program manager must review and sign justifications and approvals for Other Than Full and Open Competition).

them in the context of revolving door rules. Nevertheless, to the extent that the scope of the particular matter element of 18 U.S.C. § 207 does not include contract administration with regard to predecessor contracts, a great body of competitively useful information is allowed onto the market when former government employees seek new jobs.

(d) Specific Parties

Finally, Section 207(a)(1) requires that the particular matter have involved a "specific party or specific parties at the time of such participation." This is a significant limitation on the coverage of the statute.[108]

(e) Summary

As a means of administratively policing the integrity of the procurement system through the bid protest process, the Ethics in Government Act suffers from several deficiencies, including the criminal nature of the statute, and its concomitantly narrow focus as reflected in its numerous and highly specific offense elements. An additional handicap under which the statute labors is its failure to explicitly encompass the administration of predecessor contracts as being part of a "particular matter" that is an ongoing procurement of follow-on goods or services. This failure makes it far more difficult, when using an Ethics in Government Act violation as the fulcrum of a revolving door bid protest, to prove that predecessor contract administration activities can confer upon government employees inside information that could result in unfair competitive advantage if such government employees go to work for a contractor competing for a follow-on contract. The Ethics in Government Act, by design or inadvertence, is thus a tool ill-suited to the task of protecting the integrity of the procurement system through revolving door bid protests.

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108. Regarding the then-new ethics law, 18 U.S.C. § 207, Dean Manning wrote in 1964:

> [T]he significance of the phrase "involving a specific party or parties" must not be dismissed lightly or underestimated. Law 87-849 (18 U.S.C. § 207) discriminates with great care in its use of this phrase. Wherever the phrase does appear in the new statute it will be found to reflect a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate.

BAYLESS MANNING, FEDERAL CONFLICT OF INTEREST LAW 204 (1964).

2. Procurement Integrity Act

(a) General

Originally enacted as Section 6 of the Office of Federal Procurement Policy Act Amendments of 1988,[109] the Procurement Integrity Act shares several of the same drawbacks as the Ethics In Government Act with regard to its ability to protect the integrity of the procurement system from the threat of revolving door impropriety. The Procurement Integrity Act was enacted primarily in response to the broad range of abuses highlighted by the "Ill Wind" investigations of the 1980s, and was not focused on the revolving door problem.[110] It therefore is not surprising that the law does not perfectly address revolving door concerns.

Providing criminal penalties for violations under certain circumstances,[111] the Procurement Integrity Act was drafted with precision and narrow focus appropriate for proceedings that could result in imprisonment and requiring proof beyond a reasonable doubt, but ill-suited for use in bid protests resulting at most only in remedial administrative action. In addition, like Ethics in Government Act Section 207(a)(1), the Procurement Integrity Act does not cast its net widely enough to prevent disclosure of all information that could confer unfair competitive advantage upon a contractor.

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109. Codified at 41 U.S.C. § 423. *See generally* Jamie S. Gorelick & Paul F. Enzinna, *Restrictions on the Release of Government Information*, 20 PUB. CONT. L.J. 427 (Summer 1991); *Guidelines And Observations On The Procurement Integrity Rules Affecting The Hiring Of Government Employees*, 39 GOV'T CONTRACTOR No. 2, 3.

110. Hon. Jeff Bingaman, *The Twelfth Annual Gilbert A. Cuneo Lecture: The Origins and Development of the Federal Acquisition Streamlining Act*, 145 MIL. L. REV. 149, 153 (1994). *See also* 134 CONG. REC. S17,071-01 (remarks of Sen. Glenn). For an overview and discussion of the legislative history of the Procurement Integrity Act, *see* Sharon A. Donaldson, *Section Six of the Office of Federal Policy and Procurement Act Amendments of 1988: A New Ethical Standard in Government Contracts?*, 20 CUMB. L. REV. 421 (1989/1990).

111. Although to date there have apparently been no reported prosecutions under the Procurement Integrity Act (negative search result in WESTLAW DCT database), improper disclosure of or obtaining of procurement information, when done in exchange for a thing of value or in order to confer a competitive advantage in competing for a federal agency procurement contract, are felonies punishable by fines and or imprisonment for up to five years. *See* 41 U.S.C. § 423(e)(1) (2000).

(b) Disclosure of Procurement Information, Section 423(a)

The Procurement Integrity Act provision bearing most directly on the revolving door problem is Section 423(a), Prohibition on Disclosing Procurement Information,[112] which states, in pertinent part:[113]

- no former official of the United States[114] who by virtue of that office had access to
- contractor bid or proposal information or
- source selection information,
- may knowingly disclose such information before the award of the federal agency procurement contract to which the information relates,
- other than as provided by law.[115]

Though superficially less narrowly—drawn than 18 U.S.C. § 207(a)(1), Section 423 suffers from an identical limitation—it focuses exclusively on one procurement at a time by defining the terms "contractor bid or proposal information" and "source selection information" with reference only to the procurement under consideration.

Contractor Bid or Proposal Information—Section 423(f)(1)(A-D) lists, as "contractor bid or proposal information," cost and pricing data, indirect costs and direct labor rates, duly-marked proprietary information about manufacturing processes, and information identified by the contractor as bid and proposal information.[116] However, these items are classified as "contractor bid and proposal information" only when they are "submitted to a federal agency *as part of or in connection with a bid or proposal* to enter into a federal agency procurement contract."[117] Thus, the Procurement Integrity Act does not protect from disclosure information obtained

112. 41 U.S.C. § 423(a). This and each of the other principal substantive provisions of the Procurement Integrity Act, 41 U.S.C. § 423(a-d), are repeated essentially verbatim at 48 C.F.R. § 3.104-4(a-d).

113. 41 U.S.C. § 423(a) also applies on the same terms to current federal officials. 41 U.S.C. § 423(b) contains an analogous provision prohibiting persons from obtaining contractor bid or proposal or source selection information.

114. Including persons who have acted for on behalf of, or who has advised the United States with regard to a federal agency procurement. 41 U.S.C. § 423(b).

115. *Id.* § 423(a).

116. 41 U.S.C. § 423(f)(1)(a-d).

117. *Id.* § 423(f)(1).

by a government employee while engaged in contract administration duties.[118]

Source Selection Information—Likewise, the term "source selection information" is defined comprehensively to include bid prices, proposed costs, source selection plans, technical evaluation plans, technical, cost, and price evaluations of proposals, competitive range determinations, rankings of bids, proposals, or competitors, source evaluation board reports, and information duly marked as source selection information.[119] Again, however, such information only qualifies as "source selection information" if it has been "prepared for use by a federal agency *for the purpose of evaluating a bid or proposal* to enter into a federal agency contract."[120] The statute thus appears to focus on discrete procurements.

A protester could argue that, as discussed above, administration of predecessor contracts is part of a seamless acquisition planning process to fulfill a continuing requirement, and that most knowledge acquired by government personnel so engaged should be protected by the Procurement Integrity Act as being the root of "source selection information" specifi-

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118. Government employees are explicitly prohibited from disclosing such information under the provisions of the Trade Secrets Act, 18 U.S.C. § 1905. The Trade Secrets Act, however, does not appear, in the context of bid protests, to have been effective in preventing such disclosures. *See* ARO, Inc., B-197436, May 19, 1980, 80-1 CPD ¶ 344 (judicial determination of Trade Secrets Act violation required in order to sustain protester's demand for cancellation of ongoing procurement and award to it). *See also* NSI Tech. Servs., B-253797.4, Dec. 29, 1993, 93-2 CPD ¶ 344 (protester with apparent Trade Secrets Act claim referred to Department of Justice). *But see* Hex Indus., Avel Corp., and Cosmodyne, Inc., B-243867, Aug. 30, 1991, 91-2 CPD ¶ 223 (where it is clear that the government's use of proprietary data or trade secrets violates a firm's proprietary rights, General Accounting Office may grant relief).

The regulatory prohibition against use of nonpublic information to further a government employee's private interests, however, may provide some theoretical protection. *See* 5 C.F.R. § 2635.703 (2000). This provision has the advantage, unlike the Procurement Integrity Act, of recognizing the importance of protecting information gained on one procurement from disclosure with regard to another procurement. 5 C.F.R. § 2635.703, example 3. However, this provision has never been employed by a protester in any bid protest (based on negative search results in the WESTLAW CG, BCA, and ALLFEDS databases using the query "2635.703").

119. 41 U.S.C. § 423(f)(2)(A-J) (2000).

120. *Id.* § 423(f)(2) (emphasis added). Unlike with "contractor bid or proposal information," however, the defense against the improper release of "source selection information" is not backstopped by the Trade Secrets Act, but would at least theoretically be supported by 5 C.F.R. § 2635.703 (restrictions on use of nonpublic information).

cally prepared for a particular procurement. However, such an argument, although meritorious in the abstract, would likely fail because such knowledge does not correspond with any precision to the items of source selection information listed in Section 423(f)(2)(A-J).[121] The careful, precise drafting of the statute would appear to militate against such adventuring.

(c) Post-Government Service Employment Contacts, Section 423(c)

Although it is often impossible to discern from bid protest decisions[122] precisely when a former government employee was first contacted by the non-federal employer, in a number of cases, it is clear that such contacts were made while the former government employee was still working for the government.[123] Under such circumstances, a violation of Section 423(c) of the Procurement Integrity Act is possible.[124] Section 423(c), however, added to the Procurement Integrity Act in 1989,[125] has an even more explicit focus on discrete procurements. Requiring positive preventive actions rather than positing proscriptions, Section 423(c) requires that,

- an agency official who
- participates personally and substantially[126]
- in a federal agency procurement[127]

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121. The listing appears to be exclusive. In addition to the doctrine of *inclusio unius est exclusio alterius*, the language of the statute uses words denoting exclusivity. Instead of saying that "source selection information" "includes" the items listed (thus suggesting that the list is not exclusive), it states that the term "means" any of the items listed. *See* United States v. Terence, 132 F.3d 1291 (9th Cir. 1997); Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

122. The absence of such essential details in bid protest decisions is itself a significant failing that is permitted to occur because of the way revolving door bid protests are currently handled. *See infra* Section III.C.3.(e).

123. *See, e.g.*, Caelum Research Corp. v. Department of Transp., GSBCA No. 13139-P, GSBCA No. 13155-P, GSBCA No. 13156-P, 95-2 BCA 27,733; Central Tex. College, B-245233.4, Jan. 29, 1992, 92-1 CPD ¶ 121; Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105.

124. 41 U.S.C. § 423(c).

125. Pub. L. No. 101-189, § 814(a)(1)(C).

126. The term is defined in 48 C.F.R. § 3.104-3. *See* discussion *infra.*

127. Section 423(f)(4) states that "'federal agency procurement' mean the acquisition (by using competitive procedures and awarding *a contract*) of goods or services . . . ." 41 U.S.C. § 423(f)(4). The procurement must be in excess of the simplified acquisition threshold. 41 U.S.C. § 423(c)(1).

- who contacts or is contacted regarding possible non-Federal employment for that official
- by a person who *is* a bidder or offeror *in that procurement*
- the official shall
- promptly report the contact, in writing to the official's supervisor and to the designated agency ethics official
- and either
- reject the possibility of non-Federal employment,
  or
- disqualify himself from further personal and substantial participation in that procurement until permitted to resume such participation in accordance with the requirements of 18 U.S.C. Section 208.[128]

Several elements of Section 423(c) limit its protection of the integrity of the procurement system. First, it only applies to "personal and substantial participation," a term not defined in the statute. The Federal Acquisition Regulation Section 3.104-3 employs 294 words to define the term, spending sixty-one percent of them (179) in describing what is *not* "personal and substantial participation."[129] The regulatory definition reflects careful, thoughtful, consideration, and an attempt to balance all pertinent interests. However, as a means of drawing a clear line between participation that does and does not trigger the protection of the Procurement Integrity Act with regard to job offers and negotiations, Section 3.104-3 is a failure. This failure may simply reflect the impossible nature of such a task. Nevertheless, by focusing more attention on what is *not* covered participation, Section 3.104-3 conveys restrictive connotations that may thereby erode the protection against revolving door impropriety that it might otherwise have provided.

In addition, several of the specific exclusions of Section 3.104-3 from the definition of "personal and substantial participation" arguably degrade rather than promote procurement integrity. Service on agency-level

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128. 41 U.S.C. § 423(c) (emphasis added). The Federal Acquisition Regulation prescribes disqualification procedures at 48 C.F.R. § 3.104-6 (2000).

129. 48 C.F.R. § 3.104-3(2-4). The regulation defines the terms as follows (negative definition portions in italics):

> (2) Participating "personally" means participating directly, and includes the direct and active supervision of a subordinate's participation in the matter.

boards,[130] performance of general, technical, or scientific effort having broad, indirect application with a procurement,[131] preparation of in-house cost estimates in OMB Circular A-76 actions,[132] and discharge of clerical

129. (continued)

> (3) Participating "substantially" means that the employee's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. *However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.*
>
> (4) Generally, an individual will not be considered to have participated personally and substantially in a procurement solely by participating in the following activities:
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> (i) Agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;
>
> (ii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;
>
> (iii) Clerical functions supporting the conduct of a particular procurement; and
>
> (iv) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

Id.

130. 48 C.F.R. § 3.104-3(4)(i).
131. *Id.* § 3.104-3(4)(ii).
132. *Id.* § 3.104-3(4)(iv).

functions supporting a procurement[133] may entail exposure to important proprietary or source selection information. Yet, under Section 3.104-3 (4)(i-iv), persons performing such activities are under no duty to take prophylactic action in the event they are contacted regarding possible employment by a bidder or offeror. These exclusions also create opportunities for misunderstanding, misuse, and abuse, as well as post hoc rationalization by persons accused of violations of Section 423(c), and by agencies seeking to justify their actions. The balancing prescribed in Section 3.104-3(3) should furnish sufficient guidance without the need for specific regulatory exclusions from Section 423(c) coverage.

Further, Section 423(c) limits, by its terms, its coverage, not only to particular procurements (to the exclusion of predecessor procurements or administration of predecessor contracts),[134] but also to firms that are bidders or offerors at the time of the employment contact.[135] Thus, employment contacts occurring prior to the actual submission of a bid or offer would not subject the government employee to the requirements of Section 23(c).

The final characteristic of Section 423(c) that significantly weakens the protection afforded to the integrity of the procurement system is Subsection 423(c)(4).[136] At first reading, this provision may appear to strengthen the protection promised by Section 423(c), by extending the civil, administrative, and criminal penalties for violations of the section to bidders and offerors who discuss employment with government employees. However, instead of imposing on bidders and offerors an affirmative duty to ensure that the government employees they hire have complied with Section 423(c), the subsection imposes liability only if the employer "know[s] that the official has not complied with" the section's reporting and rejection or disqualification requirements.[137] Thus a bidder or offeror

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133. *Id.* § 3.104-3(4)(iii).

134. 41 U.S.C. § 423(c)(1) (2000) ("in *that* federal agency procurement") (emphasis added).

135. *Id.* ("by a person who *is* a bidder or offeror") (emphasis added).

136. *Id.* § 423(c)(4). The subsection provides:

> A bidder or offeror who engages in employment discussions with an official who is subject to the restrictions of this subsection, knowing that the official has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

Id.

137. *Id.*

is free to remain blissfully ignorant regarding the official activities of the government employees it pursues during the course of a procurement.[138] The language of Subsection 423(c)(4) provides that actual rather than constructive knowledge of violations would be required for liability exposure to exist.[139] Instead of encouraging the offeror to ensure the propriety of its hiring of a government employee whose official duties place him close to a procurement in which it is interested, Subsection 423(c)(4) perversely creates an incentive for the offeror to unreasonably keep its "head in the sand."[140] This aspect of Section 423(c) does not advance the government's interest in procurement integrity. The restrictive characteristics of Section 423(c) greatly diminish its protective effect against revolving door improprieties, and perhaps explain the dearth of reported bid protest cases in which a violation of the section was used as a protest ground.[141]

(d) Decision Makers and Senior Procurement Officials, Section 423(d)

Section 423(d) of the Procurement Integrity Act[142] attacks the problem presented in the Grumbly situation, detailed in the Introduction of the article.[143] It is addressed: under Subsection 423(d)(1)(C), to decision-

138. Government employees are likewise only liable if they knowingly fail to comply with the requirements of Section 423(c). However, actual knowledge should be more easily proven in the case of government employees versus bidders and offerors.

139. The subsection's diction ("knowing") is crystal clear. Further, when Congress wishes to indicate that a statute's coverage extends to constructive knowledge, or to preclude "deliberate ignorance," it knows how to do so. *See* 31 U.S.C. § 3729(b) (2000) (false claims statute, "knowing" and "knowingly" defined to include actual knowledge, deliberate ignorance, and reckless disregard for the truth); 12 U.S.C. § 1701q-1 (2000) (civil money penalties against mortgagors). While the theory of "deliberate ignorance" is applicable, in rare cases, in which the scienter requirement is only willfulness, *United States v. Wisenbaker*, 14 F.3d 1022 (5th Cir. 1994), when the scienter requirement is actual or positive knowledge, there must be conscious avoidance of knowledge of illegality. *See* United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976); EDWARD J. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 17.09.

140. Indifference to concerns regarding the qualifications of prospective employees is an ever less tenable business practice. *See* Jim Stavros, *Employee Screening Can Prevent Fraud; Right Information About Applicants Reduces Risk to Company*, THE LEGAL INTELLIGENCER, June 1, 1995, at 7.

141. A search of the WESTLAW CG, BCA, and DCT databases yielded no cases in which Section 423(c) was advanced as a protest ground.

142. 41 U.S.C. § 423(d).

143. *See supra* note 4 and accompanying text.

makers in procurement actions valued in excess of $10,000,000;[144] under Subsection 423(d)(1)(A), to senior procurement officials serving as such at the time of the selection of the contractor or the award of a contract to the contractor in excess of $10,000,000;[145] and, under Subsection 423(d)(1)(B), to program managers, deputy program managers, and administrative contracting officers for contracts in excess of $10,000,000.[146] Covered former government employees may not accept compensation for services rendered as an employee, officer, director, or consultant, from a contractor, within one year after the service or decision pertaining to a contract involving the contractor.[147]

Section 423(d) has the virtue of recognizing, through Subsection 423(d)(1)(B), that serving in certain key contract administration positions (program manager, deputy program manager, and administrative contracting officer) creates procurement integrity concerns without reference to involvement in a particular procurement. However, the subsection's meager coverage does not address contract administration support personnel, who would likewise have access to (and arguably in some cases a more detailed knowledge of) inside information that could impart an unfair competitive advantage. Further, Subsection 423(d)(1)(B) only prohibits acceptance of compensation from the contractor in place at the time of service in the contract administration position. For example, if the program manager for a $20,000,000 contract, K_1, with *XYZ* Corp., wants to retire and go to work for *ABC* Inc., to compete for and execute K_2, a follow-on contract for the same requirement, Section 423(d)(1)(B) does not prevent him from doing so.[148]

Section 423(d) shares with Section 423(c) the limitation that it exposes the contractor to liability only if it compensates the former government employee knowing that such compensation violates Section

144. Included are persons who personally decide to award contracts, establish overhead rates, approve issuance of contract payments, or pay/settle contract claims. 41 U.S.C. § 423 (d)(1)(C).

145. Covered officials are: the procuring contracting officer, the source selection authority, members of the source selection evaluation board, or the chief of a financial or technical evaluation team. 41 U.S.C. § 423(d)(1)(A).

146. *Id.* § 423(d)(1)(B).

147. *Id.* § 423(d)(1).

148. Section 423(d)(1)(B) covers only contracts "awarded *to that contractor.*" *Id.* § 423(d)(1)(B).

423(d),[149] thereby encouraging "head in the sand" hiring decisions.[150] In addition, the one-year compensation ban fails to take into account the substantial number of procurements that take longer than a year to complete.[151] Thus, Section 423(d) would not prevent the program manager in the above example from going to work for *XYZ* Corp., and assist it in its proposal preparation for the K_2 procurement, a fifteen-month process, as long as he waited one year to do so.

(e) Protest Limitations

Section 423(g) distinguishes procurement integrity as a unique protest ground, by requiring a person who discovers violations of the Act to report the discovery to the agency responsible for the affected procurement within fourteen days after discovery, on pain of precluding resort to the Comptroller General's bid protest process.[152] This is a significantly stricter deadline than is the case under the Comptroller General's bid protest regulations for procurements conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.[153] There are valid reasons to require such unusual haste in bring-

149. 41 U.S.C. § 423(d)(4). Actual, versus constructive knowledge, is required. Congress has shown that where it wishes to include both concepts in a statute, it knows how to do so ("knew or should have known"). *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B)(I) (IV) (2000); 15 U.S.C. § 16(g) (2000); 15 U.S.C. § 78u-3(a); 21 U.S.C. § 335a(d)(4)(B)(ii) (2000).

150. Section 423(d) suffers from an additional major shortcoming. Subsection 423(d)(2) permits acceptance of employment with a firm to which, for example, a former government employee had personally awarded a $1,000,000,000 contract, as long as the former employee worked for an affiliate of the firm that does not produce the same or similar product or service as the entity to which the contract was awarded. 41 U.S.C. § 423(d)(2). This shortcoming appears to relate primarily to the *quid pro quo* corruption concerns addressed by the Procurement Integrity Act, rather than to concerns arising out of the thesis case scenario. However, the provision exemplifies the ambivalence, timidity, and compromise that must have figured in the enactment of the law, and perhaps explains how Congress, attempting to design a horse, referred the task of design to a committee, thereby producing a camel.

151. *See, e.g.*, Holmes and Narver Servs./Morrison-Knudson Servs.; Pan Am World Servs., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, *aff'd on reconsideration*, B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 (at least 13 months); Bendix Field Eng'g Corp., B-232501, Dec. 30, 1988, 88-2 CPD ¶ 642 (at least 20 months from initiation of solicitation package to award).

152. 41 U.S.C. § 423(g); *see also* 4 C.F.R. § 21.5(d) (2000) (General Accounting Office implementation).

153. Such protests must be filed not later than 10 days following the conduct of the debriefing. 4 C.F.R § 21.2(a)(2).

ing matters affecting a procurement's integrity to the attention of the responsible government officials.[154] For instance, Section 423(g) may be intended to recognize the special enormity of procurement integrity violations, as compared to "garden-variety" procurement irregularities, and therefore attempt to give the government the greatest opportunity to avoid problems of this nature. Although laudable in theory,[155] this provision may serve only to stigmatize procurement integrity protests, leading to a belief that they are disfavored actions, and thus contribute to the lower sustain rate for revolving door bid protests. A recent General Accounting Office protest case that strictly interpreted this provision, to the detriment of a protester that had initially reported an alleged violation in a timely manner to the agency, only serves to aggravate such a perception.[156]

(f) Summary

The Procurement Integrity Act overall does not adequately meet the challenges to the integrity of the procurement system that arise when former government employees go to work for firms competing for contracts awarded to satisfy the requirements for which the former employees had official responsibility when in government service. By defining key terms in a restrictive fashion, the reach of the Act has been effectively limited to cases involving information prepared specifically for a discrete procurement, discounting the competitive value of information learned during contract administration activities. When combined with the Act's fundamentally criminal character, and a uniquely restrictive protest time limitation, these restrictive definitions render the Procurement Integrity Act a poor means for a bid protester to vindicate his claim to fair treatment of his bid or offer when competing for award with a contractor who has hired a key former government employee.

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154. SRS Tech., B-277366, July 30, 1997, 97-2 CPD ¶ 42 ("The 14-day reporting requirement affords the agency an opportunity to investigate alleged improper action during the conduct of an acquisition and, in appropriate circumstances, to take remedial action before completing the tainted procurement.").

155. In addition, this provision supports the article's argument that revolving door/conflict of interest protest grounds are different in ways that require special protection.

156. *See* SRS Tech., B-277366, July 30, 1997, 97-2 CPD ¶ 42 (noting that the protester notified the agency in a timely fashion and promptly received the agency position in reply that a violation had not occurred; the protester waited for over 100 days to protest; the protest was dismissed as untimely; the agency response implicitly deemed the equivalent of a debriefing to trigger the start of the 10-day clock for filing of protests under 4 C.F.R. § 21.2(a)(2)).

D. Conclusion

Is it presumptuous to challenge the current revolving door rules as inadequately solicitous of the integrity of the federal procurement system? This article does not challenge them. It simply notes that they apparently were not designed to comprehensively address revolving door issues in bid protests.

The Ethics in Government Act and the Procurement Integrity Act, at one end of the spectrum, focus like a laser beam on criminal conduct. Accordingly, they have been written to put everyone on notice of the acts they must avoid on pain of prosecution, fines, or imprisonment. It is too much to ask such criminal statutes to do double-duty as administrative protest grounds. All we can hope is that their existence will deter as many former government employees and competing contractors as possible from the most blatant and egregious unethical practices.

At the other end of the spectrum is the theory of the appearance of impropriety, a true legal stepchild. Though recognized in a wide variety of legal settings, "appearance of impropriety" in government contracting exists in a tenuous status at best, relying on scraps of ambiguous and equivocal regulatory guidance and authority that give protest fora little by which to navigate.

Unfortunately, there is currently no middle path between the extremes; no tool to address improprieties associated with former government employees who go to work for contractors under circumstances in which it is difficult to determine whether actual or apparent impropriety exists. The procedural rules exacerbate this difficulty by failing to impose upon the parties who are in an exclusive position to illuminate the facts bearing on these issues (namely, the agency, the former government employee, and the contractor who hired him) the duty to do so. Instead the rules impose and never shift the burden from the protester, and effectively hold that "ties goes to the [agency]."[157]

In view of the shortcomings of the rules, it is not surprising that revolving door bid protests are denied at such an unusually high rate, and that the protest fora experience such difficulty in arriving at decisions that comprehensively and critically evaluate all relevant evidence.

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157. Riggins Co., B-214460, July 31, 1984, 84-2 CPD ¶ 137 (holding that the protester has the burden of proof, which is not carried when the evidence consists of conflicting statements between the protester and the agency).

III. Applying the Rules: Hard Facts Are Good to Find

> When it comes to ethical issues . . . "close enough for government work" is not sufficient. In a democratic state, the government must be held to a higher standard than "close enough." Public confidence in the integrity of the public procurement system . . . requires that those who work for the government refrain from the appearance of impropriety to the greatest extent possible. "Close enough for government work" does not meet this standard. In short, the evil that must be avoided is the appearance of favorable treatment by an agent of government towards a private entity.[158]

A. Introduction

There is tension among the various compelling and sometimes conflicting interests: integrity, mission accomplishment, and competition, as filtered, reconciled, and stewed by the political branches, and as embodied in applicable law and regulation. This has resulted in the creation of tools that are not properly calibrated to accomplish the task of protecting the procurement system from the actual and apparent evils stemming from post-government service employment by government contractors. Further, the Federal Circuit's decision in *CACI, Inc.–Federal v. United States*,[159] which itself stemmed from the inadequacies of the revolving door rules, cast a pall of doubt over the appearance of impropriety as a basis for protecting the integrity of the procurement system.

This article is premised on a belief that the overwhelming majority of former government employees who accept positions with firms doing business with their former agencies do so in a completely ethical manner. However, when such virtuous behavior is not "bedecked with the outward ornaments of decency and decorum,"[160] the procurement system and its stewards, past and present, suffer damage to their image. The premise that

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158. Express One Int'l, Inc. v. United States Postal Serv., 814 F. Supp. 93, 99 (D.C.D.C. 1993).

159. 719 F.2d 1567 (Fed. Cir. 1983).

160. The full text of Fielding's advice regarding the importance of appearances is as follows: "Let this, my young readers, be your constant maxim, that no man can be good enough to enable him to neglect the rules of Prudence; nor will Virtue herself look beautiful, unless she be bedecked with the outward ornaments of decency and decorum." HENRY FIELDING, THE HISTORY OF TOM JONES, A FOUNDLING 92 (1909).

most former government employees conduct themselves with integrity in their post-government service employment suggests that the bid protest fora reach the "correct" result in a high percentage of its revolving door cases. In other words, based upon the prevalence of virtue among former government employees, when a protest forum denies a protest because no impropriety has affected the integrity of a procurement, we can be fairly confident that this is correct. However, when protest decisions do not satisfy the need to learn what happened, to discern who is telling the truth, and to understand the legal basis of the decisions, there is no reliable means of distinguishing the sheep from the goats. Under these circumstances, the temptation to generalize pejoratively regarding the ethics of government contractors and the former government employees who work for them is unfair yet difficult to resist, especially for the vast majority of the citizenry that is unfamiliar with the niceties of public contracting.

Section III begins with an examination of the 1983 case of *CACI, Inc.–Federal v. United States.* The primary effect of the Federal Circuit decision in this case was the confusion it spawned concerning the appearance of impropriety theory, by means of its requirement that disqualification based upon such an appearance must be supported by "hard facts."[161] Presumably, however, if "hard facts" were known regarding impropriety in the hiring or employment of a former government employee in the context of a protested procurement, there would be no need to rely on the appearance of impropriety, because actual impropriety would be proven (or disproven). The court further attenuated the appearance of impropriety theory with its seeming disparagement of other evidence suggestive of impropriety, but less compelling than "hard facts," as mere "suspicion and innuendo."[162] In addition, one portion of the opinion even appears to denounce the legitimacy of using the appearance of impropriety as a basis for injunctive relief in conflict of interest cases at all.[163] However, in view of the conflict of interest bid protest record since *CACI, Inc.–Federal*, the "hard facts" requirement appears to have had the same impact.

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161. *CACI, Inc.–Federal*, 719 F.2d at 1582. *See infra* Section III.B.2.

162. *CACI, Inc.–Federal*, 719 F.2d at 1582.

163. This, however, turned out not to have been the intent of the Federal Circuit. NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377 (Fed. Cir. 1986) (overruling a Claims Court decision that had enjoined the government from disqualifying a competitor based upon an appearance of impropriety). The Federal Circuit wrote: "Though the Claims Court erroneously limited that power to cases involving actual, but not the appearance of, impropriety, we do not repeat that mistake here." *Id. See infra* Section III.B.3.(d).

The *CACI, Inc.–Federal* decision thus set the stage for fifteen years of timidity by the protest fora,[164] forcing them to search for "hard facts" evidence of criminal conduct under rules that encouraged former government employees and their new employers to admit nothing and deny everything. Under these circumstances, it would be remarkable if subsequent revolving door protest decisions were able, on a consistent basis, adequately to examine the facts, apply the law, and reach results capable of withstanding "intelligent scrutiny."[165] However, as one would expect, revolving door protest decisions since *CACI, Inc.–Federal* have mirrored the muddled and imprecise state of the law. Section III concludes with an examination of the ways in which this unfortunate circumstance has been embodied in the post-1983 bid protest decisions.

B. *CACI, Inc.–Federal Legacy*

1. Background[166]

Formally commencing in September 1982, the Department of Justice (DOJ), Antitrust Division Information Systems Support Group (ISSG) conducted the procurement that was the subject of the *CACI, Inc.–Federal* protest to acquire data processing and litigation support services.[167] Eight firms responded to the Request for Proposals, including CACI, Inc.–Federal (CACI) and Sterling Systems (Sterling).[168]

Sterling's proposal was prepared under the direction of Mr. Robert E. Stevens, the former ISSG Chief (from 1978 to 1980).[169] Four of the five members of the Government Technical Evaluation Committee (TEC): Messrs. Anderson, Sweeney, and Smith, and Ms. Shelton, had some prior

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164. The Federal Circuit decision in *CACI, Inc.–Federal* overruled the Claims Court's decision disqualifying the awardee because of the appearance of impropriety resulting from its actions during the procurement. CACI, Inc.–Federal v. United States, 1 Cl. Ct. at 352 (1983). The Federal Circuit opinion reads as a severe rebuke. *See infra* Section III.B.2.-3.

165. *See* LIVELY, *supra* note 60.

166. To set forth all material facts, it will be necessary to recite particulars gleaned from both the Claims Court and the Federal Circuit opinions. Unless otherwise noted, there is no apparent conflict between the courts with regard to any facts herein.

167. *CACI, Inc.–Federal*, 719 F.2d at 1570.

168. *Id.*

169. *Id.*

social or professional association with Stevens.[170] Anderson had discussed with Stevens the possibility of accepting future employment for Stevens at Sterling, and had an open-ended expectation of working for Stevens.[171] There was also evidence of efforts to recruit Shelton to work

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170. *Id.* The TEC Chairman, Mr. Carl E. Anderson, had worked for Stevens, either directly or indirectly, for nine years, both in and out of government service. *Id.* at 1571. Mr. Terence Sweeney, who succeeded Stevens as ISSG Chief; Ms. Patricia J. Shelton; and Mr. Durwin E. Smith, had worked for Stevens from 1978 until his departure in 1980. *Id.* Smith also had a social relationship with Stevens. *Id.* Mr. Thomas E. Powers was the only TEC member who had no prior professional or social relationship with Stevens. *Id.*

Although mention was omitted by the Federal Circuit opinion, Anderson, Sweeney, and Shelton also had social relationships with Stevens. *CACI, Inc.–Federal*, 1 Cl. Ct. at 355. In addition, Sweeney was hired by Stevens at ISSG, and reported directly to him. *Id.* at 354. They were friends who "worked together very intensely for two years." *Id.* Stevens had hired Sweeney to work at ISSG. *Id.* at 355. A veteran ISSG employee testified under oath at trial in Claims Court that these circumstances appeared "suspicious" because "[t]hey [Sweeney and Smith] owe their jobs" to Stevens. *Id.* Shelton and Stevens were "poker budd[ies]." *Id.*

171. There is conflicting evidence regarding specificity and immediacy of employment negotiations between Stevens and Anderson. Anderson testified at trial as follows:

> Q: When you had the last discussion, at that time did you contemplate there being any further discussions?
>
> A[Anderson]: I would say I would contemplate that there would be further discussions. We left it sort of hanging. He indicated that he had hoped to have positions available in the future, but right now he had nothing he could offer me, and *I sort of anticipated some future contact from Mr. Stevens*.

Tr. 402. *CACI, Inc.–Federal*, 1 Cl. Ct. at 356 (emphasis added). According to Anderson, these discussions took place in April of 1981. *CACI, Inc.–Federal*, 719 F.2d 1577. No specific positions or salary was discussed, but it was clear that Anderson was going to be chief of a division within Sterling. *Id.*

However, two CACI employees testified that Anderson had informed them that he had been offered a job by Stevens, and would be leaving to accept the job "in a few months." *CACI, Inc.–Federal*, 1 Cl. Ct. at 355; *CACI, Inc.–Federal*, 719 F.2d at 1577.

Stevens's testimony on this issue is both self-serving and suspect in its own right. Stevens admitted that he had offered a job to Anderson, but testified that he believed the job offer had been made "years" earlier. *CACI, Inc.–Federal*, 1 Cl. Ct. at 361. However, the record disclosed that the offer had been made much more recently. *Id.* (Claims Court opinion avers that "[t]he record shows that it was quite recent."). Stevens testified that after he (Stevens) "left the government, Anderson 'was promoted and his salary at that point was . . . above the rates that I was able to compete with or use him on contracts . . . . '" *CACI, Inc.–Federal*, 719 F.2d at 1577. However, in view of the fact that he intended to employ Anderson as a division chief, the statement that he could not compete with Anderson's new

at Sterling.[172] The procuring contracting officer (PCO), Mr. Ronald L. Endicott, apparently had no prior professional or social relationship with Stevens.[173]

In August 1981, Sterling requested from the Antitrust Division an opinion regarding the propriety of Stevens's participation in the upcoming litigation services contract competition.[174] The Assistant Attorney General in charge of the Antitrust Division replied by letter on 23 November 1981 that Stevens participation would not violate 18 U.S.C. § 207.[175]

Proposals were required to be subdivided into technical and business management (cost) parts. They were weighted at seventy percent and thirty percent respectively, and evaluated separately.[176] On a 100-point scoring system, initially, the CACI (85.2) and Sterling (79) technical pro-

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171. (continued) salary following his government promotion appears dubious. Finally, Stevens at one point in his testimony swore that "there was no specific job" under discussion, yet at another point, he referred to "the position we had talked about." *Id.*

172. *CACI, Inc.–Federal*, 1 Cl. Ct. at 355-56. The Federal Circuit opinion related the following regarding Stevens's overture to Shelton:

> Stevens had similar discussions about possible employment with Shelton. Shelton testified that in March or April of 1981, they had "some discussions about the possibility of my moving to Sterling Systems at some point." No specific position or salary was discussed. After that time, there were no additional discussions about employment. Stevens testified that after he staffed a contract using personnel within the company, that "terminated any possibility of discussion with Pat [Shelton]." He also stated that although he had a specific job in mind for Shelton on another contract then under consideration, "the job did not materialize" because the contract was not awarded.

CACI, Inc.–Federal, 719 F.2d at 1577-78.

173. *CACI, Inc.–Federal*, 719 F.2d at 1571. Endicott was employed by another DOJ division.

174. *Id.* at 1576.

175. *CACI, Inc.–Federal*, 1 Cl. Ct. at 361. The Federal Circuit appears to be confused regarding the date of the reply letter from DOJ, indicating that it was issued in May 1981, three months prior to the request for opinion by Sterling. *CACI, Inc.–Federal*, 719 F.2d at 1576. If the Federal Circuit date is correct, however, it would indeed be a strange and suspicious circumstance in its own right.

176. *CACI, Inc.–Federal*, 719 F.2d at 1570. The TEC evaluated the technical part; the PCO evaluated the business management part. However, in spite of the Federal Circuit's characterization of the evaluations as separate, Anderson assisted the PCO in evaluating the business management proposals. *Id.* at 1571. Further, Anderson "conveyed some of the cost rankings of the various proposals to Sweeney." *CACI, Inc.–Federal*, 1 Cl. Ct. at 358.

posals were ranked first and second respectively.[177] Discussions were conducted with all eight firms, culminating in a request for best and final offers (BAFOs) which were to be submitted not later than 22 November 1981.[178] During the conduct of the procurement, Stevens was, "quite a constant visitor" to ISSG, and kept in telephonic contact with TEC members.[179]

During discussions, the PCO denied CACI the opportunity to present its technical proposal, and limited the session to one hour.[180] CACI's final technical score was 87.4, while Sterling's was 84.6.[181] The TEC members who had prior relationships with Stevens: Anderson, Shelton, Smith, and Sweeney, raised their rankings for Sterling's technical proposal by ten, seven, eight, and three points respectively.[182] Powers, the only TEC member with no prior relationship to Stevens, lowered the Sterling score by three points.[183] CACI did not enjoy proportionally similar improvements in its score.[184] However, all offerors that submitted BAFOs increased their technical scores.[185]

Thereafter, the PCO and Anderson evaluated the final business management proposals, applied the weighted formula, and ascertained that Sterling had won the competition.[186] Neither the Claims Court nor the Federal Circuit opinion indicated precisely how close were the final overall rankings of the CACI and Sterling proposals.

CACI was an incumbent contractor for a portion of the requirement that was the subject of the procurement.[187] Further, in the opinion of the

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177. *CACI, Inc.–Federal*, 719 F.2d at 1571. CACI's technical proposal, however, actually scored 85.21, as reported by the Claims Court. *CACI, Inc.–Federal*, 1 Cl. Ct. at 358.

178. *CACI, Inc.–Federal*, 1 Cl. Ct. at 359.

179. *Id.* at 356 (testimony of an unnamed ISSG employee). The subject of the contacts was not reported in the opinion.

180. *Id.* at 358. Neither opinion stated whether Sterling's discussions were limited in similar fashion. However, it is reasonable to assume that if they were treated in a substantially different manner, that circumstance would have been noted.

181. *CACI, Inc.–Federal*, 719 F.2d 1567, 1571 (Fed. Cir. 1983). The next closest offeror's proposal received a grade of 75.8 points.

182. *CACI, Inc.–Federal*, 1 Cl. Ct 352, 359 (1983).

183. *Id.*

184. *Id.*

185. *CACI, Inc.–Federal*, 719 F.2d at 1580.

186. *Id.* at 1571.

187. *CACI, Inc.–Federal*, 1 Cl. Ct. at 356.

Claims Court, the procurement requirements were "not substantially different in kind from those which [CACI] and others had been fulfilling for some time.[188] The Federal Circuit, based, apparently, exclusively on Sweeney's testimony, viewed the litigation services requirement under the procurement as substantially different from that procured by the ISSG when Stevens was in charge.[189] Anderson was responsible for drafting the statement of work for the procurement at a time when he was discussing employment at Sterling with Stevens.[190]

At some point,[191] the PCO conducted an investigation of the appearances of impropriety surrounding Stevens's participation in the procurement.[192] He examined the score sheets, read some General Accounting Office decisions, and reviewed the 23 November 1981 letter from the Antitrust Division in response to Sterling's request for opinion regarding the propriety of Stevens' participation in the procurement.[193] The investigation, however, did not include a consultation with an agency ethics official with regard to issues raised by events subsequent to the 23 November 1981 letter to Sterling regarding Stevens's participation in the procurement.[194]

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188. *Id.* at 357. The Claims Court further stated:

> Although somewhat different in form, the proposed contract is essentially a follow-on to the type of continuing automatic data processing and litigation support services procured during Stevens' tenure at ISSG and thereafter. In any event the procurement is part of the same particular matter [as defined in 18 U.S.C. § 207].

Id. at 364.

189. The court found that the new requirement was, "broader in scope, different in concept, and incorporates different features than the prior contracts." *CACI, Inc.–Federal*, 719 F.2d at 1576. Sweeney, according to the Federal Circuit, stated that the services acquired under the new contract "far exceed[]" the service previously acquired, and that the "broad objective" was consolidation, management control, redundancy elimination, and the provision of new services, such as production control, to the Antitrust Division. *Id.* Some unidentified services provided under the previous contracts were to be eliminated. *Id.*

190. *CACI, Inc.–Federal*, 1 Cl. Ct. at 352.

191. The Claims Court opinion, suggests that the investigation was undertaken sometime after 22 December 1982. *See CACI, Inc.–Federal*, 1 Cl. Ct. at 361.

192. *Id.* The record does not indicate who ordered the investigation, or the reason why.

193. *Id.*

194. *Id.*

2. Protest

(a) Claims Court[195]

On 3 January 1983, CACI filed a complaint in the Claims Court, seeking declaratory and injunctive relief, along with a motion for a preliminary injunction and an application for a temporary restraining order seeking to preclude the award of the litigation services contract by DOJ to Sterling.[196] A two-day trial commenced on 10 January 1983. The testimony of sixteen witnesses was taken, consuming 529 pages of trial transcript.[197]

CACI alleged that the award to Sterling "violated ethical standards of conduct for government employees, created the appearance of impropriety, and resulted in prejudice in favor of [Sterling] and against other firms seeking the contract."[198]

On 2 February 1983, the Claims Court held in favor of CACI, finding that nontrivial improprieties had occurred, of the sort that, in *United States v. Mississippi Valley Generating Co.*,[199] the U.S. Supreme Court had deemed adequate to support government cancellation of a partially-performed contract.[200] The Claims Court reasoned that such violations justified permanently enjoining the Antitrust Division from awarding the litigation services contract to Sterling.[201] Though no explicit findings

195. CACI originally filed a General Accounting Office protest. However, when CACI learned that the agency would not delay award of the contract, it pursued its protest in court. *CACI, Inc.–Federal*, 719 F.2d at 1571.

196. *CACI, Inc.–Federal*, 1 Cl. Ct. at 352.

197. *Id.*

198. *CACI, Inc.–Federal*, 719 F.2d at 1570. CACI also advanced several speculative indicia of impropriety on the part of Anderson and Sweeney in favor of Stevens and Sterling. These included the timing of the request for proposals (RFP), the nature and relative weights of the evaluation criteria, and the type of contract. *CACI, Inc.–Federal*, 1 Cl. Ct. at 360. Further, Sterling submitted its original offer as a "teamed" proposal that included another firm, Infodata, as a subcontractor; Infodata also submitted a proposal for the prime contract listing Sterling as a subcontractor. *Id*. at 358-59. Teamed proposals entail a tradeoff of enhanced technical expertise stemming from the combination of the two firms staffs versus the extra costs associated with combined overheads of the prime contractor and the subcontractor. *Id.* at 358. Following discussions with Anderson and Sweeney, however, Sterling submitted two BAFOs, one with Infodata as its subcontractor, and another under which Sterling would perform the contract without Infodata. *Id.* at 359.

199. 364 U.S. 520 (1961).

200. *CACI, Inc.–Federal*, 1 Cl. Ct. at 366-67.

201. *Id.* at 367. The Claims Court also held that CACI had standing to bring the action. This issue, however, is beyond the scope of this article.

were made that Sterling or Stevens had violated Title 18, Sections 207 or 208, the Claims Court found the proposed award tainted by actual improprieties and the appearance of impropriety. Award under such circumstances would in the Claims Court's view be arbitrary, capricious, and an abuse of discretion. It summarized the basis for the holding as follows:

> Aside from the "appearance of evil" throughout that record, there are a number of instances in which Stevens' prior service as Chief of ISSG, and his long-standing and continuing professional and social relationships with his successors, and with all but one of the 5-member Technical Evaluation Board ripened into concrete manifestations of prejudice in favor of Stevens' company, and against plaintiff and others.[202]

(b) Federal Circuit

Harsh Criticism Rather Than Disagreement Among Colleagues—On 28 October 1983, the Federal Circuit reversed the decision of the Claims Court and remanded the case with instructions to dismiss CACI's complaint.[203] The Federal Circuit opinion's tone was acerbic and unforgiving. The higher court implicitly criticized the completeness of the Claims Court's recitation of fact.[204] It characterized a theory of impropriety, purportedly advanced by CACI, and implicitly accepted by the Claims Court, as "border[ing] on the bizarre."[205] Its disagreement with the Claims Court over the propriety of a meeting between Stevens, Anderson, and Sweeney following the initial protest was cause for ridicule.[206] The failure of the

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202. *Id.* at 363. The court mentioned various manifestations of prejudice, including biased technical proposal scoring, undue delay in commencing the procurement in order to permit Sterling to gain experience, and adoption of source selection criteria designed to favor Sterling.

203. *CACI, Inc.–Federal*, 719 F.2d at 1582.

204. A proper statement of facts required the Claims Court's recitation to be "considerably amplified by the uncontradicted evidence in the record." *Id.* at 1570.

205. *Id.* at 1579 ("It borders on the bizarre to suggest, as CACI apparently does, that the Department officials who allegedly favored Sterling anticipated that Sterling would be ranked second or lower on its technical proposal so that it could obtain the contract only if its costs, which for some unknown reason would be lower, were given substantial weight.").

206. *Id.* at 1580 ("Finally, the Claims Court and CACI *see something sinister* in the fact that Sweeney met with Stevens to discuss implementing the contract even though CACI had filed with the Comptroller General a protest over the anticipated award to Sterling." (emphasis added)).

Claims Court clearly to state the legal basis for its ruling was highlighted with exquisite yet devastating finesse at the beginning of a major section of the Federal Circuit opinion.[207]

The Federal Circuit resolved several key issues involving questions of law and fact adversely to CACI, most importantly, the issue of whether the contract under the protested procurement was the same "particular matter" as the contract Stevens administered while head of ISSG. The disposition of this issue hinged almost exclusively upon the testimony of Stevens and Sweeney,[208] which the Claims Court evidently discounted in ruling that the contracts were the same particular matter.[209] Despite that the Claims Court held a two-day trial and had the opportunity to observe the demeanor of the witnesses, the Federal Circuit, which had no such opportunity, decisively overruled the lower court's finding without even an acknowledgement of the provisions of Rule 52(a), Federal Rules of Civil Procedure.[210] Finally, the Federal Circuit stated that "[t]he Claims Court based its inferences of actual or potential wrongdoing by the Department on suspicion and innuendo, not on hard facts."[211]

Bases for Reversal—The Federal Circuit rejected every circumstance and theory discussed by the Claims Court in connection with actual impropriety or the appearance of impropriety as bases for its injunction. The higher court found that Stevens had not violated 18 U.S.C. § 207;[212] that Anderson, Shelton, Sweeney, and Smith had not violated 18 U.S.C. § 208;[213] and, that these officials were not biased in favor of Stevens and Sterling.[214]

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207. *Id.* at 1575 ("The precise grounds upon which the Claims Court enjoined the award of the contract to Sterling are unclear.").

208. *Id.* at 1576.

209. *CACI, Inc.–Federal*, 1 Cl. Ct. at 364. Admittedly, the Claims Court's finding did not explicitly comment on the credibility of Stevens and Sweeney on this issue. Nevertheless, the Claims Court must perforce have disbelieved their testimony in reaching its finding.

210. FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

211. *CACI, Inc.–Federal*, 719 F.2d at 1582.

212. *Id.* at 1575-76.

213. *Id.* at 1576-78.

214. *Id.* at 1578-81.

The Federal Circuit then stated that an appearance of impropriety was "not an adequate or proper basis" for an injunction against awarding the litigation services contract to Sterling.[215] The Federal Circuit further opined that an Office of Personnel Management standards of conduct regulation[216] referred to in the Claims Court opinion did not "provide specific and precise standards, the violation of which would justify enjoining the [DOJ] from awarding the contract."[217]

The Federal Circuit explained the reasons injunctive relief was appropriate "only in extremely limited circumstances."[218] It then rejected the Claims Court's purported reliance upon the U.S. Supreme Court's decision in *United States v. Mississippi Valley Generating Co.*[219] as support for enjoining the award to Sterling based upon appearances of impropriety. The Federal Circuit stated:

> [The] holding [in *Mississippi Valley*] rested solely on the Court's conclusion that the government employee had violated the conflict of interest statute. In the present case, in contrast, there has been no violation of the Ethics in Government Act. The broad language in *Mississippi Valley* cannot properly be applied to the significantly different situation in the present case.[220]

The Federal Circuit opinion, however, misstated the Claims Court's rationale, which was based on its findings of *actual* improprieties.[221]

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215. The Federal Circuit rejected the theory in terms that, at least facially, were unequivocal, as follows, "[a] major thrust of the decision of the Claims Court was that there was both the opportunity for and the appearance of impropriety in that process. That was not an adequate or proper basis for enjoining the award of the contract to Sterling." *Id.* at 1581. *But see* NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377 (Fed. Cir. 1986).

216. 5 C.F.R. § 735.201a (1982) (no longer in effect; largely superseded by 5 C.F.R. § 2635.101 (2000), Standards of Ethical Conduct for Employees of the Executive Branch, Basic Obligation of Public Service).

217. *CACI, Inc.–Federal*, 719 F.2d at 1581. However, the Claims Court had not attempted to use the regulation in such manner. The regulation is arguably too vague to be employed for this purpose. The Claims Court, however, referred to the regulation merely as additional authority on the issue of whether Anderson and Shelton should be deemed to have been "negotiating" for employment with or to have had an "arrangement for employment with Sterling. *See supra* Section II.C.1.(c).

218. *CACI, Inc.–Federal*, 719 F.2d at 1581 (citing United States v. John C. Grimberg Co., 702 F.2d 1362, 1372 (Fed. Cir. 1983)).

219. 364 U.S. 520 (1961).

220. *CACI, Inc.–Federal*, 719 F.2d at 1581.

221. In spite of the Claims Court's mention of "the appearance of evil," in the end it relied upon actual improprieties. CACI, Inc.–Federal v. United States, 1 Cl. Ct. 352, 363,

1. Sequelae

Introduction—The effects of the *CACI, Inc.–Federal* case have manifested themselves in four areas. First, the Federal Circuit opinion set the standard unattainably high when it ruled that the undisputed facts of the case did not create a sufficiently odious appearance of impropriety so as to justify Sterling's disqualification. By requiring "hard facts" evidence of actual criminal impropriety, the decision made it virtually impossible to protect the integrity of the procurement system from the equally deleterious effects of appearances of impropriety.

Second, the unnecessarily harsh language of the Federal Circuit opinion reversing the Claims Court sent a strong and chilling message, all by itself, to the bid protest fora: "be careful and conservative, or you may be publicly humiliated in the Federal Reporter." A reasonable conclusion was that the Federal Circuit disfavors revolving door protests.

Third, both the Claims Court and the Federal Circuit opinions created confusion regarding whether an appearance of impropriety can be a ground for protest. Such confusion, by making it more difficult to predict the correct outcome, tends to further encourage undue timidity in deciding whether to disqualify an offeror, on pain of reversal as in the *CACI, Inc.–Federal* decision. Confusion also serves to blur the rules and thus to encourage unwarranted boldness in government procurement officials in choosing to overlook evidence of actual impropriety or appearance of impropriety.

Fourth, the Federal Circuit decision tacitly encouraged two significant faults that have been reflected in revolving door protests since 1983: uncritical acceptance of testimony by witnesses with unquestionably significant personal business, investment, and criminal interests in the outcome; and, failure to consider the synergistic impact of several circumstances contributing to an overall unacceptably improper appearance warranting remedial action.

This is the legacy of *CACI, Inc.–Federal*

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221. (continued) 366-67 (1983) ("This case presents improprieties of the kind which were not condoned in *Mississippi Valley*."). The Claims Court, however, did not make definitive findings regarding violations of any specific statute, thereby contributing to the impression that the ground of its decision was the appearance of impropriety.

(b) Appearance of Impropriety: The Impossible Dream

Several of the more speculative theories advanced by CACI as evidence of impropriety require careful investigation and concern,[222] but they would not by themselves necessarily warrant remedial action. Nevertheless, in view of the far more serious undisputed facts found in the case, these circumstances are a substantial part of the ethical background of the case, and therefore should not be discounted.

The essential and undisputed[223] facts that demand remedial action are as follows:

- Stevens was the head of the ISSG, the requiring activity for a substantial portion of the requirement that later became the litigation services procurement.[224]

- Stevens had personal and professional relationships with four out of five members of the TEC that would evaluate the Sterling proposal.

- Two TEC members were hired into their government jobs by Stevens.

- Two TEC members, including the Chairman of the TEC, had recently entertained job offers from Stevens to work for him at Sterling. Anderson anticipated future employment discussions with Stevens.

- The job offers were contingent upon Sterling receiving government contracts.

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222. These include the timing of the RFP, the nature and relative weights of the evaluation criteria, the type of contract used in the procurement, Sterling's alleged efforts to recruit CACI employees, and the 22 December 1982 meeting between Anderson, Sweeney, and Stevens following the initial protest. *CACI, Inc.–Federal*, 1 Cl. Ct. at 352, 360-61.

223. "Undisputed" is used in the context of the Claims Court and Federal Circuit opinions. If the Federal Circuit did not dispute a fact found by the Claims Court, it is considered "undisputed," regardless of whether one of the parties might dispute it.

224. It is reasonable to believe that in such capacity, Stevens would have had complete access to CACI cost and price information submitted in connection with its litigation services contract, and to government cost data, estimates, and acquisition plans.

- Neither TEC member who had entertained a job offer from Stevens had either formally terminated employment discussions, nor informed the PCO regarding the offer.[225]

- During the competition, Stevens stayed in regular contact with the TEC members with whom he had prior personal relationships.

- After submission of BAFOs, the four TEC members who had prior relationships with Stevens raised Sterling's technical score by a greater percentage than was enjoyed by any other offeror.

- The only TEC member who did not have a prior relationship with Stevens lowered the Sterling score.

- Although the technical and business portions of the proposals were to be scored separately, Anderson participated substantially[226] in evaluating both proposals, and, for no apparent reason, provided some information regarding the business portion evaluation to Sweeney.[227]

- Although CACI received the higher technical score, it lost the competition because of Sterling's lower price, under the source selection criteria, made it the highest rated proposal overall.[228]

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225. Though not in effect at the time, these failures, if occurring today, would arguably violate the Procurement Integrity Act. 41 U.S.C. § 423(c)(1) (2000).

226. It is reasonable to argue that Anderson's role in evaluating the business proposals would be unusually important, and not merely advisory, since Endicott, the PCO, came from outside the Antitrust Division, and would therefore be unfamiliar with the requirement.

227. As the Federal Circuit pointed out, there was nothing inherently wrong with Anderson serving on both committees. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1579 (1983). This, however, misses the point: that the source selection plan had apparently intended that the evaluations would be conducted separately, presumably to avoid the kind of manipulation that was suspected in this case. In view of Anderson's prior longstanding relationship with Stevens, there is no basis on which to place a benign interpretation on Anderson's participation in evaluating the technical and business proposals. Further, there was no attempt to justify Anderson's disclosure of the relative cost standings of the initial proposals to Sweeney prior to TEC evaluation of the BAFOs.

228. It would have been very useful to know, when attempting to sort out the ethical issues in this case, how close the final overall scores of CACI and Sterling were. Neither

These facts, even without the admittedly equivocally suspicious circumstances noted above,[229] constitute an appearance of impropriety that demands disqualification. All four TEC members should have fully disclosed their prior relationships with Stevens to the PCO prior to assuming their duties, especially Anderson and Shelton in regard to their job discussions.[230] The PCO should have followed the apparent source selection plan provision to conduct separate evaluations of the technical and business portions of the proposals. Stevens should not have known who the TEC members were, much less should he have been in regular contact with them during the competition. The totality of circumstances created by the conduct of Stevens, Anderson, Shelton, Sweeney, and Smith indelibly stained the procurement and demanded radical remedial action.

It would be unfair, however, to ignore the most compelling fact in favor of Stevens and Sterling, namely the August 1981 ethics opinion request, and the Antitrust Division response that sanctioned Stevens's participation in the litigation services procurement.[231] How can Sterling be disqualified after it relied on the Antitrust Division approval?

There are several grounds for doubt regarding the ethics opinion process in this instance. First, the Federal Circuit opinion does not indicate

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228. (continued) opinion so informs us. The failure to include important facts such as this is also a failing of many post-*CACI, Inc.–Federal* revolving door bid protest decisions.

229. *See supra* note 221.

230. It is reasonable to presume that they did not do so. If they had, the government would certainly have proffered evidence of it, and the Federal Circuit would certainly have highlighted it.

231. In response to Sterling's letter, on 23 November 1981, William F. Baxter, the Assistant Attorney General in charge of the Antitrust Division, replied:

> Mr. Stevens would be qualified to manage Sterling's proposal activities, represent Sterling with respect to the RFP [proposal] and manage Sterling's performance on any resulting contract for at least two reasons: (1) the program covered by the RFP did not involve any specific party or parties while Mr. Stevens was employed by the Division, and (2) the RFP to be issued does not involve the "same particular matter" as anything with which Mr. Stevens was involved as a government employee. Specifically, the Antitrust Division's 1978 Litigation Support RFP and our new one will not be the "same particular matter" because of (a) time elapsed between them, and (b) fundamental differences in their scope and approach.

CACI, Inc.–Federal, 719 F.2d at 1576.

what facts were disclosed by Sterling in its request. For example, it is unknown whether the Sterling letter disclosed the extent to which Stevens had access to inside information that could be competitively useful in the upcoming litigation services procurement. Second, the opinion rests upon the controversial position (not shared by the Claims Court) that the predecessor contract administered by Stevens was not the same particular matter as the litigation services requirement to be procured. Finally, and most importantly, it is unknown who prepared the response on behalf of the Assistant Attorney General. Although no such finding was entered, it is difficult to imagine that the response was written without Anderson and Sweeney playing central roles. Who else for example, other than Sweeney, the current ISSG chief, and Anderson, the TEC chairman, would be able to educate the Assistant Attorney General regarding the issues raised by Sterling's letter? It is difficult to believe that Sweeney and Anderson disclosed to the Assistant Attorney General the their relationships with Stevens. Certainly, if these disclosures had been made, the Assistant Attorney General would have sought impartial advice on the issue, and documented his efforts. There is no evidence that this was done—there should be. Accordingly, the 23 November 1981 letter apparently sanctioning Stevens's participation in the litigation services procurement is of limited weight.

Also entitled to little weight is that the PCO conducted an "investigation" of the allegations of impropriety. This investigation consisted of reading the flawed letter from the Assistant Attorney General to Sterling, an examination of the score sheets, and review of several bid protest decisions. These meager efforts appear incomplete and inadequate, not an impartial attempt to seek the truth and ensure fair play.

By demanding greater evidence of the appearance of impropriety than was furnished by the undisputed facts of this case, the Federal Circuit effectively gutted the theory as a means of protecting the integrity of the procurement system. This was the most profound effect of the *CACI, Inc.–Federal* decision.

(c) In Terrorem Effect

The penultimate paragraph of the Federal Circuit opinion, as follows, was a stinging rebuke to the Claims Court:

> We have carefully reviewed the record in this case. We conclude that the Claims Court ruling that the Department's award of the contract to Sterling would be "arbitrary, capricious, and an abuse of discretion" because of the possibility and appearance of impropriety is not supported by the record and therefore is not a proper basis for enjoining award of the contract. *The Claims Court based its inferences of actual or potential wrongdoing by the Department on suspicion and innuendo, not on hard facts. The kind of inquiry and analysis the Claims Court made in this case, which without factual basis ascribed evil motives* to four members of the Technical Evaluation Committee in their handling of bids, was clearly erroneous and did not justify an injunction against the government's award of the contract to Sterling.[232]

These are indeed strong words that directly impugn the Claims Court's judicial temperament. In the face of the criticism it received from the higher court, it is not surprising that, when called upon to rule in a bid protest case involving different allegations of impropriety a mere two months following the *CACI, Inc.–Federal* reversal, the Claims Court sullenly denied the protest, stating: "*This court has been instructed* that 'inferences of actual or potential wrongdoing' based on 'suspicion and innuendo' are insufficient if 'not supported by the record.'"[233] The record of revolving door protest decisions following the *CACI, Inc.–Federal* decision suggests that the other protest fora were frightened as well. Such a suggestion is admittedly speculative.[234] Further, it would be wrong to ascribe undue weight to the language employed by the Federal Circuit in its *CACI, Inc.–Federal* opinion. However, in view of the overall statistical disparity between the sustain rates for thesis case protest results and protests in general (3.03% v. 13.4%) since 1983,[235] the potential for an *in terrorem* effect stemming from the language employed by the Federal Circuit is substantial, and may not lightly be dismissed as a contributing factor.

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232. *Id.* at 1581-82 (emphasis added).

233. Planning Research Corp. v. United States, 4 Cl. Ct. 283, 301 (1983) (emphasis added).

234. Further, it must be acknowledged, that in a not insubstantial number of cases, contracting officers have disqualified offerors because of an appearance of impropriety pertaining to the revolving door, and their decisions were upheld in protests. *See* NKF Eng'g, Inc., B-220007, Dec. 9, 1985, 85-2 CPD ¶ 638. Such cases, however, may only demonstrate protest fora predilection toward upholding government action, rather than concern for the integrity of the procurement system.

235. *See supra* note 12.

(d) Confusion

The Seeds Are Sown—The Federal Circuit in *CACI, Inc.–Federal* was indeed presented with a muddled case. The Claims Court appears to have amassed a great deal of evidence, which it recited in its opinion recounting the two-day trial. However, it failed to make specific findings regarding the alleged violations of the Ethics in Government Act. Although the Claims Court addressed perhaps the most important legal issues, particularly whether the procurement under protest was the same "particular matter" as the contracts administered by Stevens while he was the ISSG Chief, it did not analyze all of the elements of the statute. Further, it did not clearly state whether the outcome was based upon actual improprieties alone, or in combination with appearances of impropriety. The problem was exacerbated when the Claims Court adopted a questionable position regarding the holding in *Mississippi Valley Generating Co.*, namely that somehow the Supreme Court's action was based upon the "opportunity for a conflict of interest,"[236] thus injecting yet another possible basis for the relief it granted in *CACI, Inc.–Federal.*

The Federal Circuit, however, still was in a position to bring order out of the confusion, because it had before it a wealth of evidence. However, the higher court instead misconstrued the burden of the Claims Court's opinion, stating that "[a] major thrust of the decision of the Claims Court was that there was both the opportunity for and the appearance of impropriety in that process."[237] Whether it did or did not rely on such grounds, it is clear that the Claims Court did find actual impropriety.[238] The Federal Circuit, nevertheless, focused on the easier target presented by the Claims Court opinion: the vague notion of "appearance of or opportunity for" impropriety. The Federal Circuit flatly stated that these circumstances "[were] not . . . adequate or proper [bases]" for an injunction against award to Sterling.[239] The Federal Circuit compounded the confusion by subsequently characterizing the bases for the Claims Court's injunction as "the possibility and appearance of impropriety."[240]

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236. CACI, Inc.–Federal v. United States, 1 Cl. Ct. 352, 366 (1983). In fact, the term "opportunity for a conflict of interest" was not used in *Mississippi Valley Generating Co.* Although the Supreme Court did in general criticize improper appearances, it clearly found that actual impropriety (a violation of 18 U.S.C. § 434) had occurred, and that nonenforcement of the contract tainted by the violation was warranted. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562-63 (1961).

237. *CACI, Inc.–Federal*, 719 F.2d at 1581.

238. *CACI, Inc.–Federal*, 1 Cl. Ct. at 366-67.

239. *CACI, Inc.–Federal*, 719 F.2d at 1581.

240. *Id.*

The final score in *CACI, Inc.–Federal* discloses that actual improprieties, and appearances, opportunities, possibilities, and potentialities for improprieties (or wrongdoing) were considered, and that the Federal Circuit took a disfavored view of all but actual impropriety as a basis upon which to enjoin the award of a federal government contract.

The higher court then posed a riddle for all to ponder when pronouncing the type of proof required for such an injunction, stating that the requisite wrongdoing must be proven, not by "suspicion and innuendo," but by "hard facts."[241] Remaining unexplained, however, by the Federal Circuit opinion was the distinction between a hard fact and a "soft fact." We are not informed whether hard facts means proof beyond a reasonable doubt, by clear and convincing evidence, by a preponderance of the evidence, or an "I know it when I see it" standard. Without any definition or guidance regarding the "hard facts" standard, confusion was certain to follow.[242]

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241. *Id.*

242. The term "hard facts" is protean. The word "fact" is defined in terms suggesting actual, undisputed occurrence. BLACK'S LAW DICTIONARY 591 (6th ed. 1990). Modification using the adjective "hard" thus appears redundant. The courts have not provided a great deal of assistance in defining the term. For example, no case states whether "hard facts" is a type of evidence or a standard of proof.

The term is evidently easier to define by saying what it is *not*. "Hard facts" has been variously contrasted to: "circumstantial evidence" (*In re* Disciplinary Proceedings of Fred W. Phelps, Sr., 637 F.2d 171, 180 (10th Cir. 1981), Cosmodyne, Inc., B-224009, Nov. 18, 1986, 86-2 CPD ¶ 623)); "soft facts" (*In re* Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 635 F.2d 67, 71 (2d Cir. 1980)); "conclusions" (Sullivan v. Manhattan Life Ins. Co. of New York, 626 F.2d 1080, 1082 (1st Cir. 1980)); "inferenceand speculation" (United States v. Federal Communications Comm'n, 652 F.2d 72, 94 (D.C. Cir. 1980)); "suppositions and opinions" (Colorado v. New Mexico, 467 U.S. 310, 311 (1984)); "personal views" (Thomasson v. Perry, 80 F.3d 915, 952 (4th Cir. 1996)); "conclusory assertions" (R. Dement v. Richmond, Fredericksburg & Potomac R.R Co., 845 F.2d 451, 458 (4th Cir. 1988)); "fragmentary, inconclusive evidence" (Romero-Feliciano v. Torres-Gotzambide, 836 F.2d 1, 3 (1st Cir. 1988)); "a potpourri of conjecture, supposition, innuendo, and surmise" (Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987)); "flimsy possibilities" (Boese v. Department of the Air Force, 784 F.2d 388, 390 (Fed. Cir. 1986)); "naked, conclusory allegations" (Coleman v. Dines, 754 F.2d 353, 357 (Fed. Cir. 1985)); "circumstantial evidence" (Heinish v. Tate, 9 F.3d 1548 (6th Cir. 1993)); and, "rumors and published reports" (Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984)).

"Hard facts" has also been equated to: stipulated facts (E.F. Hutton Group, Inc. v. United States, 811 F.2d 581 (Fed. Cir. 1987)); actual facts (Llaguno v. Mingey, 763 F.2d 1560, 1579 (7th Cir. 1985) (Wood, J., dissenting), *abrogated by* County of Riverside v. McLaughlin, 500 U.S. 44 (1991)); uncontested facts (*In re* Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 635 F.2d 67, 71 (2d Cir. 1980)); "precise factual accuracy" (Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 760 (1975) (Powell, J. concurring)).

NKF Engineering, Inc. v. United States—Background. The seeds of confusion sown by *CACI, Inc.–Federal* ripened in the 1986 case of *NKF Engineering, Inc. v. United States*.[243] In *NKF*, the facts that suggested impropriety, though not so numerous, were comparably egregious to those in *CACI, Inc.–Federal*.[244] During the conduct of the procurement, the chairman of the Contract Award Review Panel (CARP), who was aware, among other salient data, of the relative standings of the offerors' proposals, left government service and accepted a position with NKF Engineering, Inc., a competitor. Thereafter, NKF's best and final offer came in thirty-three percent below its initial cost proposal, making it the apparent winner. The contracting activity, the U.S. Navy, believing that NKF appeared to have obtained and exploited an unfair competitive advantage in its hiring of the former CARP chairman, disqualified NKF for having an organizational conflict of interest.[245]

General Accounting Office Protest—The Comptroller General denied NKF's protest.[246] Asked by NKF to apply the "hard facts" standard set forth in *CACI, Inc.–Federal*, the Comptroller General agreed, but held that actual impropriety was not required to support the Navy's action. The crucial passage reads as follows:

> We agree that it is appropriate to use the CACI standard in this case. We disagree, however, with NKF's contention that an "actual" impropriety or conflict of interest must be established before an agency may consider an offeror ineligible. The court in CACI was concerned that the lower court's opinion regarding the possibility and appearance of impropriety was not supported by the record. No requirement to establish an actual impropriety was imposed or implied, and we do not believe that agencies must meet such a requirement in order to take action they believe necessary to maintain the integrity of the procurement system. *Our role is to determine whether there was a reasonable basis for the agency's judgment that the likelihood of an actual conflict of interest or impropriety warranted excluding an offeror.*[247]

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243. 9 Cl. Ct. 585 (1986), *vacated* 805 F.2d 372 (Fed. Cir. 1986).
244. *CACI, Inc.–Federal*, 719 F.2d at 373-75.
245. NKF Eng'g, Inc., B-220007, Dec. 9, 1985, 85-2 CPD ¶ 638.
246. *Id.*
247. *NKF Eng'g, Inc.*, 85-2 CPD ¶ 638 (citations omitted) (emphasis added).

Thus the Comptroller General appeared to interpret the "hard facts" requirement to mean that the agency need only have a "reasonable basis" to support its decision to disqualify.[248] The Comptroller General then found that the Navy did have a reasonable basis to conclude that an impropriety or conflict of interest was likely and that a potential "decisive unfair advantage" had been gained by NKF.[249]

Claims Court Protest—NKF brought suit in the Claims Court, seeking an injunction to bar the Navy from awarding the contract to the next offeror in line.[250] The Claims Court held that, to the extent that the Navy had disqualified NKF based upon the appearance of impropriety associated with the employment of the former CARP chairman, disqualification was not justified. Explicitly relying on the Federal Circuit opinion in *CACI, Inc.–Federal*, the apparently gun-shy Claims Court held that the "mere" appearance of impropriety cannot be "in and of itself a sustainable basis for the disqualification of an otherwise responsive and responsible bidder."[251]

In addressing actual impropriety as a basis for disqualification, the Claims Court ruled that the former CARP chairman's inside knowledge, coupled with the unusual decrease in NKF's BAFO cost proposal constituted "hard facts" within the meaning of the Federal Circuit decision in *CACI, Inc.–Federal*.[252] However, the Claims Court ruled that these "hard facts" had been considered in a vacuum that did not contain "critically important facts" that cut in favor of NKF.[253] This was error, in the opinion of the Claims Court.[254] Accordingly, the Claims Court granted the injunc-

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248. If "reasonable basis" is synonymous with "hard facts," it is difficult to *see* the need for the latter term, as the former is already recognized as the standard for review of most agency actions in the bid protest context. *See, e.g.*, Madison Servs., Inc., Comp. Gen. B-278962 (Apr. 17, 1998) (determination of agency needs); Jack Faucett Associates—Reconsideration, Protest, and Costs, Comp. Gen. B-278961.2 (Apr. 17, 1998) (RFQ cancellation); Goshen Excavators, B-279093.2 (Apr. 20, 1998) (nonresponsibility determination).

249. *NKF Eng'g Inc.*, 85–2 CPD ¶ 638.

250. NKF Eng'g Inc. v. United States, 9 Cl. Ct. 585, 587 (1986).

251. *Id.* at 592. The Claims Court referred specifically to the Federal Circuit's statement, in *CACI, Inc.–Federal*, that appearance of impropriety was an "inadequate basis for withholding award of the contract." *Id.*

252. *Id.*

253. *Id.*

254. *Id.* (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

tion, but remanded the case to the Navy to reconsider its disqualification decision in light of these additional facts and the court's ruling in regard to the appearance of impropriety.[255]

Federal Circuit Appeal—The Claims Court's opinion in *NKF* put the Federal Circuit court in a very difficult position indeed. Right or wrong, one unmistakable burden of its decision in *CACI, Inc.–Federal* had been that an appearance of impropriety "was *not an adequate or proper basis* for enjoining the award of the contract."[256] Yet in *NKF* the Federal Circuit was confronted with facts at least as unsavory as in *CACI, Inc.–Federal*. In *NKF*, further, it was the *government's* remedial action based upon an appearance of impropriety, rather than its inaction, which was at issue. The apparently unnecessary pronouncement in *CACI, Inc.–Federal* regarding the appearance of impropriety as a basis for radical remedial actions such as disqualification had thus returned to haunt the Federal Circuit.

Its choices were stark: acknowledge its mistake and overrule *CACI, Inc.–Federal* on the appearance of impropriety issue; affirm and thereby further entrench the error; or, clarify *CACI, Inc.–Federal* and overturn the Claims Court's decision. The Federal Circuit elected to take the last course of action.

This choice, however, regrettably and inevitably led to judicial artifice. In order to dispute the Claims Court's reading of the unambiguous language in *CACI, Inc.–Federal*, the Federal Circuit manipulated portions of its earlier opinion to make it appear that it had never disapproved of the appearance of impropriety as a basis for disqualification of an offeror. The operative passage from *NKF* reads as follows:

> In *CACI, Inc.–Federal*, the Claims Court enjoined the agency's award of a contract to the successful bidder based on a conflict of interest, but this court reversed. *After* noting that "*a major thrust of the decision of the Claims Court was that there were both the opportunity for and the appearance of impropriety in that process*," [clause 1] this Court concluded "*that there was no appearance of or opportunity for impropriety that would warrant enjoining the award*." [clause 2][257]

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255. *NKF Eng'g Inc.*, 9 Cl. Ct. at 595-6.

256. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1581 (1983) (emphasis added). *See infra* Section III.B.3.(d).

This passage quotes two clauses**,** from the Federal Circuit's *CACI, Inc.–Federal* opinion. Both are cited to the same page.[258] However, clause one actually appears six pages *after* clause two.[259] Further, the Federal Circuit opinion makes it appear that the second clause followed the first, and misleadingly promotes the impression that the two clauses were combined within a single thought.

Finally, the Federal Circuit's *NKF* opinion overlooks the language from *CACI, Inc–Federal*, on which the Claims Court, in *NKF*, relied in stating that the appearance of impropriety was not an adequate basis for an injunction. This sentence (the one rejecting, in *CACI, Inc.–Federal*, the appearance of impropriety as a basis for remedial action), however, immediately followed the sentence in which the first clause appeared.[260] The Federal Circuit could have found a more straightforward, although not entirely satisfying, basis on which to reconcile its decisions in *CACI, Inc.–Federal* and *NKF*.[261]

This sleight of hand set the stage for the Federal Circuit to correct its error in *CACI, Inc.–Federal.* It did so with one last criticism of the Claims Court, as follows: "Though the Claims Court erroneously limited that power to cases involving actual, but not the appearance of, impropriety, we

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257. NKF Eng'g, Inc. v. United States, 805 F.2d 372, 376 (Fed. Cir. 1986) (emphasis, parentheticals, and text formatting changes added; quotation marks in original).

258. *Id.* These clauses are cited to *CACI, Inc.–Federal*, 719 F.2d at 1567, 1575.

259. Clause one actually appears on page 1581 of *CACI, Inc. v. United States*. *See CACI, Inc.–Federal*, 719 F.2d at 1581.

260. *Id.* at 1581 ("A major thrust of the decision of the Claims Court was that there was both the opportunity for and the appearance of impropriety in that process. That was not an adequate or proper basis for enjoining the award . . . .").

261. A later passage in the opinion appears to base the outcome on the failure of proof regarding the appearance of impropriety, rather than on a determination that appearances of impropriety could not constitute a basis for disqualification, as follows:

> We conclude that the Claims Court ruling that the Department's award of the contract to Sterling would be "arbitrary, capricious, and an abuse of discretion" because of the possibility and *appearance of impropriety is not supported by the record* and therefore is not a proper basis for enjoining award of the contract.

Id. at 1582 (emphasis added). However, the proposition that appearances of impropriety, supported by hard facts, could constitute a basis for disqualification, is only implicit from this passage, and cannot overcome the clear statement, , that appearances of impropriety were "not an adequate and proper basis for enjoining award . . . ." *Id.* at 1581.

do not repeat that mistake here."[262] Thus the right thing was done: the appearance of impropriety was recognized as a basis for disqualification in revolving door cases. However, the less than forthright manner through which this worthy end was accomplished could not inspire great confidence in the permanence of the rule.[263]

Furthermore, the Federal Circuit opinion in *NKF* appears to be result-oriented, the favored result being to support government action. In attempting to reconcile its decisions in *CACI, Inc.–Federal* and *NKF*, the Federal Circuit disclosed its real agenda, as follows:

> Indeed, our vacating the Claims Court order in this case is consistent with the reversal in *CACI, Inc.–Federal*. *In both cases*, this Court finds the agency award to be based on a rational ground and Claims Court *interference with the normal procurement process* to be *error*.[264]

The Federal Circuit *NKF* opinion thus appears to combine an endorsement of the appearance of impropriety as a basis for remedial action in revolving door cases, along with a vote of confidence in the judgment of the government procurement officials who are called upon to deal with such issues. It could, therefore, be argued that in its *NKF* opinion, the

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262. NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377 (1986).

263. Moreover, such a lack of confidence would be increased by a comparison of the inconsistent rulings. The rejection of the appearance of impropriety in *CACI, Inc.–Federal* is unequivocal ("not an adequate or proper basis,"), whereas the Federal Circuit's embrace of the appearance of impropriety in *NKF* is not of the same clarity. *See CACI, Inc.–Federal*, 719 F.2d at 1581.

264. *NKF Eng'g Inc.*, 805 F.2d at 376 (emphasis added). David Hazelton explained the apparent inconsistency as follows:

> The Federal Circuit's pro-agency bias was also revealed in the 1986 decision of NKF Engineering, Inc. v. United States. The Federal Circuit, in ruling on the issue of ethical conflicts of interest between the contracting agency and a prospective contractor, took a position opposite to its conclusion in the earlier case of CACI, Inc.–Federal v. United States. The factual differences between the two cases do not explain adequately the different results. Instead, the two decisions can be reconciled best by noting that the Federal Circuit deferred to the contracting agency in each instance.

David R. Hazelton, *The Federal Circuit's Emerging Role In Bid Protest Cases*, 36 AM. U. L. REV. 919, 936-37 (1987).

Federal Circuit unleashed the government to do the right thing when former employees go to work for competing contractors. However, in view of the significant ways that revolving door cases differ from those of the garden-variety,[265] and the results as reflected in the bid protest sustain rates,[266] it is probably more accurate to say that the *CACI, Inc.–Federal/ NKF* message was at best, confusing, and at worst, a license for procurement officials to ignore unpleasant facts and circumstances and a catalyst for entropy in revolving door bid protest law.

The Federal Circuit created further confusion in its *NKF* opinion. After accepting the appearance of impropriety as a basis for remedial action to protect the integrity of the procurement system, the court failed to explain what it meant by "hard facts." The term is only mentioned once in *NKF*, quoting the Federal Circuit opinion in *CACI, Inc.–Federal*.[267] No attempt was made to define the term. Instead, the court posited a new standard: the "strong appearance."[268] What constitutes a "strong appearance" is not defined, though presumably the facts of *NKF* qualify. We were likewise not told whether "strong appearance" is a more rigorous standard than "hard facts."

Flip-Flop on the Appearance of Impropriety—The Federal Circuit's rejection, in *CACI, Inc.–Federal*, of the appearance of impropriety as a basis for disqualification, was promptly followed by the Comptroller General in six protests over the following year.[269] Up until the *NKF* decision in 1986, at least three additional General Accounting Office protests were

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265. *See supra* Section I.B.2.

266. *See supra* note 12.

267. *NKF, Eng'g Inc.*, 805 F.2d at 376.

268. "Hence, when a CO perceives a *strong appearance of impropriety* in a situation not precisely covered by the Act, it would undermine Congressional concern in the conflict of interest area to tie the hands of the CO." *Id.* at 377.

269. Hudson Valley Med. Prof'l Review Org., B-212618, Oct. 2, 1984, 84-2 CPD ¶ 378 ("The mere appearance of, or opportunity for, bias is not a sufficient basis for questioning a contract award, but that a protester must provide "hard facts" showing actual bias."); Canaveral Port Servs., Inc., B-211627.3, Sept. 26, 1984, 84-2 CPD ¶ 358 ("The protester must establish more than the appearance of a conflict of interest and the opportunity for bias; it must establish "hard facts" that a conflict of interest . . . ."); Booze, Allen & Hamilton, B-213665, Sept. 24, 1984, 84-2 CPD ¶ 329) ("The opportunity for bias is not a sufficient basis to question an award of a contract, but that the protester must provide "hard facts" showing actual bias."); Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694 ("The Court of Appeals found that the appearance of conflict and the

decided in accordance with the later-found to be inoperative *CACI, Inc.–Federal* rejection of the appearance of impropriety.[270]

The General Accounting Office, however, evidently began to doubt the validity of the Federal Circuit's *CACI, Inc.–Federal*. By December 1985, in *Defense Forecasts, Inc.*, the first hint of change appeared.[271] The Comptroller General, however, was forced to adopt tortured legal reasoning to achieve its goal, which was to support the agency decision to take action to protect the integrity of the procurement.[272] In *NKF*, the Comptroller General abandoned the Orwellian logic of *Defense Forecasts, Inc.* in favor of a plain refusal to acknowledge the unambiguous ruling of the Federal Circuit in *CACI, Inc.–Federal*.[273]

> We agree that it is appropriate to use the CACI standard in this case. We disagree, however, with NKF's contention that an "actual" impropriety or conflict of interest must be established before an agency may consider an offeror ineligible. The court in CACI was concerned that the lower court's opinion regarding the possibility and appearance of impropriety was not supported by the record. No requirement to establish an actual impropriety was imposed or implied, and we do not believe that agencies must meet such a requirement in order to take action they believe necessary to maintain the integrity of the procurement system.[274]

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269. (continued) opportunity for bias were not sufficient to overturn the award of the contract in the absence of 'hard facts' showing actual bias."); Applicon, a Division of Schlumberger Tech. Corp., B-213355, June 11, 1984, 84-1 CPD ¶ 613; Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17 ("Mere inferences of actual or potential conflict of interest do not afford a basis for disturbing a contract award; there must be 'hard facts' showing an actual conflict of interest." (citation omitted)). The Claims Court was misled as well. *See* Space Age Eng'g, Inc. v. United States, 4 Cl. Ct. 739, 744 (1984).

270. HSQ Tech., B-219410, Sept. 18, 1985, 85-2 CPD ¶ 300; NAHB Research Found., Inc., B-219344, Aug. 29, 1985, 85-2 CPD ¶ 248; Petro-Eng'g, Inc., B-218255.2, June 12, 1985, 85-1 CPD ¶ 677.

271. B-219666, Dec. 5, 1985, 85-2 CPD ¶ 629 ("An agency may reject an offer, which proposes a special government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist.").

272. The Comptroller General determined that, because the appearance of conflict of interest involved a *current* government employee, "hard facts" need not be proffered. *Id.* ¶ 629. However, as discussed above, a major aspect of the appearance of impropriety alleged in *CACI, Inc.–Federal*, was bias on the part of four members of the TEC, *current* government employees. *See supra* Section III.B.1.

273. *See supra* Section III.B.3.(d).

274. 85-2 CPD ¶ 629 (citation omitted).

In view of the Federal Circuit's ruling in *CACI, Inc.–Federal*, as followed by the General Accounting Office in nine protests, the Claims Court must have believed itself to be on firm ground when it enjoined the Navy in *NKF v. United States*. Imagine the Claims Court's confusion and chagrin, and that of the nine disappointed protesters, when the Federal Circuit executed a 180° turn in *NKF*.[275]

The "Hard Facts" Quandary—Adopting the "hard facts" standard promoted confusion in three ways. First, as discussed above, the term itself is vague and undefined in the revolving door context.[276] Second, use of the term in conjunction with the appearance of impropriety looks illogical and internally inconsistent.[277] If hard facts are available, actual impropriety has been proven, not the mere appearance of impropriety. As a tool for principled decision-making, "hard facts" is of little use. As a slogan to be invoked when convenient in upholding agency inaction in the face of appearances of impropriety, "hard facts" is perfectly suited.

Third, it is unclear whether hard facts must be proven regarding the mere existence of a conflict of interest, or, must there also be hard facts demonstrating unfair competitive advantage or prejudice resulting from the conflict? Bid protests since *CACI, Inc.–Federal* have typically required the protester to prove that it was prejudiced by the actions of the competitor that hired the former government employee.[278] Further, the Comptroller General has decided that hard facts must be proven regarding the existence of prejudice.[279] However, the Federal Circuit opinion in *NKF* suggests that proof of prejudice is not required.[280] A recent organi-

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275. Moreover, the confusion regarding the appearance of impropriety issue did not end with *NKF*. At least two years after *NKF*, the Comptroller General was still issuing decisions that required "hard facts showing an *actual* conflict of interest." Eagle Research Group, Inc., B-230050.2, May 13, 1988, 88-2 CPD ¶ 123 (emphasis added).

276. *See supra* Section III.B.3.(d).

277. The Federal Circuit initially linked the hard facts standard to the appearance of impropriety in its *CACI, Inc.–Federal* opinion. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 582 (1983) ("The Claims Court based its inferences of actual or potential wrongdoing by the Department on suspicion and innuendo, not on hard facts.").

278. *See* AT & T Techs., Inc., B-237069, Jan. 26, 1990, 90-1 CPD ¶ 114; Wall Colmonoy Corp., B-217361, Jan. 8, 1985, 85-1 CPD ¶ 27; Damon Corp., B-232721, Feb. 3, 1989, 89-1 CPD ¶ 113; HLJ Management Group, Inc.—Request for Reconsideration, B-225843.5, Mar. 6, 1989, 89-1 CPD ¶ 237 .

279. Imperial Schrade Corp., B-223527.2, Mar. 6, 19987, 87-1 CPD ¶ 254.

280. *CACI, Inc.–Federal*, 805 F.2d 372, 376 (1986) ("Whether or not inside information was actually passed from Mr. Park to NKF, the appearance of impropriety was certainly enough for the CO to make a rational decision to disqualify NKF.").

zational conflict of interest protest decision comports with this latter suggestion.[281] These conflicting results stem directly from inadequate guidance from the Federal Circuit regarding the hard facts standard it imposed.

(e) Bad Example for Protest Fora

Applicability of the Judicial Standard—The initial issue with regard to the *CACI, Inc.–Federal* legacy is whether the Federal Circuit's decision regarding the propriety of an injunction should have a significant effect on the administrative protest fora. In *CACI, Inc.–Federal*, the Federal Circuit employed the hard facts standard in its review of an appeal from an *injunction* issued by a *court* against the government.[282] Yet the standard was immediately seized upon and applied by the Comptroller General in the context of administrative bid protests in which the coercive power of an injunction was not implicated.[283] Judging from the earliest post-*CACI, Inc.–Federal* protests, moreover, no thought was given to the differing nature of judicial and administrative protests, and the remedies available in each forum, as affecting the applicability of the hard facts standard to protests lodged with the General Accounting Office.[284]

In regard to revolving door protests, is there a meaningful distinction between judicial and administrative protests? After all, they share a fundamental characteristic, namely: in each case, an entity of one co-equal branch of government (legislative or judicial) is interfering with the operations of the executive branch.

Yet the decisions of the Comptroller General are mere recommendations.[285] In view of the requirement that agencies report their noncompliance with the Comptroller General's recommendations,[286] however, the practical impact of a bid protest decision is undoubtedly more coercive than the use of the term "recommendation" would imply. Nevertheless, an

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281. Aetna Gov't Health Plans, Inc.; B-254397.15, July 27, 1995, 95-2 CPD ¶ 129 ("There is a presumption of prejudice to competing offerors where an organizational conflict of interest (other than a de minimis matter) is not resolved.").

282. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983).

283. *See supra* notes 273-274.

284. Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694; Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17.

285. 31 U.S.C. § 3554(b)(1) (2000).

286. *Id.* § 3554(b)(3), (e).

agency is at least technically free to pursue procurement integrity and mission accomplishment as it sees fit, even if the Comptroller General disagrees. The circumstance that executive agencies rarely if ever elect to do so does not place an injunction on the same level with a recommendation of the Comptroller General. There is, therefore, a legitimate issue as to whether the hard facts standard should be applied in administrative protests. Considering the differing contexts of judicial and administrative protests, and its failure to define or explain the hard facts standard, it may have been a mistake for the Federal Circuit not to have examined this issue and given appropriate guidance for the administrative protest fora on the applicability of its ruling.

Impact on Analysis of Revolving Door Protests—Nevertheless, the deed was done. The hard facts standard, being so ill-defined, could be deployed whenever a protest forum wished to deny a revolving door protest. Much like in an equal protection case where, when the term "strict scrutiny" appears, the challenged classification is almost invariably about to be found unconstitutional, when the Comptroller General starts talking about "hard facts," the protester knows that it is time to move on and get over it.[287]

In addition to promulgating a vague standard for reviewing allegations of revolving door improprieties in bid protests, the Federal Circuit, in its *CACI, Inc.–Federal* and *NKF* opinions, set a poor example for the administrative protest fora regarding the mechanics of deciding such cases, and in publishing their decisions.[288]

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287. It is telling that in the two cases in which the Comptroller General did grant revolving door protests, the hard facts standard was (needlessly, in view of the facts in each case) diluted. Guardian Techs. Int'l, B-270213.2, Feb. 20, 1996, 96-1 CPD ¶ 104 (disqualification may be based on "facts" demonstrating that awardee "may" have obtained an unfair competitive advantage); Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 (agency may exclude offeror because of the *likelihood* that it has obtained an unfair competitive advantage). In neither case was the term "hard facts" employed.

288. The ensuing critiques of Comptroller General decisions may not be unique to revolving door protests, and may ante-date *CACI, Inc.–Federal.* The relationship between this decision and the analytical weaknesses evident in revolving door cases might therefore be difficult to establish. Nevertheless, *CACI, Inc.–Federal* at a minimum contributed to the problem. Further, to the extent that these weaknesses stem from limitations in the revolving door rules, or can be ameliorated by the reforms proposed herein, they are relevant to this article.

Poverty of Detail—The exegesis of facts in *CACI, Inc.–Federal* is superficially impressive. Both the Claims Court and the Federal Circuit set forth in apparently minute detail the facts adduced at trial. Nevertheless, critical facts necessary to understanding the issues and the correctness of the outcome are missing. For example, the decision does not discuss the involvement of Anderson and Sweeney in the preparation of the DOJ reply to Sterling regarding Stevens's status in the ISSG litigation services procurement.[289] The DOJ letter was of central importance to the Federal Circuit's resolution of the issue of whether the instant procurement was the same "particular matter" as the contracts administered by Stevens while in government service, a determinant of whether a violation of 18 U.S.C. § 207 had occurred.[290] Despite this, readers of the Federal Circuit opinion are left guessing whether these individuals played any role in this very important decision. Even a bare finding that they did not participate would have been better than the appearance that the issue was simply overlooked.

In evaluating whether any impropriety affected the litigation services procurement, the CACI and Sterling cost proposals were vital, because their relative standings determined the winner.[291] However, neither opinion gives specifics regarding any offeror's cost proposal, either initially, or following the BAFO request. In view of the Federal Circuit's determination that Sterling did not manipulate its costs to win the competition,[292] some explication of the competitors' cost proposals was necessary to evaluate and appreciate the correctness of the court's finding. Such facts would also have permitted intelligent scrutiny of the possibility that Stevens was able to exploit his inside knowledge regarding information about CACI's costs in performing its prior litigation support contracts for the ISSG.

The omission of such facts does not prove that the ultimate decision was wrong. Rather, it simply makes it very difficult for the parties and the public to decide for themselves whether the proper outcome ensued. Especially when integrity issues are involved, protest decisions should err on the side of including more facts bearing on the issue than is absolutely necessary. Nevertheless, perhaps following the Federal Circuit's example, the

289. *See supra* Section III.B.3.(b).

290. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 576 (1983) ("Th[e DOJ] ruling is entitled to weight.").

291. This is so because of the tightness of the competition, at least in regard to the final technical scores (CACI: 87.4; Sterling: 84.6). *Id.* at 1571. Although CACI was the technical winner, Sterling's costs gave it the award under source selection plan.

292. *Id.* at 1578-79.

revolving door protest decisions following *CACI, Inc.–Federal* have too frequently omitted critical facts necessary to understanding whether the integrity of the procurement system was adequately protected.[293]

Unwarranted Credulity—In a bid protest, as in any other type of litigation, the finder of fact must decide whether the witnesses are telling the truth. Among the means of divining the truth are consideration of the motivations of a witness to lie or to tell the truth; whether the witness's story

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293. A major area in which the protest decisions fail the parties and the public is in the detail afforded regarding the nature of the former government employee's duties as a government employee and his or her relationship to the requirement that is the subject of the procurement. *See* Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 (former government employees "involved with administering the prior contract." No further information given regarding their position or duties); Universal Tech., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63 (General Accounting Office says it cannot evaluate allegation of impropriety because protester did not give name of former government employee; agency, however, knew to whom the protester referred, and even supplied some information regarding the employee); Bendix Field Eng'g Corp., B-232501, Dec. 30, 1988, 88-2 CPD ¶ 642 (no facts given regarding former government employee's duties while in government service or in his position with contractor); Holsman Servs. Corp., B-230248, May 20, 1988, 88-1 CPD ¶ 484 (no facts given regarding the position held by the former government employee); FXC Corp., B-227375.2, Nov. 6, 1987, 87-2 CPD ¶ 454 (former government employee was "responsible for technical review of the program supported by this procurement," no further information provided); Space Sys. Techs., Inc., B-220935, Nov. 6, 1985 (former government employee described only as a "former Army officer," no further information given); Washington Patrol Serv., Inc.—Reconsideration, B-214568.2, July 17, 1984, 84-2 CPD ¶ 57 (former Chief of Staff of closely-related but organizationally separate command from procurement activity employed by proposed awardee; no information regarding former officer's access to or participation in protested procurement).

Another category of recurring omission are details regarding the fruits of former government employees' purported efforts to *see*k legal review of proposed post-government service employment arrangements. While production of the documentation resulting from such consultations should be relatively easy, thereby permitting reference to such documentation in the protest decision, this rarely occurs. *See* Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61; Blue Tee Corp., B-246623, Mar. 18, 1992; Holmes & Narver, Inc., B-239469.2, B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210 (former government employee testifies he notified supervisor regarding acceptance of conflict-creating job by memorandum; memorandum not produced). *But see* The Earth Tech. Corp., B-230980, Aug. 4, 1988, 88-2 CPD ¶ 113.

A third important category of important omitted information is the relative standing of the protester and awardee, where, as in *CACI, Inc.–Federal*, such information is required to adequately assess the potential for unfair competitive advantage. *See* Science Pump Corp., B-255737, Mar. 25, 1994, 94-1 CPD ¶ 246 (former government employee's firm wins competition based on suspect prices; protester's price not given, even in redacted form); Sterling Med. Assocs., B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60; .

makes sense; and the extent to which the overall credibility of the witness is eroded by the telling of one or more lies. These are by no means the only ways of assessing credibility, and they must of course be used with care and discrimination.[294] Nevertheless, especially when adjudicating protest allegations in which ethical and criminal concerns are implicated, as in revolving door cases, the protest fora must, to conscientiously discharge their duties, at least consider such factors when deciding whether witnesses are testifying truthfully.

Unfortunately, however, the Federal Circuit in *CACI, Inc.–Federal* set a poor example by its uncritical acceptance of testimony that demanded far more rigorous scrutiny. In view of the fact that the Federal Circuit judges did not have the benefit of observing the witnesses at trial, extra caution in this regard was warranted.[295] Nevertheless, the Federal Circuit relied almost exclusively and uncritically on Sweeney's testimony in finding, contrary to the determination of the Claims Court, that the prior litigation services contracts over which Stevens presided while ISSG Chief was not part of the same "particular matter" as the instant procurement.[296] Sweeney's testimony should not only have been partially discounted because of Sweeney's motive to lie on behalf of his patron and friend Stevens, and his current colleague Anderson,[297] but also it should have been substantially downgraded in light of the story's inherent unbelievability,[298] and evidence that Sweeney may have been less than completely honest with regard to another issue in the case.[299]

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294. For example, undue reliance on motivation is particularly ill-advised, "because it is simply not true that an individual with a motive to lie always will do so." United States v. Tome, 3 F.3d 342 (10th Cir. 1993), *rev'd* 513 U.S. 150 (1995).

295. "Due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. RULE 52(a). "We have repeatedly held that [Rule 52(a)] means what it says." Bose Corp. v. Consumer's Union, 466 U.S. 485, 498 (1984). Admittedly, the issue was not strictly factual in nature. The higher court's deference to the trial court need not have been as pronounced as it would be on a purely factual matter. However, the predominant role of the credibility of Sweeney's testimony to the resolution of the issue should have led the Federal Circuit to greater deference toward the Claims Court's finding.

296. The court also relied on the DOJ letter, however, the court's reliance on this letter was itself uncritical. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1576 (1983). *See supra* Section III.B.3.(b).

297. *See supra* Section III.B.1.(b).

298. It requires only a moderate stretch to believe Sweeney when he testified that Stevens played no role "whatsoever" in the development of the "baseline services concept" under which the procurement was conducted. *CACI, Inc.–Federal*, 719 F.2d at 1576. However, Sweeney's statement that the service to be provided under the new contract "far

Reasonable people may differ regarding Sweeney's credibility based upon the limited evidence presented in the opinions. The point, however, is not so much whether Sweeney lied or not. Rather, it is that as a critical witness on a question of enormous significance to the case (the "particular matter" issue) Sweeney's truthfulness should have been subjected to far more exacting scrutiny than the Federal Circuit applied, especially because it did not have the advantage of observing Sweeney's demeanor while testifying.[300] It is important that all factors affecting the credibility of key witnesses be addressed, but the Federal Circuit failed to do so in *CACI, Inc.–Federal*. This failure appears to have been emulated by bid protest fora in revolving door cases since *CACI, Inc.–Federal*.[301]

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298. (continued) exceeds" those under the prior contracts is not supported by additional detail. Though the court apparently paraphrases the ways in which the new contract "far exceeds" the old, the new contract actually calls for little in the way of new service. The only such new service set forth in the opinion is production control activities. *Id.* Moreover, the fact that the court could not quote Sweeney more than one or two phrases at a time indicates that that he must have had little detailed, compelling testimony on the issue. If Sweeney had provided greater detail on this crucial issue, it is logical to expect that the court, which had otherwise painstakingly recited the facts of the case that favored the result, would have noted them.

299. Concerning the release by Anderson to Sweeney of the results of the initial review of the offerors cost proposals, Sweeney testified that he was nevertheless unable to predict the ultimate outcome of the competition. *Id.* at 1580. This testimony, if believed, would tend to negate allegations that Sweeney and the other TEC members with prior links to Stevens had manipulated the technical evaluations to favor Stevens and Sterling. However, Sweeney testified that he believed that "someone other than Sterling was going to be the lowest." *Id.* Sweeney, though, would have no way of making such a prediction based on the limited knowledge regarding the cost proposals that he was *supposed to have*. Under these circumstances his stated belief that someone other than Sterling would be lowest appears at best, disingenuous.

300. Stevens's credibility problems were also given a free pass by the Federal Circuit. *See supra* note 177.

301. Again, the critical issue is whether all factors affecting credibility are properly addressed. *See* Caelum Research Corp. v. Department of Transp., GSBCA No. 13139-P, Apr. 13, 1995, 95-2 BCA 27,733 (A former government employee, Ruble Garner, employed by subcontractor of awardee, engaged in series of misrepresentations regarding his prior role in the procurement while in government service; nevertheless the GSBCA credited without acknowledging these circumstances his testimony on key issues in protest); Biomedical Research, Inc., B-249522, Nov. 25, 1992, 92-2 CPD ¶ 381 (C.G.) (no consideration of motivation to lie affecting, and the inherent unlikelihood of, testimony by awardee's employees that the key person for the contract, a company vice president, was not informed until after award, that she would be the key person); Holmes & Narver, Inc., B-239469.2, B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210 (Former government employee, Bill W. Colston, testified that he announced his acceptance of a position with a competitor for a contract at a meeting attended by the source evaluation board (SEB) chairman for the

Contextual Myopia—In some cases, perhaps, comprehensive analysis of a bid protest may be possible even if the forum considers the protest grounds *seriatim*, as discrete issues. This, however, may not be an appropriate way to approach revolving door protests. The existence of several protest grounds in such a case requires the forum to take into account possible relationships among the protest grounds suggestive of actual impropriety that might not be revealed when the grounds are analyzed in isolation. Also, even if there is no obvious relationship among protest grounds, the coincidence of several suspicious circumstances should alert

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301. (continued) procurement, but the chairman does not remember any such announcement (he could not say that it did not occur, only that he did not remember it—an improbable memory lapse by the SEB chairman)). Nevertheless, Comptroller General found Colston's testimony "entirely credible," on critical issues without any apparent consideration of his problematic testimony in regard to his announcement. *Id.* 90-2 CPD ¶ 210. Laser Power Tech., Inc., B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267. The technical evaluation team (TET) chairman for a procurement met at restaurant late at night with the vice president of a competitor for the contract (his former military supervisor) just prior to the release of the RFP. The procurement was discussed, but the TET chairman denies divulging procurement sensitive or inside information. Comptroller General took the chairman's denial of what would have been criminal misconduct at face value. *Id.*

Further where the Comptroller has not had the opportunity to observe the demeanor of a key witness, it should carefully and explicitly address and resolve credibility issues such as motivation to lie in one's self interest. Dayton T. Brown, Inc., B-231579, Oct. 4, 1989, 88-2 CPD ¶ 314 (Former government employee, who was the head of requiring activity for the instant procurement, had responsibility for technical evaluation team for a predecessor contract that was awarded to the protester. Former government employee stated in an affidavit that he did not learn any proprietary information of the protester in his former capacity, nor did he participate in the current procurement. The Comptroller General, without citing any corroborating evidence, and without being able to *see* him testify, accepted the former government employee's averments without acknowledging his motive to lie.).

Finally, it is notable that in one of only two revolving door protests sustained by the General Accounting Office, where the Comptroller General wishes to find impropriety, it was willing to hold the inconsistent testimony of a former government employee against him. Guardian Techn., Int'l, B-270213.2, B-2702013.3, Feb. 20, 1996, 96-1 CPD ¶ 104. In that case, the Comptroller General sarcastically but correctly evaluated credibility as follows:

> The FBI attributes these contradictions to Mr. Pisenti's faulty "recollection." In our view, the most benign interpretation of these contradictions is that Mr. Pisenti does not understand that cost information is information "related to the procurement," casting doubt on the accuracy of his responses; a more unfavorable interpretation is that Mr. Pisenti's responses are not credible.

Id. 96-1 CPD ¶ 104. With regard to the reasons why the Comptroller General wished to rule in favor of the protester, *see infra* Section III.3.(e).

the forum to the possibility of impropriety requiring closer scrutiny and, potentially, remedial action.[302]

The Federal Circuit in *CACI, Inc.–Federal*, however, did not acknowledge, much less analyze, potential synergism among the various circumstances advanced by CACI as evidence the existence of impropriety. Again, reasonable persons may differ on the issue of whether this, or any other, combination of suspicious circumstances should be taken as evidence of actual impropriety. Further, the court was evidently laboring at the time under the belief that appearances of impropriety did not constitute an "adequate or proper basis" for relief,[303] and thus synergistic considerations regarding the various superficially discrete circumstances suggestive of impropriety may not have seemed required. However, even after the Federal Circuit clarified, in *NKF*, that mere appearances of impropriety could, by themselves, constitute a basis for remedial action,[304] the Comptroller General apparently has not recognized that where there's smoke, there may be fire.[305]

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302. "I only believe in coincidence occasionally." Chuck Lewis, Center for Public Integrity, *quoted in* Ken Silverstein, *Ron Brown's V.I.P. Junkets, Flying For D.N.C. Dollars*, Mendocino Environmental Center (1995), *available at* <http://www.pacific.net/~dglaser/ENVIR/MEC/ NEWSL/ISS19/13 Brown.html>.

303. CACI, Inc.–Federal v. United States, 719 F.2d at 1567, 1581 (Fed. Cir.) *See supra* Section III.3.(d).

304. NKF, Eng'g, Inc. v. United States, 805 F.2d 372, 377 (1986). *See supra* Section III.B.3.(d).

305. The problem is especially striking and troubling in best value procurements in which the government is able to reject a lower-priced offer in favor of offer with greater technical merit. *See, e.g.*, Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61. The contractor that hired as its proposed project manager the former contracting officer's technical representative for the predecessor contract was selected for award even though its proposed costs were 12% higher than those of protester. The source selection authority accepted the 12% premium because of selected awardee's purportedly lower performance risk. The protester alleged that inadequate discussions on the issue of performance risk prevented it from addressing the concern that led to its not being selected. Comptroller General was mildly critical of the agency's manner of handling discussions, but ignored the synergy among the revolving door bias, price premium, and inadequate discussions issues. *Id.* 96-1 CPD ¶ 61. Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 83-1 CPD ¶ 17. A former EPA official Mr. Foxen, who had been involved in preparation of a solicitation, left government service and became a subcontractor of a competitor for the contract to be awarded based on the solicitation, and assisted the contractor in the preparation of its proposal. Although both the selected awardee and the protester received excellent technical ratings (98.75/100 and 92.00/100 respectively), the agency chose the former offer in spite of the 11.8% price premium that came with the higher technical rating. The Comptroller

Another disquieting blind spot concerning circumstances that should be considered together is the failure to take into account the closeness of competition when assessing the likelihood of unfair competitive advantage stemming from the employment of a former government employee. Our concerns regarding unfair competitive advantage are justifiably diminished when the proposed awardee has distanced itself from the rest of the field. In a tight race, however, a little inside information, or bias on the part of former colleagues still employed by the requiring activity, can be decisive. Yet the Comptroller General has not recognized this circumstance as having any bearing with regard to unfair competitive advantage in revolving door bid protests.[306]

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305. (continued) General did not consider the possibility of a connection between the awardee's higher technical rating and Mr. Foxen's assistance, and the appearance problem associated with the price premium. *Id.* Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 87-1 CPD ¶ 254. Former military officer who worked in small arms research and development activity conducting the procurement (though his work was on different items) was employed by a competitor *see*king a contract to supply the Army with bayonets. The former officer made statements indicating he possessed inside information regarding the requirements (dismissed as mere "puffery" by the Comptroller General. Protester also objected to the establishment of what it considered to be an unusually tight schedule for submission of offers (61 days) as unduly restrictive of competition. The Comptroller General failed to address, in light of the short suspense for submission of offers, any unfair competitive advantage that the employment of the former officer may have afforded. *Id.* Eagle Research Group, Inc., B-230050.2, May 13, 1988, 88-2 CPD ¶ 123. Former contracting officer's technical representative on predecessor contract (with protester) developed, while in government service, the statement of work, technical requirements, evaluation criteria, and general cost estimate for the instant procurement. Protester alleged that awardee should be disqualified because of an organizational conflict of interest unrelated to the former government employee. Protest grounds evaluated separately, without any consideration regarding an actual link between them, or the combined appearance of impropriety engendered by the circumstances surrounding the employment of the former government employee and the awardee's alleged organizational conflict. *Id.*

306. *See, e.g.*, Damon Corp., B-232721, Feb. 3, 1989, 89-1 CPD ¶ 113. Awardee's price per point was 99.83% of protester's price per point ($16,899/16,928). Former government employee: wrote the scope of work for instant and predecessor contracts; served as member of technical review panel for predecessor contract; was the program manager for the requirement supported by the contract; and retired and went to work for awardee two months prior to selection of awardee. *Id.* General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196. Awardee's technical score was 98.16% of protester's score (983.5/965.5); awardee, a small disadvantaged business, even with the benefit of a 10% increase to protester's cost, was only 7% lower than protester ($4,682,410/4,348,039); technical merit, in source selection plan, was "significantly more important than cost. Former government employee was contracting officer's representative on predecessor

Non-foolish Consistencies[307]—The final analytical weakness traceable, at least in part, to *CACI, Inc.–Federal/NKF*, is that of inconsistency. It results from, in particular, the unacknowledged reversal on the appearance of impropriety issue, and, in general, the overall obfuscating manner in which the cases were decided. There are doubtless many bid protest issues regarding which small minds may discern inconsistencies of approach by the protest fora. These are not necessarily evil, and they may in fact be inevitable.[308] However, the post *CACI, Inc.–Federal/NKF* revolving door bid protest cases appear uniquely to reflect the result-oriented approach promoted by the Federal Circuit.[309] Further, the marked disparity of results for such bid protests as compared to bid protests overall provides a sound basis for intelligent scrutiny and criticism of apparently inconsistent decisions in revolving door cases.

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306. (continued) contract (with protester) under which he had access to protester's monthly cost reports, invoices, and other company proprietary information. *Id.* Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694. *Id.* Awardee's cost was 99.93% of protester's cost ($396,332/396,592). Comptroller General considered closeness of offers as possible evidence of impropriety, but not as to whether it increased the likelihood of unfair competitive advantage. *Id.* PRC, Inc., B-274698.2, Jan. 23, 1997, 97-1 CPD ¶ 115. Awardee's most probable cost was 96.49% of protester's most probable cost ($67,264257/69,706,454); protester's proposal received higher technical rating. Former government employee was two-star general commander of requiring activity. *Id.*

307. *See* J. BARTLETT, FAMILIAR QUOTATIONS 501 (13th ed. 1955) (citing R. EMERSON, SELF-RELIANCE (1841)).

308. Perceived inconsistency may result from factors other than defects of analysis or other intellectual limitation. For example, inconsistency between two apparently analogous cases may stem from inadequacy of facts, another vice promoted by *CACI, Inc.–Federal*. *See supra* Section III.B.3.(e). Consistency is not, therefore, a universal solvent for general and/or exclusive use in analyzing the decisions of any forum.

Then University of Chicago Law Professor Frank H. Easterbrook wrote, in 1982:

> I, too, *see*k to explain the [U.S. Supreme] Court's performance, but I offer a different perspective. Inconsistency is inevitable, in the strong sense of that word, no matter how much the Justices may disregard their own preferences, no matter how carefully they may approach their tasks, no matter how skilled they may be. I do not argue that consistency is always impossible. Some disputes may be resolved in consistent ways, and doubtless much inconsistency is attributable to slipshod work. But demands for perfect consistency can not be fulfilled, and it is inappropriate to condemn the Court's performance as an institution simply by pointing out that it sometimes, even frequently, contradicts itself.

Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 812 (Feb. 1982).

309. *See supra* Section III.B.3.(d).

The two out of sixty-six revolving door cases in which protests were sustained by the General Accounting Office: *Guardian Technologies International* (GTI),[310] and *Holmes and Narver Services, Inc./Morrison-Knudson Services, Inc* (JV); *Pan Am World Services, Inc.* (H&K),[311] are a logical focus.[312] One would expect these cases to present uniquely egregious hard facts in support of its request to overturn the judgment of the contracting activities. However, while the protester in each case made a strong argument for disqualification, the Comptroller General found circumstances highly significant in each case that had been deemed inconsequential in similar protests.

In *GTI*, the Comptroller General denigrated the efficacy of the recusal of the former government employee whose conduct was at issue, Mr. David W. Pisenti,[313] by noting that, "Mr. Pisenti's desk remained in the same "bull-pen" area as [that of the agent to whom Mr. Pisenti's procurement duties had been transferred] after the recusal."[314] However, in other revolving door cases, recusal had been cited by the Comptroller General as a circumstance in support of a finding that no unfair competitive advantage was involved,[315] even though there was apparently no evidence that the recused employees' places of work were moved.[316]

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310. B-270213.2, B-270213.3, Feb. 20, 1996, 96-1 CPD ¶ 104.

311. B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379.

312. In these cases, inconsistency is both striking and fundamental, as the Comptroller General apparently believed it necessary to dilute the hard facts standard in order to sustain the protests. *See supra* note 295.

313. The protested procurement was conducted by the DOJ, Federal Bureau of Investigation (FBI), for armor load-bearing vests for use by FBI special weapons and tactics teams. *Guardian*, 96-1 CPD ¶ 104. Mr. Pisenti, a career FBI employee, was at the time of his retirement from the FBI a supervisory special agent in the FBI Training Division, Firearms Training Unit at the FBI Training Academy, Quantico, Virginia. Mr. Pisenti was a key person involved with the development of the specifications for the body armor that was the subject of the procurement. *Id.*

314. *Id.*

315. Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 ("While the two former NASA employees were involved with administering the prior contract, the record shows that they were promptly recused from this procurement, as well as the incumbent Calspan contract, when they were approached concerning employment by Gilcrest."); FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366 ("Because he terminated his involvement in the procurement at such an early stage he neither had inside access to (nor any opportunity to influence) the final version of source selection information.").

316. If the employees' work places had been moved, such circumstance would doubtless have been noted by the Comptroller General as further proof of the efficacy of the recusals.

Further, the Comptroller General repeatedly has declined to "speculate" regarding improprieties surrounding revolving door situations.[317] Speculation, in fact, is such a disfavored activity, that the Comptroller General even declined to engage in it to draw the conclusion that, for Ethics in Government Act purposes,[318] a former government employee would be required, as the contractor's program manager, to represent the contractor before the agency.[319]

Though evidently daunted by such a modest logical leap, in *GTI*, the Comptroller General speculated freely. The Comptroller General was willing to assume the existence, and contents, of a source selection plan, to which Mr. Pisenti may have had access, even though the FBI stated that no source selection plan had been prepared. The Comptroller General further speculated that the information in the source selection plan contained "competitively useful information."[320] The Comptroller General was willing to further speculate that Mr. Pisenti "may have learned inside information inadvertently" because his work place had not been moved following his recusal from the procurement.[321]

The crowning irony of *GTI*, however, was the weight placed by the Comptroller General on the possibility that the awardee, Progressive Technologies of America (PTA) may have benefited from Mr. Pisenti's pur-

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317. Physician Corp. of America, B-270698.5, B-2706-98.7, Apr. 10, 1996, 96-1 CPD ¶ 198; Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61; Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30; Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406.2, June 25, 1993, 93-1 CPD ¶ 494; Sierra Tech. & Resources, Inc., B-243777.3, May 19, 1992.

318. 18 U.S.C. § 207(a)(1)(1994). *See supra* Section II.C.1.(b).

319. Dayton T. Brown, Inc., B-231579, Oct. 4, 1988, 88-2 CPD ¶ 314 ("While the protester speculates that at some point during performance of the contract the former employee may be in the position of representing the company back to the agency, we will not disqualify a company from an award based on speculation as to the future conduct of an individual.").

320. *Guardian*, 96-1 CPD ¶ 104.

> While we are unable to review the plan to ascertain its contents, such a plan typically contains competitively useful information, including subfactors for evaluation criteria, standards to be used in determining ratings, and the rating scheme itself. We can only conclude that the source selection plan here contained similar information.

Id. (citations omitted).

321. *Id.*

ported knowledge of the independent government cost estimate (IGCE).[322] Although the facts overall justify the Comptroller General's recommendation, it is doubtful that knowledge of the government estimate was helpful. If anything, the facts suggest that PTA, which was evidently capable of delivering vests for $360 less per item than GTI, would have won the competition whether it knew of the IGCE or not. Nevertheless, unlike other revolving door cases, the competitive usefulness of this information was not examined. Instead, competitive harm was presumed: "When it appears that an offeror may have prepared its proposal with knowledge of source selection information, such an appearance taints the integrity of the procurement process, regardless of whether any source selection information was actually obtained or used, and the agency may disqualify the offeror from the competition."[323]

This is inconsistent with prior wording in the *GTI* decision itself, and with the precedent cited with it.[324] Are these inconsistencies foolish? The indulgence in speculation and the failure to test for competitive harm go to the very core of the General Accounting Office's analysis of revolving door cases. Under these circumstances, the inconsistencies are neither foolish nor trivial. What then explains the radical departure from long-standing revolving door jurisprudence? The answer *appears* to be that the Comptroller General may have been punishing the awardee for not cooperating. Mr. Pisenti and other PTA officials answered interrogatories, but declined, without explanation, to appear and testify at the bid protest hearing.[325] On no less than ten separate occasions in the protest decision, the Comptroller General pointedly noted that Mr. Pisenti, or other PTO offi-

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322. The costs per vest for the government estimate and the offerors' proposals was as follows:

Independent Government Cost Estimate	$1152
Guardian Technologies	$1553
Progressive Technologies	$1194

323. *Guardian*, 96-1 CPD ¶ 104.

324. *Id.* ("Where a protester alleges that the awardee has obtained an unfair competitive advantage by virtue of its employment of a former government employee, our role is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee."). *See, e.g.*, General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196; FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132.

325. *Guardian*, 96-1 CPD ¶ 104.

cials, failed to appear, thus hampering the fact-finding, and, implicitly, justifying the drawing of conclusions adverse to the uncooperative parties.[326]

Drawing such a conclusion is a valid means of recognizing the appearance of impropriety of the underlying misconduct alleged in *GTI*, as magnified by the unexplained lack of cooperation with the Comptroller General's legitimate inquiries.[327] Nevertheless the better approach would have been to state explicitly such grounds for its recommendation. By instead distorting its own precedent, the Comptroller General followed in the footsteps of the Federal Circuit, reaping the harvest of *CACI, Inc.–Federal* and *NKF*.[328]

D. Conclusion

This section described the ways in which applying the rules in revolving door bid protests eroded the ability of the procurement system to protect itself from the evils of actual impropriety and the appearance of impropriety.

In *CACI, Inc.–Federal*, the Federal Circuit displayed understandable reluctance to join the Claims Court in essentially accusing Stevens, Anderson, Sweeney, Shelton, and Smith of felonious conduct, without the benefit of a criminal trial, and DOJ, of all agencies, of nonfeasance for countenancing such conduct. The Federal Circuit, however, failed to realize that it could rely upon the appearances of impropriety created by the highly questionable conduct uncovered by the Claims Court, as a means of protecting the integrity of the procurement system. After all, there has been no critical storm or legislative response to the Federal Circuit's subsequent

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326. *Id.*

327. The drawing of an adverse inference is sanctioned by General Accounting Office bid protest regulation. *See* 4 C.F.R. § 21.7(f) (2000) ("If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.")

328. In *H&K*, as in *GTI*, the refusal of a party to cooperate with the protest played a critical part. The agency declined to release to the Comptroller General the source selection plan. *Holmes & Narver*, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379. The Comptroller General then speculated in regard to the contents of the plan, presuming them to be competitively useful. *Id.* ("We believe that document clearly included information that would have been useful."). Even though the former government employee denied that he used procurement sensitive information in assisting the awardee in the preparation of its proposal, the Comptroller General assumed that he did. *Id.*

approval of the theory three years later in *NKF*. The blame for the failure in *CACI, Inc.–Federal* lies not only with the problematic Claims Court opinion, but also with the meager legal foundation underlying the appearance of impropriety as a basis for remedial action in revolving door cases.[329]

The setting of impossible standards for remedial action, the undue timidity, the legal confusion, and the exemplification of faulty techniques for deciding and reporting revolving door protests are the unfortunate results of *CACI, Inc.–Federal*. These sequelae are combined with the disadvantages to which revolving door protesters are uniquely subject: the burden of proving what amounts to criminal misconduct against parties who enjoy virtually exclusive control of the evidence, and who thus have every reason to deny wrongdoing and resist efforts to investigate the suspicious circumstances they created by hiring a former government employee. Thus, the current regime shields wrongdoing from scrutiny and remedial action behind a wall of legal confusion, inadequate facts, and poor adjudication. As a result there is no reliable way of distinguishing the ethical former government employees from the other kind, and of protecting the integrity of the federal procurement system.

It is to the goal of addressing these deficiencies in the way revolving door situations are handled that the next section, Section IV, is devoted.

IV. The Uncompromise

If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.

-Benjamin N. Cardozo[330]

A. Introduction

The evidence shows that our revolving door rules are considerably less narrow in scope than they could be; they are unsuited to protecting the procurement system from revolving door impropriety; and they have been

329. *See supra* Section II.B.2.

330. Wendt v. Fischer, 243 N.Y. 439, 443 (1926).

applied with less vigor and intellectual stringency than is appropriate in view of the important interests at stake. Reasonable persons could disagree with some or all of the foregoing analysis of and conclusions about our revolving door rules and the way in which they have been applied in bid protests.[331] Regardless, however, of where one stands on the issue, who would not welcome revolving door rules that enhance the pursuit of the highest ethical standards in post-government service employment without degrading the government's ability to accomplish its mission and promote competition in contracting?

This Section proposes such a regime: "The Uncompromise," a rule, implemented through amendments to 10 U.S.C. § 2304, and 41 U.S.C. § 253 (the core provisions of the Competition in Contracting Act of 1983 (CICA)).[332] The proposed rule would: (1) formally accept the appearance of impropriety resulting from a revolving door situation as a potential basis

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331. One could dispute the legal significance of the statistical disparity between the sustain rates for protests overall and for revolving door protests as a mere "artifact of chance." The critique of the Federal Circuit decisions in *CACI, Inc.–Federal* and *NKF* could be deemed nitpicking, hypertechnical, and oblivious to the fact that the "correct" decisions were reached in each case, namely: the agencies' decisions were upheld. Criticism of post *CACI, Inc.–Federal* revolving door protests could be viewed in the same light. The analysis could also be criticised for failing to take into account the extreme time pressure under which the protest fora operate. Most tellingly, one could argue, if the record is really so dismal, "where is the outrage?"

The complete analysis of the reasons why our revolving door bid protest jurisprudence is currently not more controversial is beyond the scope of this article. It suffices to note, for present purposes, that all of the immediately-involved parties are probably reasonably satisfied with the status quo: agencies are allowed greater freedom in conducting procurements; agencies and the protest fora are not forced to exert themselves in addressing the troubling and difficult issues involved; and the pain and suffering for disappointed protesters is spread over the entire government contracting sector, most of whose members, after all, themselves probably employ former government employees.

The satisfaction of the participants, however, is not the sole basis or proper standard for judging the propriety of our ethical regime. Kant wrote:

> We are indeed legislative members of a moral kingdom rendered possible by freedom, and presented to us by reason as an object of respect; but yet we are subjects in it, not the sovereign, and to mistake our inferior position as creatures, and presumptuously to reject the authority of the moral law, is already to revolt from it in spirit, even though the letter of it is fulfilled.

IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS, pt. I, I, 3 (1898).

332. Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of 10, 31, and 41 U.S.C.).

for remedial action; (2) enable the protester to shift the burden of persuasion in such cases to the agency, its proposed awardee, and the former government employee; and (3) recognize the competitive value of knowledge obtained in the course of performing contract administration duties. This Section first sets forth and explains the elements of the proposed rule, and then evaluates the impact of the proposed rule on the relevant government interests: efficiency, integrity, competition, and mission accomplishment. The conclusion is that the proposed rule is uncompromising in regard to ethics, without compromising the other vital interests that swirl through the revolving door.

B. A Modest Proposal

1. Policy Change

The proposed amendment[333] first explicitly recognizes that the appearance of impropriety as a bid protest ground, as follows:

> (l)(1) Congressional Policy.
>
> It is the policy of Congress that Federal contracts be awarded under circumstances not tainted by actual impropriety, or the appearance of impropriety, relating to the employment by competing contractors of former government employees. An appearance of impropriety may, by itself, justify remedial action by an agency, as well as a ground for protest by a bidder or offeror in a procurement.

In addition, by clearly identifying protesters as intended beneficiaries of the policy against appearances of impropriety in revolving door cases, the amendment would conclusively settle a previously unresolved issue.[334]

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333. The full text of the author's proposed amendment is at Appendix B, *infra*.

334. In *Inslaw, Inc. v. United States*, 40 Fed. Cl. 843 (1998), the Court of Federal Claims left the protester's standing to pursue protests based upon the standards set forth in FAR 3.101-1 in significant doubt when it wrote as follows:

> The purpose of section 3.101-1 is to set a general standard of conduct for agency procurement practices. The class of persons protected can be construed to include the plaintiffs but encompasses the public at large. [FN31] The violation of the impeccable-conduct standard may, in some cases, benefit contractors at the expense of public policy, such as com

2. Burden Shift

(a) Misplaced Burden

The unique nature of revolving door improprieties as a protest ground demands a different manner of assigning the burden of persuasion. As discussed, it is especially difficult, in the time typically permitted in bid protests, for a protester to unearth hard facts to support a claim of impropriety when a competitor has employed, for example, the former program manager for a requirement being satisfied through the procurement under protest. Because under the current rules, the protester cannot shift its burden of proof, successful revolving door protests will be, as the record indicates, extremely rare; the government nearly always wins.[335] This circumstance, however, is not cause for celebration, because the reported decisions do not promote confidence in the soundness of the analysis underlying them.

Though there is no documentation of it, it is logical to infer that for every reported revolving door protest (or too for any other type of protest), there must be some substantial number of colorable protests that are never filed. Decisions not to file would be based on a wide range of factors, including the poor track record for such protests, and the inherent difficulty of conducting, under terrific time pressure, what amounts to a criminal investigation, without the powers typically available to the most humble county prosecutor.

If the overriding goal of the protest system is to ensure that the government wins as many protests as possible, the system is not broken and therefore is not in need of fixing. If, however, the protest system is intended to promote fairness and competition,[336] changes are needed. It makes sense, therefore, to permit the revolving door protester to shift the

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334. (continued)

> petition. *The interest being protected is the integrity of the government-procurement process, not a particular interest of the contractor.* [FN32] The type of harm alleged here, misuse of the contractor's data rights, is not contemplated by this section on its face. *The hazard, unfair treatment of contractors, is arguably addressed by the section, but the primary purpose is clearly to protect the integrity of the system*.

Id. (emphasis added).

335. *See supra*, Section I.B.2.(a).

336. In describing the reasons for creating an explicit statutory basis for the bid protest jurisdiction of the General Accounting Office, the House-Senate Conference report

burden to the competing contractor that hired the former government employee. Only this party had the opportunity to avoid actual impropriety in hiring and using the former government employee, and the last clear chance to preclude the creation of an appearance of impropriety.

(b) The Burden's Proper Place

The proposed rule shifts the burden in revolving door protests onto the competitor that hires a former government employee, as follows:

> (3) It is rebuttably presumed that a competing contractor[337] has obtained an unfair competitive advantage,[338] and an agency may not award a contract to such competing contractor if:
>
> (A) the amount of the contract exceeds $10,000,000; and
>
> (B) the competing contractor has employed[339] a former government employee,[340] and such person, while a government employee, had:
>
> (i) as part of his or her official duties, the responsibility to participate in the administration of a predecessor con-

336. (continued) stated, "[t]he conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief." H.R. CONF. REP. NO. 98-861, 1646 (1984).

337. Defined in the amendment as "a non-Federal entity, commercial business, or non-profit organization, that is competing for the award of a Federal contract." Proposed § 2304(l)(2)(F), *infra* Appendix B.

338. Defined as "a substantial, but not necessarily decisive, improvement in competitive position." Proposed § 2304(l)(2)(J), *infra* Appendix B. Thus, the protester would not be required to prove that, but for the employment of the former government employee by the competing contractor, it would have won the competition. However, nothing in the proposed rule would negate the current requirement that the protester be in line for award. *See* 4 C.F.R. §§ 21.0(a), 21.1(a) (2000); United States v. Int'l Bus. Mach. Corp., 892 F.2d 1006, 1011 (Fed. Cir. 1989); Higher Power Eng'g, B-278900, Mar. 18, 1998, 98-1 CPD ¶ 84.

339. The term "employ" is broadly defined to include any form of agreement involving the exchange of services for a thing of value. Proposed § 2304(l)(2)(A), *infra* Appendix B.

340. The term "former government employee" refers to government employees who have been employed by a competing contractor. Proposed § 2304(l)(2)(D), *infra* Appendix B.

> tract for the same or similar property or services as are sought under the instant procurement; or
>
> (ii) by virtue of his or her official position, lawful access to competitively useful information or source selection information pertaining to such procurement.

The protester shifts the burden by proving that a contract worth in excess of $10,000,000 is to be awarded to a competing contractor that has employed a former government employee who had either: contract administration duties[341] as to a predecessor contract for the same or similar services;[342] or lawful access to competitively useful or source selection information.

The presumption thus recognizes the potential competitive impact of two new elements: information acquired while performing contract administration duties, and *access* to, as opposed to actual knowledge of, competitively useful or source selection information.[343] It further presumes that such information has been conveyed by the former government employee to his or her new employer, the competing contractor, which then exploited the information in preparing its bid or proposal. Unless these presumptions are rebutted, award to the competing contractor is prohibited.

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341. Under proposed § 2304(l)(2)(H), *infra* Appendix B, the term "contract administration" refers to any post-award duties except for "purely clerical functions," which are themselves defined by the fact that they do not require "the exercise of discretion or skills acquired through higher education." Proposed § 2304(l)(2)(I), *infra* Appendix B. Further useful refinement of the term "purely clerical" may be possible, but is not worth the effort and the risk of rendering the section less accessible. A list of examples of such functions is included.

Revolving door cases involving purely clerical employees are rare. They have therefore been excluded from coverage to avoid imposing an unwarranted burden on such employees and the contractors that may employ them. This exclusion would not condone the transfer of competitively useful information by purely clerical employees to competing contractors; in such cases, it would merely require the protester to carry its normal burden of proof.

342. The term "predecessor contract for the same or similar services" is not defined. This term, even more so than "purely clerical functions," resists definition and would risk obfuscation rather than enlightenment in the attempt. In most cases, whether a particular procurement does or does not have a predecessor contract will be easy to discern. Where the issue is not readily resolved, the prudent competing contractor or contracting activity should attempt to address it at the earliest possible moment. As discussed in *CACI, Inc.–Federal*, however, such a process will not invariably produce a reliable answer. *See supra* Section III, note 237 and accompanying text.

343. Note that only lawful *access* is required, not actual knowledge.

(c) Carrying the Burden

The competing contractor[344] and the contracting agency wishing to award the contract to it may, under the provisions of proposed section 2304(l)(3)(C), overcome the presumption of unfair competitive advantage if:

> (C) the head of the agency, or his delegee occupying a position at least one level above that of the source selection authority,—
>
> (i) decides, in writing that, by clear and convincing evidence,[345] the competing contractor obtained no unfair competitive advantage by virtue of its employment of such former government employee.

The burden of proof—clear and convincing evidence—is high, but proposed section 2304(l)(C)(ii) provides guidance on the types of measures that can be taken to meet the burden:

> (ii) The burden of demonstrating that unfair competitive advantage did not result from the employment of the former government employee is on the contracting activity and the compet-

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344. Although in the event of a protest, the competing contractor would be permitted to intervene, 4 C.F.R. § 21.3(b) (2000), at least in General Accounting Office protests, the burden formally falls on the contracting agency. Typically, the interests of the intervenor and the contracting agency are allied.

345. "Clear and convincing evidence" is a standard employed in several sections of the Federal Acquisition Regulation, primarily with regard to correction of mistakes in bids, for example 48 C.F.R. § 14.407-4 (2000) (mistakes after award), and responsibility for the loss of government furnished property, for example 48 C.F.R. § 52.245-2 (government property–fixed priced contracts). It is an intermediate standard of proof, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), requiring "an abiding conviction that the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310 (1984). The term has been defined by the Comptroller General in *Capay Painting Corp.*, B-185954, June 10, 1976, 76-1 CPD ¶ 367, as follows:

> That evidence should be clear—that is not ambiguous, doubtful, equivocal, or contradictory—and should be pointed to the issue under investigation. It must be 'convincing' in the sense that the source from which it comes is of such a credible nature that men of ordinary intelligence, discretion, and caution may repose confidence in it, but absolute certainty is not a requirement of clear and convincing evidence.

Id.

> ing contractor that employed him or her. In evaluating whether the presumption of unfair competitive advantage has been overcome, the head of the agency or delegee shall consider all facts and circumstances bearing on such issue. At a minimum, he or she will consider:
>
> (I) the existence of other facts, unrelated to the employment of the former government employee that, in combination with such circumstance creates an unacceptable appearance of impropriety associated with award to the contractor;
>
> (II) the closeness in price and, if applicable, technical merit of, the competing contractor's bid or proposal, and the bids or proposals of the other competing contractors;
>
> (III) the extent to which employment contacts between the contractor and the former government employee were contemporaneously, fully, and accurately disclosed to the former government employee's supervisors and to the cognizant procuring contracting officer;
>
> (IV) the timely request for, and good faith reasonable reliance upon, an ethics opinion from a designated agency ethics official regarding the propriety of the post-government service employment under consideration;
>
> (V) the existence, use, and efficacy of agency procedures to ensure that unfair competitive advantage does not result from employment of the former government employee; and
>
> (VI) the existence, use, and efficacy of competing contractor's procedures to prevent the acquisition of unfair competitive advantage as a result of employment of the former government employee.

Items I and II address two failings, discussed above, in the protests fora analysis of revolving door cases, namely:

- the failure to consider synergism among the revolving door protest grounds, other protest grounds, and other circumstances, that enhance the appearance of impropriety, and the likelihood of

actual impropriety-the "where there's smoke, there's fire" situation; and

- the failure to consider the closeness of the competition in deciding whether the competing contractor obtained an unfair competitive advantage when it employed the former government employee.[346]

Items III through VI encourage those parties that are in the best position to document the propriety of actions related to a revolving door protest to do so in a timely and complete manner. The allied interests of the former government employee; his new employer, the competing contractor; and the contracting activity, are advanced if everyone involved in the employment of a former government employee adopts, and maintains, awareness of, and a defensive posture against, impropriety and the appearance of impropriety. These tasks need not be unduly burdensome. Common-sense measures, rather than a complex compliance system, would in most cases enable an agency to make the required finding of no competitive advantage.

The outlines of a successful outplacement to a competing contractor are as follows: It starts with the government employee and his suitor documenting their employment-related contacts from the very first contact onwards.[347] The employee should notify his supervisor immediately.[348] She, in turn, should document the notice and decide which, if any, procurement officials should be notified, erring on the side of notification. All parties in the notification chain should likewise document their actions. Notification may appear to be an oppressive task; however, in an era in which high-speed personal computers with sophisticated activity journal

346. *See supra* Section III.B.3.(e).

347. The transition of a conversation from normal business or small talk to employment opportunity may be subtle and thus not easily discerned, even by the most conscientious. Again, common sense should prevail, along with a healthy dose of caution, in deciding when documentation and notification should be undertaken.

348. It could also be argued that immediate notification of a supervisor regarding a vague or incipient employment contact could create undue friction in the employee-supervisor relationship. This is a valid concern. However, a decision to delay notification is simply a trade-off that the employee must make and live with. A decision to delay reporting a contact that later ripens into more concrete employment discussions may indeed place the employee and the competing contractor at a disadvantage. The disadvantage could be mitigated, however, if the employee at least fully documents the contact, and his reasons for delaying notification.

software are readily available,[349] it is difficult to argue that full and timely documentation of such contacts are impracticable.

As soon as employment discussions reach the stage at which sufficient mutual interest in employment and factual detail regarding such employment exist, the government employee should request that his designated agency ethics official render an opinion regarding the propriety of such employment in view of all relevant circumstances.[350] The proposed rule makes it clear, however, that reliance upon an ethics opinion must be reasonable in order for it to contribute toward a finding of no competitive advantage.[351]

The importance of timely, complete, and accurate documentation, notification, and advice is manifested in two principal ways: first, it reminds all involved that ethical concerns, including the consideration of measures to protect the integrity of the procurement system, must predominate over personal interests; and, second, it obviates the need, later when the propriety of their actions is questioned, for the parties to rely on their memories and credibility as the sole evidence of the propriety of their actions.[352]

Of equal importance in avoiding impropriety is a systematic approach to the problem by the agencies and the competing contractors. Items V and VI recognize the benefits of procedures designed to discern potential ethics

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349. *See, e.g.*, David Haskin, *Day Timer Organizer 2.1, Editor's Choice*, PC MAGAZINE ONLINE (1998) <http://search.zdnet.com/pcmag/features/infomanagers/pcmg0144.Htm>; Wayne Kawamato, *ECCO Pro 4.01, Editor's Choice*, PC MAGAZINE ONLINE, <http://search.zdnet.com/ pcmag/features/infomanagers/pcmg0145.htm>. These products sell for $60 and $100 respectively.

350. Current and former DOD personnel are entitled to request post-employment ethics advice under the Joint Ethics Regulation. 32 C.F.R. § 84.31(a) (2000). Arguably, such requests are already required. *Id.* § 84.3(e) ("If the propriety of a proposed action or decision is in question for any reason, DOD employees shall *see*k guidance from a DOD component legal counsel, the DOD component DAEO or designee, or Ethics Counselor, as appropriate.").

351. "Reasonable reliance" would entail full and accurate disclosure of all material facts. An ethics opinion could not reasonably be deemed reliable otherwise. A good faith requirement exists for ethics opinions pertaining to the Procurement Integrity Act issued under the Joint Ethics Regulation. *Id.* § 84.26(a)(2)(vi).

352. It is difficult to overstate the importance of *contemporaneous* documentation. As the recent sad case of then Treasury Department Joshua Steiner demonstrates, a journal in which notes are belatedly entered can create more credibility problems than they resolve. Howard Schneider, *Journal 101: The Washington Diary Debate, Josh Steiner Was Preserving His Thoughts. Big Mistake.*, WASH. POST, Aug. 2, 1994, at F1.

problems associated with former government employees, and to avoid them or lessen their harmful effects on the integrity of the procurement system in general, and on individual procurements in particular. Under the proposed rule, such procedures must be effective and conscientiously used prior to the moment when the propriety of the actions of the former government employee and the competing contractor are questioned.[353]

Government or industry-wide uniformity is not required. Instead, an effective procedure is one that systematically ensures that potential conflicts of interest or other ethical concerns are identified in a timely manner; that appropriate prophylactic measures are considered, adopted, and explained to the parties; and, that compliance with such measures is tracked.[354] Under the proposed rule, moreover, resolution of the unfair competitive advantage issue does not depend on total compliance on perfect procedures. Rather, the rule simply credits parties for doing the best they can under the circumstances to anticipate and avoid potential ethical problems, and requires that all facts and circumstances bearing on propriety be taken into account in deciding whether the competing contractor bought an unfair competitive advantage when it hired the former government employee.

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353. Conduct or statements of the parties occurring before a dispute have long been viewed as inherently more reliable than self serving, post hac conduct or statements. Dynamics Corp. v. United States, 389 F.2d 414 (1968). "Only the action of the parties 'before a controversy arises is highly relevant in determining what the parties intended.'" *Id.* (quoting Northbridge Elec., Inc. v. United States, 175 Ct. Cl. 426, 438 n.8 (1966)).

354. The fundamental requirement—common-sense circumspection with regard to the employment of one entity's employees by another entity with whom it does business—is actually no greater than is required of prudent businesses in the commercial world.

Agency procedures should, among other things, consider measures that: provide for additional standards of conduct training for the employee; bring about recusal of the employee from certain procurement actions; furnish written guidance regarding specific remedial measures to the employee and the competing contractor; and physically move the work area of the employee while still in government service.

Competing contractor procedures should consider measures that: mandate that the prospective employee notify the agency in a timely manner regarding employment discussions, and job offers/acceptances, and give proof of such notification to the competing contractor; and provide specifically tailored initial training upon entry into service with the competing contractor in regard to the projects on which the former government employee may work.

To promote efficacy and demonstrate conscientious use of these procedures, complete, contemporaneous documentation is vital.

3. Modest or Radical?

The proposed rule may appear radical because it formally and explicitly recognizes the appearance of impropriety as an independent basis for remedial action in response to revolving door situations; because it recognizes the competitive value of information obtained while discharging contract administration functions; and because it permits the protester to shift the burden to the agency and its chosen contractor. However, recognition of the appearance of impropriety as a protest ground merely cements the Federal Circuit's action on this issue in *NKF*.[355] Further, with regard to the competitive value of contract administration information, the line between the administration and procurement functions is too blurry for such a change to be considered radical.[356]

The element of the proposed rule that may fairly engender a charge of radicalism, however, is the shifting of the ultimate burden of proof to the agency following a modest showing by the protester. This is indeed a rather extreme departure from the norm, under which the protester carries a very heavy burden throughout the proceedings.[357] The radicalism of this aspect of the proposed rule must, however, be analyzed in the context of the problem it is intended to address. If the revolving door were like garden-variety protest grounds, it would be fair to characterize the proposed rule as radical. On the contrary, the revolving door is different, and it would be a mistake to judge a remedy devised to address the problem by normal standards. Nevertheless, this aspect of the proposed rule, because of its radical nature, is significant because it will most likely entail a lengthier period to be accepted by the government, the protest fora, and the contractor community.

However, the issue of whether or not the proposed burden-shifting is radical is less important than how well it harmonizes the interests relevant to the revolving door problem.

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355. *See supra* Section III.B.3.(d).

356. *See supra* Section II.A.1.(c).

357. When considering an allegation of bias by procurement officials in favor of a competing contractor that had employed a former government employee, the Claims Court has stated that the protester must provide "well neigh [sic] irrefragable" proof. Space Age Eng'g, Inc. v. United States, 4 Cl. Ct. 739, 744 (1984).

C. Balancing the Interests: Is Compromise Required?

1. Introduction

There are four primary interests implicated by the proposed rule: efficiency, as potentially affected by the additional administrative burdens imposed on the government and competing contractors; integrity; competition; and mission accomplishment. A careful review of the ways in which the proposed rule affects our ability to pursue these interests demonstrates that it does not require compromise in order to be ethically uncompromising.

2. Efficiency: What is the Actual Burden?

The administrative "burdens" that would actually be imposed under the proposed rule should not require more than mere prudence in personnel management. In these litigious times, what sophisticated commercial enterprise fails to document its efforts to recruit any executive or technical employee, much less one it wishes to hire away from a customer? How ill-advised would it be for a company to hire an employee from a customer or competitor and ignore, in its assignment of the employee, the fact that the employee may have brought proprietary information along with him, the use of which might subject the company to civil or criminal liability?[358]

Regardless of the dictates of prudence, in absolute terms, the proposed rule should not require an unduly burdensome compliance regime, either for the government or the contractor community.[359] In addition, there are several ways in which the proposed rule could be modified to

358. An obvious answer to these questions is: an unethical company; however, it would be a mistake to allow the predilections of such an enterprise to determine the ethical rules under which government contracting is conducted.

359. *See supra* Section III.B.2.(c), especially note 364. It may be that some firms or agencies will elect to assume far greater burdens than are required. Some contractors may even curtail or eliminate recruitment of former government employees. Such exaggerated responses to the proposed rule, if enacted, would undoubtedly grow rare as experience with protests under it demonstrated the proper level of care required when hiring former government employees. Those firms persisting in such unduly timorous practices after such a "shakedown" period would grow less efficient and therefore less profitable. This possibility is a concern of the stockholders or owners of such firms, and should not be allowed to hinder reform.

reduce the burden, if experience in implementing the proposed rule demonstrates a need for adjustment.[360]

Further, in relative terms, the administrative burden should be slight in comparison with other burdens unique to federal government contracting. For example, compliance with the Cost Accounting Standards often requires covered contractors to maintain, at government expense, two sets of books, and endless red tape. Senator Glenn, during the passage of the Federal Acquisition Streamlining Act of 1994 stated:

> When we began drafting this bill, concerns were raised regarding the administrative burden associated with some of these oversight tools, which resulted in the bifurcation of the government and commercial markets. Thus, we sought to minimize this undesirable consequence of these well-intentioned provisions in an effort to strike a balance between efficiency and oversight.
>
> In addition, we have all heard stories that it is too difficult to do business with the government. From cost accounting standards to socioeconomic laws, the Federal marketplace is represented to be a quagmire of laws and bureaucratic redtape.[361]

In view of the significant burdens we have imposed on contractors and procurement officials in order to promote everything from disallowance of entertainment costs to "buying American," it is fair to assert that the relatively minor administrative burden driven by the proposed rule is an acceptable price to pay for helping to preserve the integrity of the procurement system.[362]

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360. The modification menu includes three items: the *dollar threshold*, currently $10,000,000, could be raised in order to encompass fewer procurements; the *approval authority* for the determination of unfair competitive advantage, currently at least one level above the source selection authority, could be lowered; or, the *standard of proof* for a finding of no unfair competitive advantage could be changed from "clear and convincing evidence" to a "preponderance," "substantial evidence," or some lesser standard. While most likely no single item would threaten the efficacy of the proposed rule, adoption of two or more might do so. Accordingly, great care should be taken in deciding which, if any, modifications to adopt.

361. 140 CONG. REC. S12369-03, *S12370, Aug. 23, 1994 (remarks of Sen. Glenn). *See also* 139 CONG. REC. S14381-04, *S14430, Oct. 26, 1993, *Streamlining Defense Acquisition Law-Report of the Advisory Panel on Streamlining and Codifying Acquisition Laws* (cost accounting standards so unique and intrusive that some contractors have simply quit doing business with the government).

362. In 1997, the General Accounting Office reported that a Coopers & Lybrand study estimated that government oversight requirements added 18% to the cost of products

3. Integrity

It is tempting simply to assert that the proposed rule will enhance integrity in government procurement, and then move on. That, however, would not do justice to the several meanings of integrity that would be affected if the proposed rule were enacted. Rather, the central importance of integrity to the proposal requires precision in definition of the term, as follows:

> in·teg·ri·ty (in teg' ri te) 1. soundness of and adherence to moral principle and character; uprightness; honesty. 2. the state of being whole, entire, or undiminished: *to preserve the integrity of the empire.* 3. a sound, unimpaired, or perfect condition: *the integrity of the text; the integrity of a ship's hull.* [late ME *integrite* < L *integritas.* See INTEGER, -ITY][363]

For the purposes of this article, the primary dictionary definition is most important. Will the proposed rule make former government employees, agency procurement officials, and competing contractors adhere to moral principles? Probably not.

For the few who are basically immoral, the rules may affect their external behavior, making them more cautious or more devious. The former result is desirable if not ideal, the latter, regrettable but inevitable. For the vast majority, however, the proposed rule will give them the *opportunity* to act with propriety, actual and apparent while remaining competitive.

What moral dilemma is implicated in the revolving door case? An obvious choice is expressed by the overworked Biblical admonition that

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362. (continued) and services procured by the Defense Department. GAO/NSIAD 97-48, Jan. 29, 1997, *29 (F.D.C.H.), *Acquisition Reform - DOD Faces Challenges in Reducing Oversight Costs.* However, a number of government procurement officials disagreed with the estimate, considering it inflated, and not adequately adjusted for the cost reduction impact stemming from oversight provisions such as the Cost Accounting Standards. Further study of the net effect of such provisions was deemed necessary. *Id.* Nevertheless, it appears that the government pays a substantial amount of money in return for the unique oversight provisions in its contracting system, without any reliable data to whether the oversight results in actual cost reduction.

363. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 738 (1969).

"no man can serve two masters."[364] However, there is by no means universal agreement that this is the case.[365] As Justice Cardozo recognized, one may serve two masters, provided full disclosure of all relevant circumstances has been made to both masters.[366] For example, though only for the stouthearted, representation of multiple clients in a single proceeding is technically permissible.[367] However, two masters cannot be served if their interests conflict. Thus, not only full prior disclosure of relevant circumstances, but also complete prior consideration of the possibility of conflicts is required.

Yet the current rules for non-lawyers do not compel, or even encourage, the parties in many revolving door situations to fully disclose and consider all circumstances bearing on the propriety of post-government employment with a competing contractor. To the extent, therefore, that the proposed rule at least creates an incentive for disclosure and advance protective action, it will cause the parties to stop and think about the propriety of their actions, where they might otherwise not do so. Most former government employees, competing contractors, and agency officials are fundamentally upright and honest. The mere fact that the proposed rule forces them to consider these matters, where, in the hectic swirl of events they might not otherwise do so, will enable their innate moral natures to surface and guide their actions.

The proposed rule furthers integrity in its secondary definition in which it denotes the state of being whole or entire. The proposed rule encourages the disclosure of potential ethical issues relating to post-government service employment, and the adoption and execution of measures to avoid ethical problems in revolving door situations. It thus fills a void in the federal procurement system in which for years agency officials, and sometimes contractors, made decisions in ignorance of material facts relating to propriety.[368]

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364. *Matthew* 6:24 ("No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot love God and mammon.").

365. *See* Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (Fall 1991) (corporations have been able to serve multiple masters, e.g. employees, communities, bondholders, customers, suppliers, etc.).

366. *See supra* note 339.

367. MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.7 (1983) (describing the disclosure and consent requirements for multiple representation).

368. Sometimes the former government employee lies not just to the government, but also to his new employer. *See* NKF Eng'g, Inc. v. United States, 805 F.2d 372, 374

Finally, and most subjectively, the proposed rule promotes integrity in its third sense, by making the system sounder, less impaired by cynicism and mistrust, and closer to perfection.[369] Not only does it elevate fairplay and honesty in the hiring of former government employees, but also it does this without significantly sacrificing the government's interests in competition and mission accomplishment. It is to the consideration of these interests that we now turn.

4. Competition in Contracting

(a) What is It? How Important is It?

To weigh the effects of the proposed rule on competition, the term must first be defined and itself weighed. This section demonstrates that competition should neither be measured solely by the number of entrants in a given procurement, nor should competition be regarded as a paramount interest, inevitably sweeping other interests before it.

"[C]ompetition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government's business."[370] The Federal Acquisition Regulation defines the CICA standard, "full and open competition," to mean that "all responsible sources are permitted to compete."[371]

We say that competition is very important to us. Then Deputy Secretary of Defense Frank Carlucci wrote in 1981:

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368. (continued) (Fed. Cir. 1986) (former government employee told contractor he had received approval for employment from agency legal counsel, when in fact he had not done so).

369. The inclination to regulate ethical behavior through rules of ever-increasing complexity and more onerous demands has been criticized. *See* Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417 (Feb. 1990) (conduct of public employees should be guided by public service vision rather than exacting, punctilious observance of rules; reliance on the latter stunts the former). The proposed revolving door rule, however, does not set forth an exacting list of "dos and don'ts," but rather suggests that interested parties take prudent steps to identify, disclose, and mitigate circumstances giving rise to impropriety and the appearance of impropriety. It therefore avoids the danger of further withering of the public service vision.

370. S. REP. NO. 50, 98th Cong., 1st Sess. 1983, 1984 U.S.C.C.A.N. 2174 [hereinafter SENATE CICA REPORT].

371. 48 C.F.R. § 6.003 (2000).

> The value of competition in the acquisitions process is one of the most widely accepted concepts. We believe that it reduces the costs of needed supplies and services, improves contractor performances, helps to combat rising costs, increases the industrial base, and ensures fairness of opportunity for award of government contracts.[372]

Mr. Carlucci's sentiments were embodied three years later in the CICA.[373] The preference for competition in Federal contracting, however, by no means originated in the 1980s, but can be traced back to the early Nineteenth Century.[374]

Competition is an icon.[375] Like heaven, however, everyone says they want to go there, but no one wants to die. The CICA itself permits less than full and open competition[376] and non-competitive acquisitions[377] under seven distinct sets of circumstances. In addition, the statute provides that full and open competition need not occur when authorized by another statute.[378] Accretion of such authorizations antedated the CICA,[379] and is likely to continue.[380] In practice, moreover, agencies take ample advantage of available authorizations for less than full and open competition.[381]

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372. Frank Carlucci, Deputy Secretary of Defense, memorandum to various addressees (July 27, 1981) ('Increasing Competition in the Acquisition Process'), FINAL REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972) [hereinafter COMMISSION REPORT], *reprinted in* Competition in Contracting Act of 1983: Hearings on S. 338 Before the Senate Comm. on Armed Services, 98th Cong., 1st Sess. 191 (1983) [hereinafter CICA HEARINGS].

373. Pub. L. No. 99-145, 99 Stat. 583 (1985) (codified in scattered sections of 10, 18, 41, 50 U.S.C.).

374. *See* Andrew Mayer, *International Symposium on Government Procurement Law, Part II, Military Procurement: Basic Principles and Recent Developments*, 21 GEO. WASH. J. INT'L L. & ECON. 165, 168 (1987) (Act of March 3, 1809, ch. 28, 2 Stat. 535, 536).

375. Senator Cohen, a principle draftsmen of the CICA, in remarks on the Senate floor during its consideration, stated that the statute "establishes and absolute preference for competition." 129 CONG. REC. 32,253 (1983) (statement of Senator Cohen).

376. 10 U.S.C. § 2304(b)(1-7) (2000); 41 U.S.C. § 253(b)(1-7) (2000).

377. 10 U.S.C. § 2304(c)(1-7); 41 U.S.C. § 253(c)(1-7).

378. 10 U.S.C. § 2304(a); 41 U.S.C. § 253(a).

379. Examples of competition degrading statutes include New Deal artifacts such as: the Buy American Act, 41 U.S.C. § 10; and the Davis-Bacon Act, 41 U.S.C. § 276a. *See* Mayer, *supra* note 374.

380. *See* Mayer, *supra* note 374, at 186 (number of non-competition driven socio-economic programs will increase, with sporadic retrenchments).

381. At the time of CICA enactment, some two-thirds of all DOD contracts were awarded noncompetitively. 129 CONG. REC. 32,256 (1983) (remarks of Senator Roth). There is evidence that anti-competitive sentiment persists. *See* GAO/NSIAD-97-246,

The prevalence of exceptions to full and open competition reflects substantial misgivings about the benefits of its universal application; in particular, whether cost savings invariably result when it is employed.[382]

The merits of the debate over the value of competition in contracting, however, are beyond the scope of this article. For present purposes, it is sufficient to state that competition is simply one important intermediate goal in the process by which the government discharges its missions through obtaining necessary goods and services from non-federal sources.

However, reducing the cost of government contracts is not the sole reason that competition is sought. As Mr. Carlucci noted, pursuing competition also promotes fair play in the award of federal contracts.[383] Indeed fairness, in the words of the Senate report on the CICA, is a benefit of perhaps paramount importance, as follows: "The last, and *possibly the most important*, benefit of competition is its inherent appeal of 'fair play.' Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism."[384]

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381. (continued) Sept. 24, 1997, *Maritime Security Fleet: Factors to Consider Before Deciding to Select Participants Competitively*; GAO/NSIAD 98-48, Dec. 8, 1997, *Outsourcing DOD Logistics—Savings Achievable But Defense Science Board's Projections Are Overstated* ("91 percent of recent nonship depot maintenance contracts were awarded on a sole-source basis.") GAO/NSIAD 98–48, Dec. 8, 1997; GAO/NSIAD 96-166, May 21, 1996, *Defense Depot Maintenance—More Comprehensive And Consistent Workload Data Needed For Decisionmakers* ("actual contracting environment for most types of equipment [maintenance] is largely noncompetitive"); GAO/NSIAD 96–166, May 21, 1996; GAO/GGD 94-138FS, Sept. 16, 1994, *Executive Office of the President-Major Procurements For Calendar Years 1990 to 1993* (88 % of Executive Office of the President contracts from 1990 to 1993 were awarded under without full and open competition); GAO/HR-97-13, Feb. 1, 1997, *High-Risk Series: Department of Energy Contract Management* (in the Department of Energy "competition now may be the rule but that DOE has a long way to go before it realizes the benefits of competition. Most of DOE's contract decisions continue to be noncompetitive").

382. Norman R. Augustine & Robert F. Trimble, *Procurement Competition at Work: The Manufacturer's Experience*, 6 YALE J. ON REG. 333 (1989) (policymakers must be wary of overemphasizing the value of price competition). CICA Hearings, *supra* note 372, at 304 (testimony of Professor John C. Cibinic, Jr.) (government overhead in administering competition yields diminishing return depending on value of contract and number of competitors).

383. *See* Carlucci, *supra* note 372.

384. SENATE CICA REPORT, *supra* note 372 (emphasis added).

During his 1982 testimony before the Senate Governmental Affairs Committee, Professor Cibinic discussed the reasons we promote competition. Though cost savings and other benefits were acknowledged as important grounds for pursuing competition, Professor Cibinic opined: "But *probably more important* than any of these reasons is the role that competition plays in assuring the public that Government procurement operates in a fair manner with source selection based upon merit rather than favoritism."[385]

Thus, when balancing the proposed revolving door rule against the government's interest in competition, it is essential to keep two points in mind: (1) competition in terms solely of the absolute number of competitors is not a paradigm that must be protected from any degradation, no matter what the reason; and (2) competition means more than merely maximizing the absolute number of bidders or offerors—fairplay and integrity are important goals that competition helps us to pursue. For these reasons, resistance to measures, such as the proposed rule, that appear inimical to competition, as defined by the sheer number of competitors, must be avoided in order to ensure that an accurate balance of interests is achieved.

(b) Competition in the Balance

Just how much, if at all, will this proposed rule affect competition in contracting? It is undeniable that, under the proposed rule, competing contractors will occasionally be disqualified, thereby in such procurements reducing the total number of competitors. Further, such competing contractors, in order to bring on disqualification, must have submitted an advantageous proposal, one the agency wishes to accept.[386] However, the loss of one competitor, even the apparent winner, does not necessarily destroy competition as long as two or more competitors remain. Admittedly, the ideal of full and open competition must yield in such cases, but those should be relatively few.[387] Competent, ethically aware competitors

385. *Competition in the Federal Procurement Process: Hearing on S.2127 before the Comm. on Governmental Affairs*, 97th Cong. 20-21 (1982) (statement of Prof. John Cibinic, Jr., National Law Center, George Washington University).

386. Presumably, protesters will not raise revolving door objections unless the competing contractor is in line for award.

387. Arguably, even under a definition emphasizing the total number of competitors, competition could actually be *enhanced* if potential contractors perceive that bids and offers will be fairly evaluated on their merits. Contractors must carefully consider whether

should have little difficulty in adopting practices that will put them in a

387. (continued) to enter a competition, even without the specter of favoritism or the use of inside information, in view of the substantial costs of preparing bids and proposals. *See* Michael C. Walch, *Dealing With A Not-So-Benevolent Uncle: Implied Contracts With Federal Government Agencies*, 37 STANFORD L. REV. 1367 (May 1985). Mr. Walch wrote that:

> These problems [of risk in estimating costs of performing government contracts] are compounded when several firms compete for a single government contract or bid. Each prospective contractor or bidder must incur these costs in negotiating the contract or preparing its bid before receiving any assurance of receiving the contract. The possibility that the bidder will not get the contract, and thus that these costs will never be recovered, creates a significant disincentive to deal with federal agencies.

Id. at 1383. The expense of bid or proposal preparation is a key factor in the initial bid/no-bid decision. Prospective Federal Government contractors are advised that:

> [t]he [bid/no-bid decision-making] process varies in different organizations, but the basic considerations do not. All organizations, large and small, consider the same factors . . . . It is neither inexpensive nor easy to prepare a proposal, and the decision to undertake the expense should never be made casually.

NATIONAL INSTITUTE OF FEDERAL PROCUREMENT, THE GUIDE TO DOING U.S. GOVERNMENT BUSINESS, WRITING WINNING PROPOSALS 2 (1995).

Thus, in a hotly-contested procurement involving several well-matched contractors, the marginal effect of one competitor having hired a key former government employee could be the critical factor in a potential competitor's decision whether to enter the race. The anti-competitive effect of perceived unfairness in government procurements has long been recognized. In *Heyer Prod. Co., Inc. v. United States*, 140 F. Supp. 409 (1956), the Court of Claims wrote:

> It was an implied condition of the request for offers that each of them would be honestly considered, and that offer which in the honest opinion of the contracting officer was most advantageous to the government would be accepted. *No person would have bid at all if he had known that 'the cards were stacked against him. . . .* It would not have put in a bid unless it thought it was to be honestly considered. It had a right to think it would be. The Ordnance Department impliedly promised plaintiff it would be. This is what induced it to spend its money to prepare its bid.

Id. at 412-13.

It is therefore reasonable to believe that there will be more rather than fewer entrants in federal procurements when the contracting community comes to realize that bids and proposals are to be judged solely on their merits, in competitions in which the impact of inside information is minimized. Minimizing such impact is the best that can be achieved. Any attempt to completely eradicate the effects of inside information would entail a virtual ban on the employment of former government employees by competing

position to avoid impropriety and to demonstrate the absence of unfair competitive advantage associated with the hiring of former government employees. Finally, considering the importance of fairness as a goal of competition, the degradation in competition resulting from the loss from a procurement of a firm unwilling or unable to take such measures, may reasonably be deemed slight.

5. Mission Accomplishment

(a) Introduction

Perhaps John Q. Citizen or Common Cause will not miss such a firm, but what about the program manager who considers such a competing contractor to be essential to national defense, or critical to addressing a huge environmental threat? Congress will not enact any "reform" that it believes will substantially burden the government in the accomplishment of its myriad missions. The impact upon mission accomplishment, therefore, is the most salient criterion in the balance of interests.

Two aspects of the term "mission accomplishment" are relevant: specific and long-term. Analysis of the proposed rule's impact on specific mission accomplishment refers to individual procurements in which revolving door concerns are raised, and examines whether the government will be able satisfactorily to carry out the discrete mission requirements that the procurements are undertaken to support. Long-term mission accomplishment refers to the government's ability to compete for the best-qualified personnel to staff its agencies. The proposed rule does not substantially burden the government with regard to either aspect of mission accomplishment.

(b) Specific Missions

There is no way to predict with any precision how many competing contractors will be disqualified under the proposed rule; however, as discussed, there is reason to believe that the numbers should be relatively small, and the disqualified firms not sorely missed. Further, disqualification would not be required under the proposed rule if the competing con-

tractor is a legitimate sole source, or if award to it is necessary in the public's interest.[388]

Finally, under proposed section 2304(l)(4)(C)(ii)(II), an agency, in deciding whether unfair competitive advantage has been obtained by a competing contractor, must consider the closeness of the competition. If the competing contractor is far ahead of other bidders or offerors, the agency could determine that no unfair competitive advantage accompanied the former government employee, assuming consideration of other factors does not indicate to the contrary.[389] Thus, in cases in which there is a wide disparity between the competing contractor and its rivals in regard to technical merit or price, award to the markedly superior offeror will not be precluded solely because it hired a former government employee.[390]

Thus, the proposed rule provides safety valves to ensure that an agency will not have to go without needed contractor support, or award to a contractor under circumstances counter to the public interest.

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388. Proposed § 2304(l)(4)(a-b), *infra* Appendix B, permits award to a competing contractor in the absence of a finding of no unfair competitive advantage in sole source and public interest situations. To enhance accountability, in both situations, a thirty-day congressional notice period is required.

389. Analysis would be essentially a "harmless error" inquiry, deducing from the wide disparity between bids or offers that the proposed awardee would have won the competition even without the competitive advantage resulting from its hiring of the former government employee. In order to make this logical leap however, the agency would need access to sufficient reliable information to permit an accurate assessment of what the proposed awardee's bid or offer would have been if it had not hired the former government employee. It would further need to be able to rule out the possibility that the disparity in ratings was not itself caused by unfair competitive advantage.

390. *ITT Fed. Servs. Corp.*, B-253740.2, May 27, 1994, 94-2 CPD ¶ 30, is a prime example of how the proposed rule could result in a finding of no unfair competitive advantage, based largely on disparity in the quality of offers. In *ITT*, the former government employee, Mr. Teufel, requested an ethics opinion regarding post–employment restrictions several months before the solicitation was issued in the protested procurement, and executed a certificate acknowledging his duty to refrain from disclosing competition-sensitive information. *Id.* 94-2 CPD ¶ 30. The agency was able to give specific information regarding Mr. Teufel's activities in his last months with the government, and show that his participation on the procurement was minimal. *Id.* More importantly, in view of Mr. Teufel's limited involvement with the procurement, was the fact that the protester's proposal was rated 50% lower overall technically (including a RED [unsatisfactory] rating for quality control). *Id.*

(c) Long-Term Mission Accomplishment

If government is to perform effectively, it must be able to compete for the services of qualified managers, scientists, professionals, engineers, and others possessing required skills and experience. Moreover, the ability to move easily from government service to the private sector through the revolving door undoubtedly serves a very useful function in encouraging talented people to consider short-term government employment where they might otherwise decline it.[391] The purported unduly negative impact of demanding ethical rules regarding post-government service employment is a longstanding *bête noire* of those who value this function, and an often cited argument against rules that might restrict its salutary effect.[392]

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391. Government employees who feel free to come and go from public service have been viewed as unique and valuable assets:

> Individuals who are serving government for limited periods of time have greater freedom to exercise their individual judgment, to challenge conventional wisdom, and to disagree with superiors on important public issues than do career civil servants. They are more likely to speak their own minds, knowing that they can readily find private employment if necessary, than are those whose security depends on continuous government employment and who thus may be reluctant to make waves. Moreover, a law which discourages movement between the private and public sector would further isolate dedicated career civil servants from other citizens at a time when alienation between government and the tax-paying public is eroding faith in our national institutions. Our government has long benefited from the mix of career and short-term employees in its service, ...

H.R. REP. 96-115 at 5 (1979).

392. *See* COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON BUSINESS ORGANIZATION OF THE DEPARTMENT OF DEFENSE 58-59 (1955) ("A particular obstacle to attracting competent men into political service is the problem caused by those portions of the conflict of interest laws requiring divestment of personal investments . . . ."); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, CONFLICT OF INTEREST AND THE FEDERAL SERVICE 10 [hereinafter CITY BAR REPORT] (citing reports and articles supportive of the negative effects of conflict of interest provisions on recruitment); Thomas D. Morgan, *Appropriate Limits On Participation By Former Agency Official In Matters Before An Agency*, 1980 DUKE L.J. 1, 51 (Feb. 1980) (overly restrictive rules create problems for government recruitment); "To make government service more difficult to exit can only make it less appealing to enter." Remarks of Federal Trade Commission Chairman Calvin Collier before Council on Younger Lawyers, 1976 Annual Convention of the Federal Bar Association (Sept. 16, 1976, *quoted in* S. Doc. No. 25 at 65; *see also supra* Section I.B.

However, studies documenting a negative relationship between existing revolving door rules and the government's competitiveness in the personnel market are difficult to find.[393] It is reasonable to argue that if such a relationship could be measured, that revolving door enthusiasts would trumpet them to advance necessary "reforms." On the contrary, however, available evidence is at worst mixed, and actually supports a finding of no significant impact.[394]

The scarcity of documentation to support fears of mission-crippling personnel shortages resulting from restrictive revolving door rules might have a relatively simple common-sense explanation. For example, these cases frequently involve former government employees who were career civil servants or military officers and who *retired*, rather than resigned, to accept employment from a competing contractor.[395] It is difficult to argue

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393. According to the authors of the *City Bar Report*, as late as 1960, the effects of government ethics rules on recruitment "has never been adequately explored or debated." CITY BAR REPORT, *supra* note 392, at 152. Thirty years later, Professor Robert G. Vaughn noted that the issue was amenable to empirical study and documentation, yet little research into the matter had been conducted and "[a]rguments continue to be based on anecdote and supposition." Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 441 (Feb. 1990).

394. After a 1983 study, the General Accounting Office found it "extremely difficult, if not impossible, to attribute any specific degree of federal recruiting difficulty to the Ethics Act or to any of its provisions." GAO/FPCD 83-22, Feb. 23, 1983, *Information on Selected Aspects of the Ethics in Government Act of 1978*, app. I, at 1. However, the GAO study itself relied heavily on discussions with "individuals at the White House, OGE, other executive branch agencies, public interest groups, and other organizations" in reaching its conclusion, rather than upon a more systematic and scientific approach. *Id.* Further, the GAO report did appear to blame ethics rules for a part of whatever difficulty in recruitment the Federal government was then experiencing, along with other factors unrelated to ethical rules. *Id.* at 2.

In the *City Bar Report*, the authors found that ethics rules (focusing on divestment rather than post-employment restrictions) had little effect on recruitment and retention of civil servants, a substantial effect with regard to political appointees, and no impact with regard to full time government attorneys. CITY BAR REPORT, *supra* note 392, at 154-60.

Critics of the effect of "overly restrictive" revolving door rules are forced to rely on speculation, rather than hard fact, even though such facts should be readily observed and measured. Vaughn, *supra* note 393. Professor Morgan, in an article in which he bemoaned the adverse affect of overly restrictive ethics rules on government recruitment, was nevertheless forced to acknowledge that "[t]he number of desirable public servants who would accept government employment but for post-employment restrictions is unknown." Morgan, *supra* note 392, at 53. In addition, he also conceded that no realistic study of the issue had ever been undertaken. *Id.* at 51. Professor Morgan further admitted that, [t]he Carter Administration reportedly found that no one declined a cabinet position for the stated reason that he or she would not be willing to comply with post-employment restrictions." *Id.*

395. In 33 out of 66 (50%) of thesis cases, the former government employee was

that a high percentage of persons who decide to serve for the twenty or thirty years required for retirement did so with the expectation, *at the time of their commitment to career government service*, that they would be able to leverage the skills gained in public service to obtain employment with a government contractor. Many career public servants may entertain vague notions in this regard, some few may even make specific plans. However, is it reasonable to believe that a high percentage of public servants will forego career status because of the possibility that, decades hence, their prospects for employment might be limited, for a finite period of time, by duties discharged at the close of their government careers? Probably not.

Second, nearly all revolving door protests involve former government employees who are *not* political appointees. Political appointees typically suspend highly successful and remunerative careers to serve in government. As noted in the *City Bar Report*, this group is most likely to be deterred from public service by restrictive ethics rules.[396] Rather, the former government employees most often named in revolving protests serve in mid-level managerial and technical positions: long-term public servants whose career plans are unlikely to be decisively influenced by revolving door restrictions.[397]

Assume, arguendo, that restrictive revolving door rules would have a negative effect on public service recruitment.[398] There is nevertheless no reason to believe that the proposed revolving door rule would have such an effect. The rule does not prohibit former government employees from seeking jobs with contractors—it simply creates an incentive for such contractors, former government employees, and agencies to act properly and document their actions contemporaneously; and to disclose, in the event of a protest, the specific facts and circumstances that demonstrate the propriety of their actions. Further, a contractor's exposure to protests based upon

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395. (continued) identified as having retired from government service. *See infra* Appendix A.

396. CITY BAR REPORT, *supra* note 392, at 156; *but see supra* note 391 (no Carter Administration cabinet nominee declinations due to post-employment restrictions).

397. As noted previously, revolving door protest decisions frequently omit salient details regarding the positions occupied by the former government employees whose actions are at issue. *See supra* Section III.B.3.(c). However, where it is possible to discern the type of duties discharged, they most often involve duties such as program manager, administrative contracting officer, or contracting officer representative. *See infra* Appendix B.

398. Carried to extremes, this is obviously a valid point. If, for example, former government employees were forever barred from working with any government contractor, certainly recruitment would suffer.

the proposed rule, though theoretically of indefinite duration, should precipitously decrease after two or three years following departure from government service;[399] a reasonably short period assuming the contractor values the skills and experience of its new employee, and not merely the inside information or access he or she brings. There is, therefore, small chance that these new requirements will cause contractors to curtail or cease their efforts to recruit former government employees, thereby denying themselves access to a huge pool of talent.[400]

But analysis of long-term mission accomplishment must include, not only the effect of the proposed rule on *recruitment* of new employees, but also, *retention* of current personnel. The government's interest in retention of highly qualified employees is at least as compelling as recruitment of new ones. This is because, in general, veteran public servants have learned their jobs, perform them well, and have been the object of considerable investment in training, mentoring, and career development. The proposed rule does little to degrade retention of employees whom the government should wish to retain. Anything that makes it easier for contractors to hire government employees harms the government's competitive position with regard to retention.

Consider, however, an employee, already thinking of leaving federal service, who is offered an assignment to work on a project or procurement that may restrict his job opportunities. Might not the existence of the proposed rule cause him to leave the government earlier? Yes; but in such a case, what has been lost? The employee, it is stipulated, was already so close to leaving that the mere possibility of a restriction was decisive. It is reasonable in such a case to believe that departure was only a matter of a brief time, and the loss, therefore, minimal. Further, it is just as possible that such an employee, if familiar with the rule, will simply accept the assignment, act prudently to document his actions on the project and in his subsequent job search, and leave government service when it suits him plans, rather than prematurely due to perceived draconian restrictions on

399. After such time, in the great majority of cases, inside information will have grown stale, and insider contacts eroded by turnover within the agency and lack of day-to-day intimacy. *CACI, Inc.–Federal* is the exception that proves the rule. Although Mr. Stevens had been gone from the agency for two years at the time of the protested competition, he evidently worked diligently to maintain his relationships with the TEC members, even discussing future job opportunities with two of them. *See supra* Section III.B.1.(b).

400. As of 1995, according to the AFL-CIO, public employees comprise 15.5% of the U.S. workforce. *Public Workers, Public Employees as a Percentage of All Workers, 1995*, WASH. POST, June 12, 1998, at E2.

post-government service employment. Thus, by giving current government personnel guidance on how to leave on their own terms, the proposed rule furthers, to some small degree, the government's ability to retain good employees.

D. Conclusion

Only enactment of the proposed rule, and a fair trial, will demonstrate definitively whether we must compromise one or more important interests in order to promote greater fairness in addressing the revolving door problem. However, when the true nature of the ostensibly countervailing interests: efficiency, competition, and mission accomplishment; are plumbed, it is reasonable to predict that the proposed rule will enhance (or, at least, not degrade) government's ability to pursue them while strengthening its commitment to procurement integrity.

The magnitude of the revolving door "problem" is indeed controversial. It is, however, difficult to argue that all is well, or that a reform that seeks merely to encourage ethical awareness and prudent practices by agencies, former government employees, and competing contractors, at little or no cost to the other important related interests, is not worthy of serious consideration.

As it currently stands, firms doing business with the federal government have cause, for both right and wrong reasons, to view all personnel of the activities with which they do business as potential employees. The right reason: their character, skills, and experience; the wrong reason: inside information regarding government requirements, incumbent competitors or source selection strategy; or access to and favoritism from former colleagues still working for the agency. Our present rules encourage secrecy in negotiations for, acceptance of, and performance in, positions with competing contractor organizations. Other firms involved in a competition involving a revolving door employee have no way of penetrating the veil of secrecy to learn the truth about whether their offers were fairly evaluated.

The protest fora labor in this ignorance and under the current flawed rules, as further obfuscated by the Federal Circuit's *CACI, Inc.–Federal* decision and its progeny, and the default stance that the government gets the benefit of the doubt. It is therefore not surprising that they overwhelmingly deny revolving door protests in decisions that neither set forth suffi-

cient facts to permit independent judgments regarding their correctness, nor rigorously analyze the available evidence. Intelligent scrutiny of these decisions does not permit the public to decide for itself whether the parties to any given revolving door situation are rogues or saints. Until something is done to permit such intelligent scrutiny, most people will probably conclude that:

"*Few men have virtue to withstand the highest bidder.*"

George Washington

Appendix A: Case Table[a]

CASE NO.	CASE NAME	YEAR	RESULT[b]	CACI[c]	RETD[d]	POSN[e]
B-278129.4	PROTECCION S.A.	1998	Denied	No	No	UK
B-274698.2	PRC, INC	1997	Denied	Yes	Yes	SE
B-272461	MORTARA INSTRMNT	1996	Denied	Yes	Yes	AC
B-270698.4	PHYSICIAN CORP	1996	Denied	Yes	Yes	PM
B-270213.2	**GUARDIAN TECH**	1996	**Sustained**	Yes	Yes	TE
B-266299	CREATIVE MGMT	1996	Denied	No	Yes	CR
B-259925	DIVERSIFIED INTL	1995	Denied	Yes	UK	UK
B-258622	STANFORD TELE	1995	Denied	Yes	Yes	PM
B-257294	CLEVELAND TELE	1994	Denied	Yes	No	UK
B-255737	SCIENCE PUMP	1994	Denied	Yes	Yes	TE
B-255580.3	TEXTRON MARINE	1994	Denied	Yes	Yes	CR
B-253740.2	ITT FEDERAL SVCS	1994	Denied	Yes	Yes	TE
B-253714	RAMCOR SVCS	1993	Denied	Yes	No	PM
B-252406.2	SCI-TECH GAUGING	1993	Denied	No	No	TE
B-250912	LORI HAWTHORNE	1993	Denied	Yes	No	TE
B-248429.2	DFC APPRAISAL	1992	Denied	Yes	UK	UK
B-246793.3	FHC OPTIONS	1992	Denied	No	Yes	TE
B-246623	BLUE TEE CORP	1992	Denied	No	Yes	PM
B-224597.3	GENERAL ELECTRIC	1992	Denied	Yes	Yes	AC
B-245233.4	CENTRAL TEXAS	1992	Denied	No	Yes	PM
B-243927.4	PERSON SYSTEMS	1992	Denied	Yes	No	UK
B-243777.3	SIERRA TECH	1992	Denied	Yes	No	TE
B-241727	TECHNOLOGY CNCPT	1991	Denied	No	Yes	CR
B-241536	MANOFF GROUP	1990	Denied	Yes	No	TE
B-214568	WASHINGTON PTRL	1984	Denied	No	Yes	UR
B-241157	UNIVERSAL TECH	1991	Denied	Yes	No	UK

B-239469.2	HOLMES & NARVER	1990	Denied	Yes	No	TE
B-236903	MDT CORP	1990	Denied	Yes	Yes	CR
B-235906.2	**HOLMES & NARVER**	1989	**Sustained**	Yes	Yes	MI
B-235248.2	INTER-CON SECRTY	1989	Denied	No	No	EM
B-234629.2	INTL RESOURCES GP	1989	Denied	Yes	Yes	PM
B-233369.2	LASERPOWER	1989	Denied	Yes	Yes	SS
B-232721	DAMON CORP	1989	Denied	Yes	Yes	SS
B-233166.3	JOSEPH DECLERK	1989	Denied	Yes	UK	UK
B-232501	BENIDX FIELD ENG'G	1988	Denied	No	Yes	TE
B-232234.2	EMERSON ELECTRIC	1989	Denied	No	Yes	EM
B-231815	USATREX INTL	1988	Denied	No	No	TE
B-231710	MARIAH ASSOCS	1988	Denied	Yes	No	AC
B-231579	DAYTON T BROWN	1988	Denied	Yes	Yes	PM
B-230980	THE EARTH TECH	1988	Denied	No	Yes	PM
B-230248	HOLSMAN SVCS	1988	Denied	No	Yes	UK
B-230050.2	EAGLE RESEARCH	1988	Denied	No	No	CR
B-227375.2	FXC CORP	1987	Denied	No	Yes	AC
B-22584.3	HLJ MANAGEMENT	1988	Denied	Yes	Yes	CR
B-225576	LOUISIANA FOUND	1987	Denied	No	UK	UK
B-224366	RCA SERVICE CO	1986	Denied	Yes	No	SS
B-223555	REGIONAL ENV CON	1986	Denied	No	Yes	PM
B-223527.2	IMPERIAL SCHRADE	1987	Denied	Yes	Yes	PM
B-221250.2	TRACOR APPLIED	1986	Denied	No	UK	UK
B-220935	SPACE SYSTEMS	1985	Denied	No	UK	MI
B-220216.2	WALKERS FREIGHT	1986	Denied	No	No	PM
B-217361	WALL COLMONOY	1985	Denied	No	No	AC
B-216512	BOW INDUSTRIES	198	Denied	No	No	PM
B-213665	BOOZ ALLEN	1984	Denied	Yes	UK	UK
B-213650	STERLING MEDICAL	1984	Denied	No	No	TE
B-213310.2	DJ FINDLEY INC	1984	Denied	No	No	TE

B-212499.2	PINKERTON COMP	1984	Denied	Yes	No	UK
B-212318	CULP WISNER CULP	1983	Denied	Yes	No	PM
B-211180	IONICS INC	1984	Denied	Yes	Yes	UK
B-210800	COMPUTER SCIENCE	1984	Denied	Yes	No	AC
B-207723	BRAY STUDIOS	1982	Denied	No	No	AC
B-205820	DIVERSIFIED COMP	1982	Denied	No	No	UR
B-205464	WESTERN ENG'G	1982	Denied	No	Yes	UK
B-201331.2	JL ASSOCIATES	1982	Denied	No	Yes	PM
B-194669	POLITE MAINT	1979	Denied	No	No	SS
B-186723	RIGGINS & WMSON	1976	Denied	No	Yes	SS

a. In order to be included, the protest must contain an allegation that the proposed awardee gained an unfair competitive advantage as a result of its employment of a former Government employee.
b. SUSTAINED or DENIED refers only to action on the revolving door allegation(s) raised by the protester.
c. YES indicates that the decision relied on either *CACI Inc. Federal* or *NKE*, either by direct reference, or by use of the "hard facts" standard.
d. The following legend applies to the RETD (Retired) column:

YES It is possible to discern from the decision that the former Government employee retired from Government service.

NO It is possible to discern from the decision that the former Government employee left Government service prior to qualifying for retirement benefits, or there is no indication that the former Government employee retired.

UK It is not possible to discern from the decision that the former Government employee's status at the time he or she left Government service.

e. The following legend applies to the POSN (Duty Position) column:

PM Program manager of deputy program manager or program support personnel (other than technical).

CR Contracting officer's representative or contracting officer's technical representative.

AC Administrative contracting officer or contract administration support personnel.

EM Enlisted member of the armed forces not otherwise classified.

MI Military commissioned officer (below pay grade O-7) not otherwise classified.

SS Source selection official or support personnel.

e. (continued)

TE Technical expert, scientist.

SE Senior executive service or flag officer.

UR Employee had no apparent relationship to the contracting activity.

UK It is not possible to discern from the decision that the former government employee's position at the time he left government service.

Appendix B: Proposed Revolving Door Reform Act*

106TH CONGRESS
1ST SESSION

To amend chapter 137 of Title 10, United States Code, to strengthen the integrity of the defense procurement system by recognizing the appearance of impropriety as a basis for disqualification of competing contractors who have employed former Government employees, and to require agencies wishing to award contracts to such contractors to determine, prior to award, that the competing contractor obtained no unfair competitive advantage by hiring a former Government employee.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 25, 1999

MS. REPRESENTATIVE (for herself and MR. CONGRESSMAN) introduced the following bill; which was referred to the Committee on Armed Services

To amend chapter 137 of Title 10, United States Code, to strengthen the integrity of the defense procurement system by recognizing the appearance of impropriety as a basis for disqualification of competing contractors who have employed former Government employees, and to require agencies wishing to award contracts to such contractors to determine, prior to award, that the competing contractor obtained no unfair competitive advantage by hiring a former Government employee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

*. This Proposed Act was drafted by the author in the manner it may be seen if presented to Congress.

SHORT TITLE

SECTION 1. This Act may be cited as the "Revolving Door Reform Act of 1999."

AMENDMENTS

SECTION 2. Section 2304(a)(1) of title 10, United States Code, is amended to read as follows:

(a)(1) Except as provided in subsections (b), (c), ~~and~~ (g) and (l) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services—

SECTION 3. The following subsection is added to section 2304 of title 10, United States Code:

(1) Congressional Policy.

It is the policy of Congress that Federal contracts be awarded under circumstances not tainted by actual impropriety, or the appearance of impropriety, relating to the employment by competing contractors of former Government employees.

(2) Definitions.

As used in this subsection

(A) The term "employ" means the creation any relationship under which services are to be provided in return for money or any other thing of value. A person is considered to have been employed if a contract, understanding, agreement, or other arrangement, whether formal or informal, written or unwritten, has been reached between the employer and employee, for the exchange of services for money or a thing of value, regardless of whether substantial services have been provided thereunder, and without regard to the duration of the employment.

(B) The term "employee" includes, but is not limited to: independent contractors, consultants, advisors, officers, directors, or agents, whether engaged on a full or part time basis.

(C) The term "Government employee" means:

(i) an "officer," as defined in section 2104 of title 5;

(ii) an "employee," as defined in section 2105 of title 5; or

(iii) a "member of the uniformed services," as defined in section 2101 of title 5.

(D) The term "former Government employee" means any Government employee who has been employed, as defined in section 2304(l)(2)(A) of Title 10, by a competing contractor.

(E) The term "competitively useful information" means any of the items in the following list of information pertaining to a procurement, or to the procurement's predecessor contract for the same or similar property services, if that information has not been previously made available to the public or disclosed publicly in accordance with law or regulation:

(i) Cost or pricing data (as defined by section 2306a(h) of Title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section;

(ii) Indirect costs and direct labor rates;

(iii) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation;

(iv) Information marked by the contractor as "contractor bid or proposal information", in accordance with applicable law or regulation;

(F) The term "competing contractor" means a non-Federal entity, commercial business, or non-profit organization, that is competing for the award of a Federal contract.

(G) The term "source selection information" means source selection information, as defined in section 423(f)(2) of Title 41.

(H) The term "contract administration" means assigned postaward functions related to the administration of contracts, but does not include purely clerical functions.

(I) The term "purely clerical function" means a function that does not require the exercise of discretion, or the application of skills acquired through higher education. Examples of purely clerical functions include: typing, transcription, filing, or reception services.

(J) The term "unfair competitive advantage" means a substantial, but not necessarily decisive, improvement in competitive position.

(3) It is rebuttably presumed that a competing contractor has obtained an unfair competitive advantage, and an agency may not award a contract to such competing contractor if:

(A) the amount of the contract exceeds $10,000,000;

(B) the competing contractor has employed a former Government employee, and such person, while a Government employee, had:

(i) as part of his or her official duties, the responsibility to participate in the administration of a predecessor contract for the same or similar property or services as are sought under the instant procurement; or

(ii) by virtue of his or her official position, lawful access to competitively useful information or source selection information pertaining to such procurement.

(4) Notwithstanding the existence of circumstances set forth in section 2304(l)(3) of Title 10, an agency may award a contract to such a competing contractor if:

(A) the competing contractor is the only responsible source; no other type of property or services will satisfy the needs of the agency; and –

(i) the contracting officer justifies such circumstances in writing, and certifies the accuracy and completeness of the justification; and

(ii) the justification is approved by the head of the agency, or his or her delegee occupying a position at least one level above that of the source selection authority; and

(iii) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(B) the head of the agency, or his or her delegee occupying a position at least one level above that of the source selection authority, decides in writing that it is necessay in the public interest to award to the competing contractor, the head of the agency or his or her delegee notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(C) the head of the agency, or his or her delegee occupying a position at least one level above that of the source selection authority, decides in writing that, by clear and convincing evidence, the contractor obtained no unfair competitive advantage by virtue of its employment of such former Government employee.

(5) The burden of demonstrating that unfair competitive advantage did not result from the employment of the former Government employee is on the competing contractor that employed him or her. In evaluating whether the presumption of unfair competitive advantage has been overcome, the head of the agency or delegee shall consider all facts and circumstances bearing on such issue. At a minimum, he or she will consider:

(A) the existence of other facts, unrelated to the employment of the former Government employee that, in combination with such circumstance creates an unacceptable appearance of impropriety associated with award to the contractor;

(B) the closeness in price and, if applicable, technical merit of, the competing contractor's bid or proposal, and the bids or proposals of the other competing contractors;

(C) the extent to which employment contacts between the contractor and the former Government employee were contemporaneously, fully,

and accurately disclosed to the former Government employee's supervisors and to the cognizant procuring contracting officer;

(D) the timely request for, and reasonable reliance upon, an ethics opinion from a designated agency ethics official regarding the propriety of the post-Government service employment under consideration;

(E) the existence, use, and efficacy of agency procedures to ensure that unfair competitive advantage does not result from employment of the former Government employee; and

(F) the existence, use, and efficacy of competing contractor's procedures to prevent the acquisition of unfair competitive advantage as a result of employment of the former Government employee.

A PRECARIOUS "HOT ZONE"— THE PRESIDENT'S PLAN TO COMBAT BIOTERRORISM

VICTORIA V. SUTTON[1]

I. Introduction

The President, since taking office, has "made the fight against terrorism a top national security objective."[2] President Clinton announced on 22 May 1998 that he "is determined that in the coming century, we will be capable of deterring and preventing such terrorist attacks."[3] The President is also convinced that we must also have the ability to limit the damage and manage the consequences should such an attack occur."[4] With this most recent announcement, the President introduced Presidential Decision Directive 62 (PDD 62), which is to "create a new and more systematic approach to fighting the terrorist threat of the next century"[5] and to clarify the roles of agencies and departments to ensure a coordinated approach to planning for such terrorist induced emergencies. However, as yet no formal procedure exists for coordinating federal, state, and local forces should we have a bioterrorism event, or an effective plan for participation of the nation's military forces in response to such an event.

While nuclear, chemical, and biological weaponry all fall within the general classification of WMD; until very recently, nuclear weaponry has dominated planning and discussion. Today, however, it is increasingly recognized that chemical and particularly biological weapons represent much more credible threats in the hands of terrorists than do nuclear ones. This follows for many reasons, for example, ease of maintaining secrecy in

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2. The White House, Office of the Press Secretary, Fact Sheet: Combating Terrorism: Presidential Decision Directive 626, Annapolis, Md. (May 22, 1998) [hereinafter Combating Terrorism].

3. *Id.*

4. *Id.*

5. *Id.*

preparation of the weapons, ease of production and delivery of the weapons, ease of obtaining wide dispersal of the weapons—particularly in the case of biological weapons. It is also true that modern genetic engineering carries with it the specter of modification of familiar weapons species such as anthrax and smallpox into forms against which all our vaccines and other defenses would be worthless.

This current planning is directed against all weapons of mass destruction (WMD), which include technological as well as specifically chemical and biological activities. This article will focus on a plan for biological and chemical weapons that should be distinguished from the approach to a plan for all other technological threats. While the United States skills in planning to combat nuclear weapons and other technological weapons have been practiced throughout the cold war, our skills in beginning to comprehend and meet the threats of chemical and biological warfare on a domestic level have only recently begun to be developed fully.

Although PDD 62 is the most recent formal action, the planning for responses to domestic bioterrorism is shaped by prior presidential directives, statutes, and U.S. constitutional guidance. The planning for the prevention, detection, and actual encounters with bioterrorism now has actually begun, but as separate departmental missions under the auspices of individual agencies and departments. These initial planning and funding activities have been examined through a number of Government Account Office (GAO) investigatory reports at the request of Congress, criticizing the lack of coordination. The implementation of any emergency response capability, fortunately, has not been tested on a major scale as yet, and this article addresses the legal status of the coordination of federal agencies, the military, as well as state and local governments under the constraints of statutes, regulations, case law and the U.S. Constitution.

Richard Preston, a science thriller novelist, produced a response scenario to a bioterrorism event in his 1997 book, *The Cobra Event*.[6] *The New York Times* reported that "Mr. Clinton was so alarmed by . . . *The Cobra Event* . . . that he instructed intelligence experts to evaluate its credibility."[7] More alarming perhaps even than its suggested biological possibility, is the lack of statutory clarity that would be essential for effective implementing of a strategy for the United States in terms of preparedness and emergency responsiveness. This article examines the present status of federal, state,

6. RICHARD PRESTON, THE COBRA EVENT (1997).

7. *See* Interview by *New York Times* with President Bill Clinton (Jan. 21, 1999).

and local preparedness and proposes such changes to statutes and federal regulations and to the implementation of currently applicable statutes to enable our federal, state, and local resources to be effectively used in research, preparedness as well as in emergency responsiveness.

II. Who Is In Charge?

The President's strategy has been to combine threats of all WMD into a single framework for preparation and planned response.[8] The designation of a lead agency or department for coordination appears to fall within the responsibility of the newly created Office of the National Coordinator for Security Infrastructure Protection and Counter-Terrorism, working "within the National Security Council and report[ing] to the Assistant to the President for National Security Affairs."[9] This office is to give "advice on budgets . . . lead in the development of guidelines that might be needed for crisis management, . . . oversee the broad variety of relevant policies and programs included in such areas as counter-terrorism, [and oversee the] protection of critical infrastructure and preparedness and consequence management for [response to] [WMD]" under PDD 62.[10]

The separation of WMD between technological weapons on the one hand and chemical and biological weapons on the other is suggested in the introduction to this article. Moreover, a separation of leadership among preparedness, research, funding, and planning activities and the emergency response activities, matched with respective missions of the departments and agencies would provide the most effective use of our resources. Perhaps a lesson from the Cherokee tribal custom of designating a wartime chief and a peacetime chief, where, "war was decided upon, its conduct was turned over to the town war organization,"[11] should be considered in structuring the leadership for these two activities. That is, preparedness and research are very different activities and require very different skills as compared to the activities and skills of emergency response. Whether the proposed separation is a workable plan is examined in the following sections.

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8. *See* Presidential Decision Directive 62 (May 1998).

9. Combating Terrorism, *supra* note 2.

10. *Id.*

11. V. Richard Persico, Jr., *Early Nineteenth-Century Cherokee Political Organization*, *in* THE CHEROKEE INDIAN NATION (Duane H. King ed., 1979).

A. Preparedness, Research, Funding and Planning—Who is in Charge?

Recent GAO testimony before Congress describes the scope of combating foreign-origin as well as domestic terrorism and makes recommendations for crosscutting and coordination management,[12] which repeats many of the same criticisms included in a GAO report issued just over a year earlier.[13]

The second report recommends that the Office of Management and Budget (OMB) conduct a crosscutting review, identify priorities and gaps and identify funding. However, the scope of the responsibility requires the staffer in OMB charged with this duty, to fully understand the scientific merit of programs spanning approximately twenty-two departments and agencies, as well as the legal and interagency constraints. In addition, this OMB staffer must compose a line-item budget for each agency identifying those items which fit into the comprehensive, government-wide program, which will probably be reviewed by dozens of congressional committees and subcommittees that claim departmental jurisdiction—not program jurisdiction.

Before the line-item, crosscutting coordination can be accomplished, as envisioned by the GAO, Congress must also agree to a joint appropriations hearing, with each department's and agency's appropriations committee coming together to receive a joint presentation of the coordinated budget.

This is not an unprecedented achievement. In an historical joint meeting of congressional committees, the Mathematics and Science Education Initiative of the Bush Administration was presented to two congressional committees as a line-item program crosscutting twelve departments' budgets in a comprehensive, coordinated program, which identified priorities and avoided gaps and overlaps in funding and programming.[14] This type of joint hearing would ensure that duplication of terrorism research and

12. *Testimony of Henry L. Hinton, Jr., Assistant Comptroller General, National Security and International Affairs Division, before the Subcomm. on Nat'l Security, Veterans Affairs, and Int'l Relations, Committee on Government Reform,* U.S. House of Representatives, GAO/T-NSIAD/GGD-99-107 (March 11, 1999) [hereinafter Testimony of Henry L. Hinton, Jr.].

13. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, COMBATING TERRORISM: SPENDING ON GOVERNMENT WIDE PROGRAMS REQUIRES BETTER MANAGEMENT AND COORDINATION, GAO/NSIAD-98-39 (Dec. 1997).

14. D. ALLAN BROMLEY, THE PRESIDENT'S SCIENTISTS 84 (1994).

development programs would not occur as they did in one instance identified by the State Department where one congressional committee established a program and approved funds for that program while an identical program already existed and was funded through another congressional committee.[15]

1. Federal Coordination and Leadership

The design of a plan to confront the threats of bioterrorism, with a logical division of leadership between the planning and the emergency response responsibilities could follow previous statutory designs having demonstrated efficacy. Current statutory mechanisms are currently in place that could provide a framework for the recommendations made by the GAO.

The GAO recommendation that these responsibilities be assigned to the OMB represents an overwhelming range of duties. The performance of such crosscutting, coordinated functions was, in fact, performed in a previous Administration by a well-coordinated assemblage of federal employees and appointees, meeting once a month over an annual planning period enabled by the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) statute.[16] During the period from 1989 to 1992, the implementation of this statute required three Ph.D.-level staff from the Office of Science and Technology Policy, one staff member from the OMB, and two levels of coordination among staff and senior policy appointees from twelve or more agencies and departments involved in each of the crosscutting programs.[17]

The GAO has identified twenty-two departments and agencies that should be involved in the crosscutting, coordinated plan to combat terrorism.[18] The use of the statutory FCCSET mechanism fluctuates with the priorities of the Director of the Office of Science and Technology Policy. During the GAO reporting period, the FCCSET mechanism had fallen out of use, otherwise GAO might have identified it as a potential mechanism to implement their recommendations. Such initiatives as biotechnology, advanced computing, global climate change, and math and science educa-

15. GAO REPORT, GAO/NSIAD-98-39, app. III (Dec. 1997).
16. 42 U.S.C.S. § 6651 (LEXIS 2000).
17. OFFICE OF SCIENCE AND TECHNOLOGY POLICY, FCCSET HANDBOOK (March 1991).
18. U.S. General Accounting Office, GAO/NSIAD-98-39, app. I (Dec. 1997).

tion were each coordinated in a crosscutting program such as this between 1989 and 1992. Bioterrorism certainly meets the criteria under the statute and could be identified for this congressionally mandated research and planning mechanism to accomplish the recommendations made by GAO.

With obviously no alternatives, and a vital need to match resources with programmatic goals, the GAO was left to suggest that OMB itself carry out the entire crosscutting, coordination function. On the basis of prior experience with crosscutting budgets, it is apparent that this is an impossible task for OMB acting alone. Without scientific expertise across all agencies working carefully with OMB to prepare a comprehensive research plan matched with specific funding on a line item basis from each participating department or agency, no government-wide plan can be said to be truly crosscutting or coordinated. Such programs in the past were highlighted in the federal budget as separately identified and funded Presidential Initiatives, distinguished by the crosscutting, coordinated line-item approach.[19]

2. Intergovernmental Planning and Coordination

The threat of domestic terrorism demands an intergovernmental coordination system as well as a coordinated federal intra-governmental process. This issue was also addressed by the GAO report in its acknowledgment that the Attorney General was in the process of establishing a National Domestic Preparedness Office within the Federal Bureau of Investigation "to reduce state and local confusion over the many federal training and equipment programs necessary to prepare for terrorist incidents involving weapons of mass destruction."[20] This addresses the question of the availability of training resources for state and local governments, but fails to address the more comprehensive issue of ensuring that each state and local government is linked to a process which addresses the legal and public health responsibilities and expectations. The effort to create an accessible laundry list of training programs in the hope of preparing state and local governments is comparable to sending state and local governments out to a grocery store with a grocery list (but without money) to make a specific unique cuisine for which only the federal government has the recipe.

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19. U.S. OFFICE OF MANAGEMENT AND BUDGET, FEDERAL BUDGET 1990, FEDERAL BUDGET 1991, FEDERAL BUDGET 1992.

20. *Testimony of Henry L. Hinton, Jr.*, *supra* note 12, at 2.

B. Emergency Response—Who's in Charge?

1. Federal Coordination and Leadership

Intragovernmental relationships are addressed by Presidential Decision Directive 39 (PDD 39), which identifies the Federal Bureau of Investigation (FBI) as the lead agency for domestic crisis response and the Federal Emergency Management Agency (FEMA) as the lead agency for consequence management. The National Security Council is charged with the lead for interagency terrorism policy coordination.[21] The most recently issued of the directives—PDD 62—designated an office of "National Coordinator for Security Infrastructure Protection and Counter-Terrorism"[22] charged with government-wide responsibility for the broad GAO mandate for accountability, as discussed above. The FBI or FEMA, under the Economy Act of 1932,[23] could then use the broad authority given by Congress to any executive department to place orders with the military (or any other department) for materials, supplies, equipment, work or—from the military—passive services (those not statutorily prohibited).[24]

While the mission of the FBI is reflected in its leadership role in the investigation of terrorism, the expertise required for epidemiological investigations is much more strongly centered in the mission of the Public Health Service. The Centers for Disease Control (CDC) and the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID) are the world's leading centers for forensic analysis and have been recommended for leadership roles in bioterrorism response.[25] While apprehension of the bioterrorist is clearly within the mission of the FBI,[26] the Public Health Service, the CDC, and the USAMRIID, are more adequately staffed to investigate biological contamination and to provide epidemiological identification of the process and agent being used in any particular bioterrorism event.

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21. Presidential Decision Directive 39 (June 1995).

22. Presidential Decision Directive 62 (May 1998).

23. 31 U.S.C.S. § 686 (LEXIS 2000).

24. U.S. v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

25. RICHARD A. FALKENRATH ET AL., AMERICAN'S ACHILLES' HEEL—NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK 298 (1998).

26. *See* Federal Bureau of Investigations, *FBI Mission Statement* (visited Mar. 22, 2000) <http://www.fbi.gov/contact/fo/kc/mission.htm>.

The shortcomings of the FBI in the context of its leadership of domestic bioterrorism, preparedness, and response have been identified to include its lack of expertise in WMD and its limited experience in counterintelligence within governmental agencies, and the lack of skills in the investigation and apprehension of extra-governmental counterintelligence agents required in bioterrorism events.[27] The experience in building capacity in interdepartmental bureaucracies in substantive matters is also clearly lacking in the FBI's portfolio of skills, which would make the agency a poor candidate for the leadership role in planning and executing response and preparedness for domestic bioterrorism.[28]

So, too, FEMA, as the lead agency for response to a bioterrorism event, has skill primarily in planning for natural disaster responses. These typically require immediate infrastructure compensation to communities for such natural disasters as earthquakes, flooding, and volcanic eruption and do not address the kinds of responses necessary for the leadership role for bioterrorism response and preparedness.[29]

2. Intergovernmental Coordination and Leadership—Sovereignty Analysis

The authority for the federal government to intervene in state matters such as public health presents an issue of state sovereignty, and must be considered in any intergovernmental plan. Indian reservations, both those held in trust by the Department of Interior or held in fee simple by the tribes, do not have the same sovereignty issues as do states; because although they are separate governments, these reservations apply federal law in areas where states enjoy exclusive jurisdiction. The importance of Indian tribal governments and Indian reservations are critical, however, in

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26. (continued)

> The mission of the FBI is to uphold the law through the investigation of violations of federal criminal law; to protect the United States from for eign intelligence and terrorist activities; to provide leadership and law enforcement assistance to federal, state, local, and international agencies; and to perform these responsibilities in a manner that is responsive to the Constitution of the United States.

Id.

27. FALKENRATH ET AL., *supra* note 25, at 272-73.

28. *Id.* at 272-73.

29. *Id.* at 273.

part because there are at least nine reservations that have boundaries on international borders or international waters.[30] This requires a federal and tribal relationship focusing on national security against the entry of bioterroristic threats into the U.S. Border-crossing agreements. While the federal government has made agreements with these tribes, special focus is required on the emerging issues of possible bioterrorism.

3. Constitutional Tenth Amendment State Sovereignty

The readiness of state and local governments to respond to domestic terrorism was assessed by RAND Corporation in 1995 through a grant from the U.S. Department of Justice, National Institute of Justice.[31] Although the sponsoring department's mission is the application of law, this effort failed to address or even to identify legal issues for state and local governments as one of import in analyzing readiness.[32]

The first step in the response protocol to bioterrorism must necessarily take place at the state and local levels. The CDC, in collaboration with the Council of State and Territorial Epidemiologists, have developed guidance for public health surveillance which–for the first time–established uniform criteria for state health departments in reporting diseases.[33] This provides for uniform identification of the occurrence of reportable diseases. Laws that mandate the reporting of specific diseases however are state laws which result in variation in multiple lists of varying reportable diseases. A list of nationally reportable diseases however has been identified in the CDC protocol applicable to all states.[34]

Because the myriad of state laws provide no uniformity for federal response, the effort to address public health through the federal level has been lead by associations of state professionals. This reporting protocol was developed in collaboration with the Council of State and Territorial

30. Telephone Interview with Ron Andrade, former-President, National Congress of American Indians (Nov. 30, 1999) (identifying the following international border reservations: Tohona O'Dum, Cocopah, Ft. Huoma, Blackfeet, Red Lake Chippewa, Portage, Sue St. Marie, St. Regis, and Maloceet).

31. KEVIN JACK RILEY ET AL., DOMESTIC TERRORISM—A NATIONAL ASSESSMENT OF STATE AND LOCAL PREPAREDNESS 1-4 (1995).

32. *Id.*

33. Centers for Disease Control, Case Definitions for Public Health Surveillance, MMWR 1997; 46 (No. RR-10): [p.57].

34. *Id*. at 1.

Epidemiologists (CSTE) and approved by a full vote of the CSTE membership. It was also endorsed by the Association of State and Territorial Public Health Laboratory Directors (ASTPHLD). From this, CDC in collaboration with the Council of State and Territorial Epidemiologists have developed a "policy" that requires state health departments nationwide to report cases of the selected diseases to CDC's National Notifiable Diseases Surveillance System (NNDSS).[35] Interestingly, a recommendation was proposed to develop an "NBC Response Center" to respond to nuclear, biological, and chemical attacks as a part of an interagency effort to combine the FBI, FEMA, Department of Defense, Department of Health and Human Services, the EPA, the U.S. Marine Corps, the Chemical and Biological Defense Command and the Department of Energy into a central group, modeled after the existing Counterterrorist Centers, another interagency effort led by the Central Intelligence Agency.[36] Although the NNDSS had been in existence for more than four years, at the time of the recommendation, it was never included in this analysis as a possible national reporting center. While the use of these agencies as the lead intelligence agencies avoids the immediate concern of public health and state sovereignty, it all but ignores the unique agency missions, training, and skills demanded in a public health epidemic crisis.

The responsibilities for developing the reporting protocol of the NNDSS have been set forth in federal regulations promulgated by the CDC, which address the interface between the state associations and the federal agencies.[37] This rather surprising reliance upon non-governmental support for systems to safeguard our nation against presumptively catastrophic biological risks has evolved because of Tenth Amendment[38] constitutional prohibitions against usurping states' authority in the area of public health.

4. Constitutional Non-Delegation of Authority or Ultra Vires Analysis

Further, the broad delegation of authority for rulemaking to these non-governmental organizations suggests that the non-delegation doctrine[39]

35. *Id*. at 1-2.

36. FALKENRATH ET AL., *supra* note 25, at 274-76.

37. 64 Fed. Reg. 17,674 (Apr. 12, 1999).

38. U.S. CONST. art. X.

39. The source of the non-delegation doctrine is found in the U.S. Constitution, Article I, § 1, which provides that "[a]ll legislative powers herein granted shall be vested in a

may be quietly eroding under the pressure of urgent need for essential national components of our national security considered within a state sovereignty context. If, in fact, this is a delegation of federal legislative powers, what is the legislative source of those powers?

The more obscure *ultra vires* doctrine,[40] which does not permit an agency to go beyond the scope of its delegated authority, may be at the heart of this analysis. Indeed, absent a congressional mandate to carry out a federal public health response system to bioterrorism, the agency has no defined scope to exceed. In fact, the very activity of rulemaking to develop a national public health bioterrorism response system, something that Congress is itself prevented from doing, must be beyond the scope of authority for any agency—*ultra vires.*

5. Federal Laws Applicable to Nationwide Bioterrorism Preparedness and Response

Given these constitutional limitations on congressional and Executive authority to usurp states' sovereignty, the application of existing federal laws must necessarily be considered as a partial solution to the bioterrorism challenge.

Under the Posse Comitatus Act[41] the military cannot be used to enforce any laws against civilians. However, an exception to this use of the military is made where states make a request, or where there is no state request, to suppress any insurrection where it is "impracticable to enforce the laws of the U.S. . . . by the ordinary course of judicial proceedings."[42] The only clear exception (in the absence of insurrection) here is that a state must make a request prior to the use of military enforcement. In addition, to activate this latter exception, the President must issue an order activating the military for that specific exception. Failure to do so can leave in ques-

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39. (continued) Congress of the Unites States," and in the Constitution, Article I, § 8 which provides that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into execution" the other powers in Article I. Therefore, Congress cannot delegate its legislative powers, but can delegate authority to promulgate rules to carry out those legislative powers.

40. 5 U.S.C.S. § 706(2)(C) (LEXIS 2000) (allowing judicial review to determine whether an agency has acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

41. 18 U.S.C.S. § 1385 (LEXIS 2000).

42. 10 U.S.C.S. § 333 (LEXIS 2000).

tion the authority under which the military might be acting, as was the case in the Wounded Knee incident.[43] Under the Posse Comitatus Act, however, the military can be used for the provision of materials and supplies, and certain other passive activities.[44]

An innovative and clearly viable intergovernmental emergency preparedness statute exists in the area of environmental emergency preparedness. The Emergency Planning and Community Right-to-Know Act of 1986[45] provided for the coordination of local emergency planning committees (LEPCs) with both state and federal emergency planning authorities.[46] By 1989, most states had appointed LEPCs primarily based upon county delineations in compliance with this statute.[47]

> The LEPC has a statutorily prescribed membership which is "to include, at a minimum, representatives from each of the following groups or organizations: elected state and local officials; law enforcement; civil defense; firefighting; first aid; health; local environmental; hospital; and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to the requirements of this subchapter.[48]

The responsibilities of these LEPCs include the collection of release information from local toxic substance emitters, as well as the development of comprehensive emergency response plans.[49]

While there is no mandate for the federal government to avoid duplication of resources at the local level as the result of federal mandates, members of Congress are ultimately accountable for such overlaps.

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43. United States v. Jaramillo, 380 F. Supp. 1375, 1379 (1974).

44. United States v. Red Feather, 392 F. Supp. 916 (DCSD 1975). This case sets forth a number of examples of passive activities under the Act to include, reconnaissance missions, but specifically includes advice from the military as participatory and non-passive.

45. 42 U.S.C.S. §§ 11001-11050 (LEXIS 2000).

46. *Id.* § 11001(b).

47. *See generally* Vickie V. Sutton, Perceptions of Local Emergency Planning Committee Members Responsibility for Risk Communication and a Proposed Model Risk Communication Program for Local Emergency Planning Committees Under SARA, Title III (1989) (unpublished Ph.D. dissertation, University of Texas at Dallas) (on file with author) (providing information on the formation of the LEPCs).

48. 42 U.S.C.S. § 11001(c).

49. *Id.* § 11003(a).

Amending the Emergency Planning and Community Right-to-Know Act to provide for the emergency planning for bioterrorism emergencies, using the LEPC resource, would accelerate the development of plans for bioterrorism response by at least one or two years.[50] While the LEPC plans are subject to review and approval by the National Response Team[51] under the National Contingency Plan of the Superfund statute;[52] the bioterrorism component should also be reviewable by the FBI, as well as FEMA under the current leadership designations. The Attorney General's establishment of a National Domestic Preparedness Office within the Federal Bureau of Investigation "to reduce state and local confusion over the many federal training and equipment programs to prepare for terrorist incidents involving weapons of mass destruction"[53] might also be used to review such emergency plans and to identify training needs.

The most important, recent legislation in this area which has been constructed to meet the threat of bioterrorism are the Defense Against Weapons of Mass Destruction Act of 1996[54] and the Combating Proliferation of Weapons of Mass Destruction Act of 1996[55] which finds that "the threat posed to the citizens of the United States by nuclear, radiological, biological and chemical weapons delivered by unconventional means is significant and growing."[56] On its face, the legislation attempts to approach the terrorist threat by combining biological with chemical and radiological—again, biological requiring significantly different personnel, skills and strategies than chemical and radiological threats.

The legislation also recognizes there are shortcomings in the coordination between federal, state, and local governments;[57] however, the legislation finds that the "[s]haring of the expertise and capabilities of the Department of Defense, which traditionally has provided assistance to federal, state, and local officials in neutralizing, dismantling, and disposing of explosive ordnance, as well as radiological, biological, and chemical mate-

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50. The appointment of the LEPCs took more than one year, and an additional year to resolve a conflict with the state of Georgia concerning the delineation of planning districts. A similar delay could be anticipated for a bioterrorism planning network for state and local governments.

51. 42 U.S.C.S. § 11003(g).

52. *Id.* § 9605.

53. *Testimony of Henry L. Hinton, Jr.*, *supra* note 12, at 2.

54. 50 U.S.C.S. §§ 2301-2363 (LEXIS 2000) (as amended by the Defense Against Weapons of Mass Destruction Act of 1998).

55. *Id.* §§ 2351, 2366.

56. *Id.* § 2301(13).

57. *Id.* § 2301(19)-(26).

rials"[58] can be a vital contribution against bioterrorism. Although, the Congress may have an expectation that the Department of Defense is coordinating "traditionally" with state and local governments, there is no evidence of such a system or policy. Traditional coordination with states and local governments is more likely to be the result of very long and tedious negotiations, cost allocations, budgetary planning and eventual execution of a coordinated approach to, for example, the disposing of explosive ordnance at a locally closed military base. In fact, the largest appropriation authorized by this legislation for fiscal year 1997 was for $16.4 million to establish a training program for state and local responders, which is the list of courses discussed earlier in this article that fail to present any coordinated effort to link local and state governments with the federal government.

The most significant contribution of this legislation is the money to assist the Public Health Service in establishing Metro Medical Strike Teams in major U.S. cities; however the token $6.6 million appropriated for this effort does not signal serious congressional support for such a plan.[59] Again, there is a "grab-bag" of solutions, under-funded, nestled in the most significant of legislation passed to date on the bioterrorism threat.

6. The Cobra Event *as a Fictional Case Study*

Preston skillfully develops his story in *The Cobra Event* to describe the building of a team which he called the "Reachdeep team,"[60] guided by legal constraints to respond to the unknown bioterrorist. He correctly identified PDD 39 and National Security Directive 7 as the controlling authority[61] and described the FBI (and the head of its National Security Division)[62] convening a meeting and ultimately assembling the "Reachdeep team." A number of "high-level military officers" were included together with a representative from the Office of the Attorney General, Department of Justice.[63] Representatives with no team-leadership, but with supporting roles, were included from the U.S. Public Health Service and the Centers for Disease Control.[64]

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58. *Id.* § 2301(25).
59. FALKENRATH ET AL., *supra* note 25, at 262.
60. PRESTON, *supra* note 6, at 349.
61. *Id*. at 175.
62. *Id.* at 174.
63. *Id.* at 176.
64. *Id.* at 175.

Intergovernmental coordination included the presence of the "Chief of the Emergency Management Office for the City of New York, representing the mayor,"[65] and dismissed any specific state presence, altogether. In this scenario, the mayor never appeared at any of the meetings and the city police service and firefighting service seemed to willingly take commands from the Reachdeep team without supervision, notification or participation by any local authority. State and local governments are unlikely to respond in this manner and will require a leadership role in any such event. State sovereignty requires constraints by the federal government in the areas of protecting the public health, which is after all a state issue. The passage of the first comprehensive food and drug bill languished for seventeen years in Congress primarily because of the constitutional position of many legislators that this was a matter to be legislated by state and local governments.[66] Federal jurisdiction for this statute and others[67] is the Commerce Clause of the U.S. Constitution and thus applies to interstate sales. But to regulate bioterrorism on the basis of interstate commerce would require that the pertinent biologics be sold in interstate commerce. With the further restriction of *United States v. Lopez*[68] requiring a "substantial effects" standard on commerce further doubt would be raised as to the reliability of a Commerce Clause basis for regulation of bioterrorism in state and local government—hardly making such legislation useful to deal with public health emergencies.

Whether such federal legislation to invoke federal jurisdiction in emergency preparedness and response activities comports with the Tenth Amendment of the U.S. Constitution also poses potential constitutional challenges to any such legislation. Congressional power to determine what should be regulated for states and local governments was articulated by the court in *Garcia v. San Antonio Metropolitan Transit Authority*[69] when the more restrictive test of "traditional governmental functions"[70] was abandoned as "unworkable."[71] However, dissenters find that the Court's reasoning, in the majority opinion, that federal political officials

65. *Id*. at 175.

66. PETER B. HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW 8 (1991). The Federal Food and Drugs Act of 1906 was enacted after legislation was first introduced in 1879.

67. The Biologics Act of 1902, 32 Stat. 728.

68. 514 U.S. 549 (1995).

69. 469 U.S. 528 (1985).

70. National League of Cities v. Usery, Secretary of Labor, 426 U.S. 833, 852 (1976).

71. *Id.* at 864.

should be "the sole judges of the limits of their own power"[72] runs afoul of the principle that the federal judiciary is the sole determiner concerning the constitutionality of legislation.[73]

However, if the regulation of the intergovernmental process to combat bioterrorism is developed, leaving no state role, then the preemption doctrine could be applied to overcome challenges through state legislation. In one case where nuclear safety for the citizenry was argued by the state to be an issue of state interest, the court found it not to be fully preempted by federal law. But the court did not allow preemption of the federal regulations concerning safety, but on the basis of economic interests of the state, as those would not be preempted by the statute.[74] The Court seems here to find a way to protect the state's jurisdiction over the safety of its citizens, even if through means of an economic test.

The U.S. Supreme Court, in consideration of the Twenty-First Amendment[75] to the U.S. Constitution in *South Dakota v. Dole*, permitted the withholding of highway funds from a state that failed to make unlawful the possession or purchase of alcoholic beverages by a person less that twenty-one years of age.[76] The issue turned on whether this was a condition on a grant or a regulation. Finding a condition on a grant permitted the application of the Spending Power Clause[77] rather than a violation of the Twenty-First Amendment.

A statutory solution to maintaining telecommunications during a disaster, with state and local governments, illustrates another intergovernmental emergency situation; however, the field of telecommunications is traditionally a federal area, not a state and local government issue. The subsequent regulations to implement the statute[78] address an emergency plan for telecommunications in the event of a natural disaster or non-wartime disaster, providing for communications of federal officials with state and local officials. This regulation requires a management structure to include the "legal authority for telecommunications management" and "[a]

72. *Id.*

73. *Id.* (referring to *Marbury v. Madison*).

74. Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Devel. Comm'n, 461 U.S. 190 (1983).

75. U.S. CONST. art. XXI.

76. South Dakota v. Dole, 483 U.S. 203 (1987).

77. U.S. CONST. art. XVI.

78. 42 U.S.C.S. § 6611 (LEXIS 2000).

control mechanism to manage the initiation, coordination and restoration of telecommunications services."[79]

Legislation should be structed such as that in *South Dakota v. Dole*. This would mean requiring state coordination with federal governments as a condition for the receipt of grant money related to the objective of preparing and responding to bioterrorism, preempting the field through the principles of *Pacific Gas*, and satisfying the dissenters in *Garcia* by making a narrow delineation of the control of state and local resources at the direction of federal officials, in time of emergency. This would seem to satisfy the constitutional requirements of such legislation.

III. The Current Federal Plan

Current planning, research, and preparedness in the area of potential bioterrorism are accurately reflected in the GAO reports that document an absence of strong leadership and a failure to achieve a crosscutting, coordinated program matched with identified resources in the federal budget. Responses to the GAO report by the various departments identified in the reports were not encouraging and indicated more that the departments and agencies did not fully understand the scope of the problem they were purporting to address.

The Office of Management and Budget identified meetings with representatives of the National Security Council, Departments of State, Defense, Justice and the Public Health Service, for implementing the National Defense Authorization Act,[80] in which they have been establishing methodologies to identify functions in the budgets, which is unfortunate, since there exists a Congressionally mandated methodology for such identification that would address a broader range of resources.[81] Further, the OMB states that it does not concur with the implementation of a formal crosscutting review process based upon its years of experience.[82] Interestingly, the author of this OMB response seems to be unaware of the existing

79. 47 C.F.R. § 202.0 (2000).
80. GAO Report, GAO/NSIAD-98-39, App. III (Dec. 1997).
81. 42 U.S.C.S. § 6651 (LEXIS 2000).
82. GAO Report, GAO/NSIAD-98-39, App. III (Dec. 1997).

statutory, formal, crosscutting review process, which was a major part of the OMB budget review process from 1989 to 1992.

The Department of Defense concurred with the GAO recommendations and expressed concern that the Economy Act prevented its assistance to state and local law enforcement agencies without reimbursement. Such reimbursement requires statutory authority, and since PDD 39 is not a statute, it cannot provide the authorization to waive reimbursement.[83] This is clearly an issue, which must be addressed in any legislation directed toward coordination of federal, state, and local governmental services.

The Department of State sought to establish that the terrorism function was thoroughly coordinated through their Interagency Coordinating Subgroup–although there was no "National Security Council or Office of Management and Budget active participation" in this subgroup.[84]

IV. Recommendations for a Bioterrorism Plan—Congressional Leadership is Essential

Congressional jurisdiction recently has been established by the Committee on Government Reform through its Subcommittee on National Security, Veterans Affairs, and International Relations in the U.S. House of Representatives, in its hearing on terrorism.[85] In the U.S. Senate, the Committee on Health, Education, Labor and Pensions Committee through the Subcommittee on Public Health and Safety, chaired by Senator Frist, have recently held hearings on bioterrorism.[86]

There is an immediate need to propose a statute, with a title such as the Bioterrorism Research, Preparedness and Responsiveness Program, constructed much on the model of the High Performance Computing and Communications Act[87] and the Global Climate Change Research Program[88] to provide for a coordinated, crosscutting effort to avoid gaps in vital areas, to avoid duplication of programs and research and to provide for optimum use of our resources through matching resources with programmatic needs. Further, and as an essential component of this program, a joint appropriations hearing must be agreed among the Congressional

83. *Id.*
84. *Id.*
85. 11 March 1999.
86. 25 March 1999.
87. 15 U.S.C.S. § 5511 (LEXIS 2000).
88. *Id.* §§ 2921-2961.

committees having jurisdiction for appropriations for the participating agencies and departments. While some of these committees may anticipate having small parts of the crosscutting budget, a Joint Appropriations Committee representing all appropriations for this program is essential. Otherwise, each line item identified for the program may be selected for elimination by the respective appropriations committees for those agencies with no regard to the effect upon the comprehensive program placed at risk by these eliminations.

The inclusions of other amendments to existing legislation is essential to the success of such a program. An amendment of the exceptions[89] to the Posse Comitatus Act to include military responses not only for the exceptions of drug enforcement, immigration and tariff laws which were included in amendments of 1981 and 1988, but for bioterrorism-related activities, as well, should be included. An amendment of the Emergency Planning and Community Right-to-Know Act of 1986 to include the preparation of plans in coordination with FEMA and the FBI for bioterrorism prevention, preparedness and response, should also be specifically included to avoid any confusion of interpretation.

Federal leadership in the intragovernmental crosscutting and coordination area for bioterrorism, as distinguished from the broadly defined area of WMD, should be lodged with the Public Health Service, Surgeon General. While other forms of terrorism correspond with the missions of the FBI and FEMA, the mission of the Public Health Service, coupled with the statutory provision for its conversion to a military service,[90] provides the appropriate level of leadership to command both civilian and military resources in response to a bioterrorism event. The Public Health Service, although converted to a military service, is not subject to the Posse Comitatus Act according to the analysis in *United States v. Jaramillo* wherein the special unit of the U.S. Marshall's Office is not found to be subject to the Act[91] and military policy statements,[92] while the Army is regulated by the Posse Comitatus Act, and as a matter of military policy, the Act is also applicable to the Marines and Navy. The use of the Public Health Service in the top leadership role provides the best of both worlds for domestic use of the military, while avoiding the need for any legislative amendment to allow for other branches of the military to take a leadership role.

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89. 10 U.S.C.S. §§ 371-380 (LEXIS 2000).
90. 42 U.S.C.S. § 217 (LEXIS 2000).
91. United States v. Jaramillo, 380 F. Supp. 1375 (1974).
92. U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7 (15 May 1974).

During the NATO visit to Washington, D.C., in May 1999, over seventy museums and all of the Washington Metro stations were closed, and federal government employees were told not to report to work because of fear of a terrorism event. Unfortunately, much of congressional action in the past has been only as a result of a disaster: The Biologics Act of 1906 was a response to the death of several children due to a vaccine infected with tetanus. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 was a result of the Love Canal environmental disaster; and the Emergency Planning and Community Right-to-Know Act of 1986 was a result of the Bhopal disaster.

The importance of enactment of legislation to address the unique legal, scientific and budgeting problems presented by the issue of bioterrorism is apparent in light of the potential magnitude of the threat to public safety in the United States. As discussed, prior environmental disasters gave rise to major legislative solutions; but a bioterrorism disaster could prove to be greater in magnitude by far, than the previous problems that gave rise to congressional action. The threat of bioterrorism simply cannot be left to languish under the crippled plan of the President. Congressional action should be taken before we as a nation, defenseless, face the disaster of a shattered domestic security, a country in panic, and a national future in jeopardy.

YAMASHITA, MEDINA, AND BEYOND: COMMAND RESPONSIBILITY IN CONTEMPORARY MILITARY OPERATIONS

MAJOR MICHAEL L. SMIDT[1]

The honor of a general consists . . . in keeping subalterns under his orders on the honest path, in maintaining good discipline. . . .[2]

I. Introduction

This article examines the customary international law[3] doctrine of command responsibility. Its origins and development are traced, as well as the United States practice in applying the doctrine. Ultimately, this article considers the application of the doctrine in the context of contemporary military operations. More specifically, the article looks at U.S. policy in terms of charging U.S. soldiers with war crimes—how U.S. domestic pol-

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2. LLOYD J. MATHEWS & DALE E. BROWN, THE CHALLENGE OF MILITARY LEADERSHIP 23 (1989) (quoting Napoleon to Marshal Berthier, June 8, 1811, CORRESPONDENCE DE NAPOLEON, Corres. No. 17782, vol. XXII, 215 (32 Vols.; Paris 1858-70)).

3. Because there is no supranational legislature with prescriptive jurisdictional power over the various independent national sovereigns that make up the international community, the law of nations is, to a large extent, created by custom. *See infra* note 181. Customary international law, "results from a general and constant practice of states followed by them from a sense of legal obligation . . . ." RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987).

The first step then in determining the normative aspect of a particular custom then, is to look to the actual practice of states in terms of their conduct in the international community. Second, if the custom is to rise to the level of law, binding on all states, a determination must be made that the state conduct involved is based on an apparent belief that compliance with the practice is required.

Evidence that a particular custom has become a shared international community expectation requiring compliance can be found in the practice of states, including policy pronouncements, general principles of law applied in domestic systems of law, international and domestic "judicial decisions . . . " applying international law, "and the teachings of the most highly qualified publicists of the various nations. . . ." The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1066 (1954).

icy may impact the implementing of the international standards of command responsibility in the domestic setting. The article recommends an amendment to the Uniform Code of Military Justice (UCMJ) to facilitate assimilating the international standard into domestic courts-martial practice. Finally, because an amendment is not likely in the foreseeable future, this article advocates the use of a relatively untapped but existing basis of jurisdiction as a modality of incorporating the international standard in the interim.

The primary anticipated benefits in adopting the international standard are threefold. First, and most importantly, because the international standard is arguably a higher standard than the one currently followed by domestic courts-martial applying the UCMJ, adopting the international standard should result in the commission of fewer war crimes and war crime-like acts. Second, the prophylactic qualities of the broader international standard in preventing war crimes should also serve to strengthen the legitimacy of operations that the United States participates in across the entire conflict spectrum because of the anticipated reduction in war crime-like acts. Finally, adopting the international standard will support the notion that the United States is serious about conforming to the law of nations.

A. Proper Military Leadership

Ten good soldiers wisely led, will beat a hundred without a head.[4]

1. Combat Operations

The key to success on the battlefield has always been, and will continue to be, the ability of one party to a conflict to destroy the other's will to fight. Destruction of the enemy's determination to win is often accomplished by massing overwhelming combat power against the adversary.[5] In most cases, destroying an opponent's physical capability to conduct aggressive warfare has the attendant collateral benefit of extinguishing the

4. ROBERT A. FITTON, LEADERSHIP: QUOTATIONS FROM THE MILITARY TRADITION 149 (1990) (quoting Euripides).

5. CARL VON CLAUSEWITZ, ON WAR 75, 77 (1984).

enemy's resolve to continue the fight.[6] Therefore, the best-equipped, largest force, with the most advanced training and tactics typically wins.

However, in history, the examples of poorly equipped, outnumbered units overcoming "superior forces" are legion. Where a "less powerful" force beats the "more formidable" one, it can often be traced to the leader inducing or influencing soldier discipline, attitude, motivation, and endurance. The thread that links successful military organizations from the time of the bow and arrow to the days of the Multiple Launch Rocket System (MLRS) is superior leadership and motivated soldiers.[7]

No matter how advanced military tactics and technology become, success on the battlefield will continue to be primarily dependent on the human dimension. Ultimately, one human being must convince another human being to take, or participate in, extraordinary acts to be victorious in warfare. A successful battlefield commander is one who can influence his subordinates, in a very difficult and unusual environment, to do as he or she asks no matter what the personal cost may be, no matter how uncomfortable the subordinates may be with the task involved. "The most essential dynamic of combat power is competent and confident officer and noncommissioned officer leadership."[8]

It is through effective military leadership that a soldier can be influenced to perform acts that transcend the norms of human nature. Only a successful and skilled motivator of troops can inspire a combatant to charge a machine gun position, contrary to the most powerful of human instincts, that of self-preservation, in order to acquire a small and seemingly insignificant piece of turf. Powerful and persuasive leaders are required to build and maintain the degree of commitment necessary to successfully execute an armed conflict.

Just as dynamic military commanders can induce their subordinates to accomplish heroic acts beyond the pale of traditional human limitations, they also, unfortunately, possess the power and means of ordering, encouraging, or acquiescing to, acts that are inhumane in the extreme. Through

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6. *See generally* THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS, app. A (Principles of Warfare) (1 Feb. 1995) [hereinafter JOINT PUB. 3-0]; U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, 2-0 through 2-24 (June 1993) [hereinafter FM 100-5].

7. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP (Aug. 1999) [hereinafter FM 22-100].

8. FM 100-5, *supra* note 6, at 2-11.

an abuse of legitimate military leadership and authority, a commander may condone, or even direct, conduct that goes far beyond even the relaxed standards of acceptable violence associated with warfare. Under the direction of persuasive leadership, soldiers have committed acts so atrocious as to exceed any possible rational application of military force.[9]

It is to the leader that a young soldier looks for guidance in terms of distinguishing appropriate and inappropriate uses of force during military operations.

> For the common soldier, at least, war has the feel, the spiritual texture, of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can't tell where you are, or why you're there, and the only certainty is overwhelming ambiguity . . . . You lose your sense of the definite, hence your sense of truth itself.[10]

In combat, where soldiers are routinely asked to participate in conduct that under normal conditions would be labeled as immoral or unlawful, often the leader becomes the soldiers' surrogate conscience.

Soldiers learn to rely on the commander's guidance as the soldier surrenders some of his own discretion, judgment, and inhibitions to play a role in the collective success of the unit and to further the higher cause in which they are engaged. The soldier learns, to a degree, to subordinate his instincts for survival and his ideas of right and wrong to his leader's orders. The soldier has a general obligation to obey a superior's orders and to presume that the orders received from the superior are lawful.[11]

Even the law supports the need for strict obedience on the part of subordinates. In some cases, adherence to an unlawful order that results in violating the law of war may form the basis for a defense in a subsequent

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9. *See generally* IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1998); ARYEH NEIER & ARYEN NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998); SU ZHIGENG, LEST WE FORGET: NANJING MASSACRE 1937 (1995).

10. TIM O'BRIEN, THE THINGS THEY CARRIED 88 (1990).

11. *See generally* NICO KEIJZER, THE MILITARY DUTY TO OBEY (1977). For a superb work on the duty to obey and the defense of superior orders, see MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR (1999).

war crimes trial if certain conditions are present.[12] The leader is the individual that establishes the command climate—the unit's collective sense of right and wrong.

2. Contemporary Military Operations, Legitimacy of the Force, and the Operation

In contemporary military operations, specifically Military Operations Other Than War (MOOTW),[13] members of the military do not ordinarily find themselves in high intensity combat.[14] Therefore the service member is seemingly less likely to operate in a scenario where the service member's moral compass is off its normal azimuth. Right and wrong are less ambiguous because the participants are less likely to be asked to apply destructive forces at levels routinely required to take lives and destroy property. The line between acceptable and unacceptable conduct is less blurred therefore, in low intensity conflicts. However, there are other cir-

12. *See generally* OSIEL, *supra* note 11.

13. Military Operations Other Than War (MOOTW) is a term used to denote "[o]perations that encompass the use of military capabilities across the range of military operations short of war." THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 283 (23 Mar. 1994) (amended through 6 Apr. 1999).

"MOOTW focus on deterring war and promoting peace while war encompasses large-scale, sustained combat operations to achieve national objectives or to protect national interests." THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR, exec. summary, vii (16 June 1995) [hereinafter JOINT PUB. 3-07]. The sixteen doctrinal types of MOOTW include: (1) arms control, (2) combatting terrorism, (3) Department of Defense (DOD) support to counterdrug operations, (4) enforcement of sanctions/maritime interdiction operations, (5) enforcing exclusion zones, (6) ensuring freedom of navigation and overflight, (7) humanitarian assistance, (8) military support to civil authorities (MSCA), (9) nation assistance/support to counterinsurgency, (10) noncombatant evacuation operations (NEO), (11) peace operations (PO), (12) protection of shipping, (13) recovery operations, (14) show of force operations, (15) strikes and raids, and (16) support to insurgencies. *Id.* ch. III.

14. Because MOOTW are by definition, operations short of war, MOOTW generally do not involve high intensity combat and the rules of engagement (ROE) are normally more restrictive than those typically promulgated in war. JOINT PUB. 3-07, *supra* note 13, at I-1. However, MOOTW, such as peace enforcement operations and raids and strikes, have characteristics of war and sometimes employ combat tactics and techniques involving significant uses of force. For example, in October of 1993, during humanitarian assistance operations in Somalia, a force of U.S. soldiers attempted to capture a Somali warlord. The operation resulted in a protracted combat operation in Mogadisu, resulting in the deaths of 18 U.S. service members and an estimated 500 Somalis. *See generally* MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999).

cumstances, some very significant, that impact on a participant's ability to choose correctly when faced with difficult issues in MOOTW.

Consider for example, the Canadian experience in Somalia. In December 1992, paratroopers from the prestigious Canadian Airborne Regiment began arriving in Somalia to participate in humanitarian relief efforts. Their mission was to secure an area around the central Somali town of Belet Huen. Once secure, humanitarian relief workers would be better able to distribute food to starving Somalis.[15]

In the beginning, these motivated professional soldiers performed their mission with enthusiasm. Although they were a combat unit ready for battle, the paratroopers truly wanted to help the Somali people. Over time, however, many lost their motivation, and discipline started to slip. Somalis began to throw rocks at the food convoys. The paratroopers were harassed by the local citizens even while they tried to repair roads and hospitals. However, the greatest cause for the loss of morale was the "incessant stream of desperate Somalis sneaking into the Canadian compound at night to steal food and anything else they could scrounge."[16]

The Canadians felt a deepening sense of frustration and despair. They were upset and felt that they were spending too much time routing out thieves rather than performing their mission.[17] Various members of the unit began to consider how they might deter the infiltrating thieves. One officer gave an order that soldiers who caught Somalis in the compound were to "abuse" them.[18] Another officer directed the men to shoot fleeing looters below the waist if they refused to stop after being ordered to do so.[19]

A team of soldiers, including a sniper, wearing night vision goggles, began setting traps using food as bait. When Somalis grabbed the food, they were ordered to halt. If they ran, they were shot. There was some evidence that perhaps a few Somalis had been shot at point blank range and killed after being brought to the ground. The Canadian officers felt the

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15. John Dermont et al., *Bitter to the End: The Somalia Inquiry Takes its Best Shot–and Ottawa Fires Back*, MACLEAN'S, July 14, 1997 (citing a Canadian Government "Somalia Commission" report).

16. *Id.*

17. *Id.*

18. L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 370 (1995).

19. *Id.*

rules of engagement were vague and believed the men were only doing their job.[20]

The most infamous incident linked to the Canadian paratroopers in Somalia involved the torture and murder of a Somali man caught stealing in the compound. He was beaten, burned with cigarettes, and tortured for three hours by two young enlisted soldiers before dying. Noncommissioned officers (NCO) in the area could hear the man's cries for help. One NCO told the tormentors not to kill the Somali.[21]

In disciplinary proceedings after the incident, the officer who gave the order to "abuse" Somalis contended that he merely meant for them to be "roughed up," not literally abused.[22] One of the two soldiers charged attempted to hang himself after the incident and was determined to be mentally incompetent to stand trial. The other soldier involved was convicted and sentenced to five years confinement. The NCO who instructed the two to not kill the Somali was convicted for failing to exercise proper control and received a nominal sentence. Although no commanders were prosecuted criminally for the acts of their subordinates, some received letters of reprimand.[23] However, because of the abuses in Somalia, as well as other prior incidents of poor discipline, a death sentence was extended to the unit itself. The Canadian government took the extreme measure of disbanding the Canadian Airborne Regiment.[24] In MOOTW, factors such as boredom, ungrateful host nation citizens, an ill-defined eneny, the use of terror

20. Dermont et al., *supra* note 15.

21. Green, *supra* note 18.

22. *Id.*

23. *Id.*; Dermont et al., *supra* note 15.

24. Dermont et al., *supra* note 15; Colin Nickerson, *Canada's Sterling Military Reputation Tarnished by Scandal*, FORT WORTH STAR-TELEGRAM, Nov. 9, 1997. There were also reported abuses by Belgian and Italian paratroopers as well. Pictures appeared in Belgian newspapers showing Belgian soldiers "roasting" a Somali over an open fire and of soldiers forcing Somalis to eat vomit. One Somali died in the hands of Belgian soldiers while confined in a metal container for two days in the blazing sun without water. Italian soldiers have been accused of starving, torturing, shocking Somalis with electricity and throwing Somalis on razor sharp barbed wire. They were also alleged to have tortured children and raped women. According to one Italian Paratrooper, their officers participated in the torture and ordered them to "not treat the Somalis like human beings." *More Evidence of Torture by Italian Troops in Somalia*, AGENCE FRANCE-PRESSE, June 13, 1997; Andrew Duffy, *Now it's Belgian Soldiers: Paratroopers Charged for Holding Somali Over Fire*, OTTAWA CITIZEN, Apr. 12, 1997, at A1; *Soldiers Face Charges of Torture on UN Mission*, IRISH TIMES, June 23, 1997; Robert Fox, *Belgian Troops Admit to "Roasting" Somali Boy*, DAILEY TELEGRAPH LONDON, June 24, 1997.

tactics by the opposition, and vauge missions and exit strategies may all contribute to a soldier's moral disorientation.

Although the lines between acceptable and unacceptable conduct may be more blurred in combat operations typically present in international armed conflict, the legitimacy of the operation itself is usually less questionable in international armed conflict than in MOOTW.[25] It is foreseeable that improper conduct on the part of soldiers in a fight against world domination by an evil power would be less likely to cause hometown support for the operation itself to wane than would questionable conduct in a humanitarian peacekeeping operation.[26] It is easier to understand the need for military intervention in response to an aggressive military invasion of

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25. The traditional and doctrinally recognized Principles of War, the factors that lead to a successful conclusion in high intensity conflict, are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. JOINT PUB. 3-0, *supra* note 6, app. A.

The Principles for MOOTW however include: objective, unity of effort, security, restraint, perseverance, and legitimacy. *Id.* at V-2. Therefore, although legitimacy is important in any military operation, the principle has been highlighted by doctrine in MOOTW.

> In MOOTW, legitimacy is a condition based on the perception by a specific audience of the legality, morality, or rightness of a set of actions. This audience may be the U.S. public, foreign nations, the populations in the area of responsibility/joint operations area (AOR/JOA), of the participating forces. If an operation is perceived as legitimate, there is a strong impulse to support the action.

JOINT PUB. 3-07, *supra* note 13, at II-5. Certainly this passage is referring generally to the legitimacy of the operation itself rather than the idea of maintaining legitimacy through the proper conduct of the soldiers involved. The *Jus ad Bellum* rather than the *Jus in Bello* of the operation is the focus. However, the publication goes on to say:

> Legitimacy may depend on adherence to objectives agreed to by the international community, ensuring the action is appropriate to the situation and fairness in dealing with various factions. It may be reinforced by restraint in the use of force, the type of forces employed, and the *disciplined conduct of the forces involved.*

Id. (emphasis added). For an interesting view on the importance of morality in foreign relations, see John Norton Moore, *Morality and the Rule of Law in the Foreign Policy of the Democracies,* Andrew R. Cecil Lectures on Moral Values in a Free Society, University of Texas (Nov. 14, 1999) *reprinted in* CENTER FOR NATIONAL SECURITY LAW, NATIONAL SECURITY LAW, SUPPLEMENTARY READINGS, UNIVERSITY OF VIRGINIA, NATIONAL SECURITY LAW SUMMER INSTITUTE (Summer 1999).

26. JOINT PUB. 3-07, *supra* note 13, at II-5.

a long time ally by a tyrannical regime versus the need for a military presence in keeping warring factions apart in a civil war where the parties have been fighting for years.

Where the legitimacy of the operation itself is less concrete, the proper conduct of the participants becomes even more important. Support for a questionable military operation may dwindle to unacceptably low levels if the conduct of the participating soldiers is perceived as being inhumane or criminal. Inhumane conduct by military forces is always distasteful, but when the basis of the operation is humanitarian intervention, intervening forces are expected to maintain the "moral high ground" and operate in ways entirely consistent with the purported basis for the use of force.

This suggests then, especially where armies from democratic nations are involved, that a reduction in war crimes and war crime-like acts should result in an increase in support for the operation and the forces involved. It is entirely predictable, however, that where soldiers are deployed from democratically-based political systems, if they fail to conduct themselves in a highly professional manner, support for these operations may evaporate. No matter how legitimate the cause of the operation may have been upon initial deployment of the forces, there is a link between the conduct of the forces in the operation and the perceived continued legitimacy of the action itself.

B. Armed Mobs v. Legitimate Military Forces

The hallmark of any legitimate military organization is proper leadership. It is precisely that quality that distinguishes lawful military forces from armed mobs. To receive the full protection and benefits of the law of war, an armed military force participating in armed conflict of an international character, must be "commanded by a person responsible for his subordinates."[27] Similarly, even in internal armed conflicts, if insurgents are to receive any degree of international protection, they must be commanded by leaders responsible for their conduct.[28]

Therefore, if a group of armed individuals in an armed conflict hopes to receive any sort of international legal protection or status, there is a quid pro quo. The organization must be led by a person responsible for the activities of subordinates. Although admittedly, this is not the only requirement,[29] it is the criterion most closely related to suppressing war

crimes and human rights violations. Authoritative and responsible leadership is the characteristic that often sets the military apart from many other organizations. When military leadership works well, it creates a unity not always equally present in many civilian organizations. For some civilian business consultants, in today's highly competitive commercial marketplace, the military has become a study in proper management procedures.[30] However, the authoritative power of a military leader carries with it tremendous potential for abuse of that power.

C. The Responsibility of Command

Now when the troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general. None of these disasters can be attributed to natural causes.[31]

Command and leadership are not necessarily the same.[32] The former is a legal status, an authoritative position recognized under the law. The latter is the skills and techniques necessary to influence soldiers to submit to the orders issued by those in authority or those holding the lawful status of command. The responsibility for the success or failure of a military mission falls squarely on the commander's shoulders. But, the commander's responsibility extends to more than just mission success.

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27. Annex to the Convention, Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GPW]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 43, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The United States is not a party to Protocol I. However, nations are, including the United States, principal allies. In today's multinational and coalition operational environment, the Protocols should not be ignored by United States planners.

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 609 [hereinafter Protocol II]; COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (Jean S. Pictet et al. eds., 1958).

29. GPW, *supra* note 27, art. 4; Protocol I, *supra* note 27, art. 1.

30. *See generally* JAMES DUNNIGAN & KANIEL MASTERSON, THE WAY OF THE WARRIOR, BUSINESS TACTICS AND TECHNIQUES FROM HISTORY'S TWELVE GREATEST GENERALS (1997).

31. SUN TZU, THE ART OF WAR 125 (Samuel B. Griffith trans., Oxford Univ. Press 1963) (500 BC).

32. AUBREY S. NEWMAN, WHAT ARE GENERALS MADE OF? 41 (1987).

From the provision of supplies, to the good order and discipline of a unit, from the cleanliness of the barracks to training the force, the commander is ultimately responsible. It is U.S. Army doctrine that commanders are "responsible for everything their command does or fails to do."[33] Although commanders can delegate authority to subordinate leaders to accomplish a mission or task, the commander can never delegate the responsibility that comes with command.[34] Command responsibility, according to U.S. Army doctrine, "is the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit. He is responsible for the health, welfare, morale, and discipline of personnel. . . ."[35]

D. The Role of Commander in the Prevention of War Crimes

In the soldier, the natural tendency for unbridled action and outbursts of violence must be subordinated to demands of a higher kind: obedience, order, rule, and method.[36]

If the purpose of the laws of war is to prevent unnecessary suffering,[37] the commander is in the best position to prevent violations of these humanitarian goals. For example, according to some, the primary cause of the My Lai Massacre was the "tremendous lack of leadership at the ground

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33. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 2-1b (30 Mar. 1988); W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 73, 74 (1995).

34. FM 22-100, *supra* note 7, para. 6-100-103.

35. U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS, 1-1 (May 1997).

36. CLAUSEWITZ, *supra* note 5, at 187.

37. Mark S. Martins, *"War Crimes" During Operations Other Than War: Military Doctrine and Law Fifty Years after Nuremberg—And Beyond*, 149 MIL. L. REV. 145, 176 n.141 (1995) (quoting Hague IV, *supra* note 27, pmbl.). The Convention states that the parties were:

> Animated by their desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as should mitigate their severity as far as possible; . . . .

Id.

level."[38] A soldier can be influenced to perform noble and heroic feats of courage despite natural inclinations to avoid such activity. However, warriors can just as easily be prodded into taking part in atrocities contrary to those same societal or human norms. Correct leadership may be the difference between heroic and evil conduct on the part of soldiers during war.[39]

The military is a unique society where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector. Coupled with this significant lawful control over the troops is the commander's stewardship over a unit's tremendously awesome destructive capabilities. Mankind must, therefore, rely on commanders to use their authority to control both a military force's organic capacity for destruction and the conduct of their subordinates. Commanders have both a moral and legal role in preventing atrocities that could potentially be committed by subordinates against non-combatants, including the wounded and sick, civilians, and prisoners of war, as well as the destruction of civilian property lacking in military value.[40]

Certainly, a disciplined army is capable of committing war crimes on the largest scale imaginable when directed to do so by those in command. However, generally speaking, professional armies operating under a recognizable and responsible chain of command commit fewer war crimes than unorganized or poorly trained forces.[41] For example, much of the fighting in the former Yugoslavia and Rwanda was done by small paramilitary organizations. There are an estimated 88,000 suspects in Rwanda in connection with violence against the Tutsi minority in 1994.[42]

In affirming Japanese General Tomoyuki Yamashita's death sentence, General Douglas MacArthur wrote: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international

38. Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 169 (1993).

39. FM 100-5, *supra* note 6, at 2-3, 4.

40. *See generally In Re Yamashita*, 327 U.S. 1 (1946).

41. Martins, *supra* note 37, at 177-78 n.146.

42. Frederik Harhoff, *Consonance or Rivalry? Calibrating The Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT'L L. 571 n.1 (citing Elisabeth Neuffer, *Amid Tribal Struggles, Crimes Go Unpunished; War Tribunal Stalls Over Mass Killings*, BOSTON GLOBE, Dec. 8, 1996, at A1).

society." Humanity has a right to expect military commanders to do all they can to prevent atrocities by their soldiers.[43]

The victims of war are some of the most vulnerable of all human beings. With little to no ability to resist the potential evil uncontrolled soldiers are capable of, humanity must place its complete trust and faith in a commander's determination and willingness to supervise his subordinates and prevent atrocities. Commanders are "society's last line of defense" against war crimes.[44]

E. Command and Criminal Responsibility

While there is no doubt that the commander is responsible for the activities of the unit, the question becomes when, if ever, can a commander be criminally responsible for crimes committed by subordinates? The customary international law doctrine of command responsibility involves holding commanders criminally liable for war crimes committed by subordinates. If certain conditions are met, a commander is charged as a principal to a crime even though the commander did not directly participate in the commission of the actual offense.

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43. Order of General Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, February 6, 1946, *reprinted in* LEON FRIEDMAN, THE LAW OF WAR, A DOCUMENTARY HISTORY 1598-99 (1972); TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRADGEDY frontispiece (1970); A. FRANK REEL, THE CASE OF GENERAL YAMASHITA 235 (1949).

44. Timothy Wu & Young-Sung Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 290 (1997). Even the soldiers involved in the actual commission of war crimes may be the unrecognized victims of a commander's failure to fulfill his duty as a leader. One legal expert in this area has suggested that:

> [t]he most important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants . . . . Unless troops are trained and required to draw the distinction between military and non-military killings, and to retain such respect for the value of like than unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives.

TELFORD TAYLOR, WAR CRIMES, WAR MORALITY AND THE MILITARY PROFESSION 337-38 (Malham M. Walkin ed., 2d rev. ed. 1986).

II. The Customary International Law Doctrine of Command Responsibility

The cornerstone of military professionalism is professional conduct on the battlefield.[45]

In combat, a commander is responsible for preventing and repressing war crimes and taking appropriate remedial actions, including, if warranted, punishing those responsible for them.[46] In describing General Yamashita's failure as a leader, General MacArthur wrote: "This officer, of proven field merit and entrusted with a high command involving authority adequate to his responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, and to mankind; he has failed utterly his soldier faith."[47]

While the responsibility of a commander is all encompassing, the commander cannot be liable for every crime committed by subordinates.[48] It would be manifestly unfair to punish a commander for crimes that he had no ability to prevent.[49] Under the customary international law doctrine of command responsibility, a commander may be criminally responsible for the war crimes committed by his subordinates only if certain prerequisites are present.[50]

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45. William G. Eckhardt, *Command Responsibility: A Plea for A Workable Standard*, 97 MIL. L. REV. 1 (1982).

46. William V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L. J. 605, 661 (1972); *see* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 4.1-4.3 (Dec. 9, 1998) [hereinafter DOD DIR. 5100.77]; CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, para. 5a(1)-(3) (27 Aug. 1999).

47. FRIEDMAN, *supra* note 43 (Order of General MacArthur).

48. *See* O'Brien, *supra* note 46, at 661; Eckhardt, *supra* note 45, at 4; Parks, *supra* note 33, at 76; Wu & Kang, *supra* note 44, at 290.

49. *Id.* In a case commonly referred to as the *German High Command Case*, the military tribunal opined:

> Modern war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates. . . . He has a right to assume that details entrusted to responsible subordinates will be legally executed. . . . Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination.

UNITED NATIONS WAR CRIMES COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 76 (1948) [hereinafter German High Command Case].

50. *See generally In re* Yamashita, 327 U.S. 1 (1946); William H. Parks, *Command*

Even if the commander takes no direct part in crimes committed by subordinates, the commander will, by operation of law, be considered a principal if the commander's action or inaction in response to the criminal activity is so derelict as to rise to the level of criminal negligence or acquiescence.[51] "Criminality does not attach to every individual in this chain of command from that fact alone. . . . That can occur only where the act is directly traceable to him or where his failure to supervise his subordinates constitutes criminal negligence . . . ."[52]

Certainly a military leader can always be relieved of command or charged with the separate crime of dereliction of duty for not fulfilling command responsibility.[53] However, where the commander deviates significantly from customary command practices and war crimes are committed by subordinates as a direct result, the commander may be guilty of the underlying offenses just as if he participated in them himself.

A. Command Responsibility Prior to World War II

[A] community, or its rulers may be held responsible for the crime of a subject if they knew it and did not prevent it when they could and should prevent it.[54]

Many are under the impression that the doctrine of command responsibility originated in World War II. This, however, is not the case.[55] International recognition of the concept "occurred as early as 1474 with the trial

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50. (continued) *Responsibility For War Crimes*, 62 MIL L. REV. 1 (1973); Addicott & Hudson, *supra* note 38, at n.66.

51. UNITED NATIONS SECURITY COUNCIL, LETTER, 24 MAY 1994, FROM THE SECRETARY GENERAL TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/1994/674, at 17 (1994).

52. German High Command Case, *supra* note 49.

53. UCMJ art. 92 (LEXIS 2000).

54. HUGO GROTIUS, DE JURE BELLI AC PACIS 523 (C.E.I.P. ed., Kelsy trans., 1925).

55. In 1439, Charles VII of France issued an Ordinance at Orleans creating command responsibility for a failure to investigate and take action in response to atrocities committed by subordinates. He wrote:

> The king orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according these Ordinances. If he fails to do so or covers up the misdeed or delays taking

of Peter Von Hagenbach."[56] Early in United States military practice, the doctrine of holding commanders responsible for the criminal acts of their subordinates has been applied as well.

During counterinsurgency operations in the Philippines in the early 1900s, Brigadier General Jacob H. Smith, U.S. Army, was tried and convicted at a court-martial for inciting, ordering, and permitting subordinates to commit "war crimes." The insurgents had routinely tortured, murdered, and mutilated captured American prisoners. General Smith told Major Littleton Waller, United States Marine Corps, "I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please

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55. (continued)

> action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense as if he had committed it himself and shall be punished in the same way as the offender would have.

Green, *supra* note 18, at 321 (quoting ORDONNANCES DES ROIS DE FRANCE DE LA TROISIEME RACE (Louis Guillaume de Vilevault & Louis G.O.F. de Brequigny eds., 1782)); *quoted in* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS 149 n.40 (1993).

56. *See generally* Parks, *supra* note 50 (providing an excellent discussion on the historical development of command responsibility). Hagenbach was tried by an international tribunal of twenty-eight judges from states within the Holy Roman Empire. The accused was charged with murder, rape, perjury, and other crimes against "the laws of God and man." Today these crimes could be classified as crimes against humanity. After being convicted, Hagenbach was stripped of his knighthood and executed for failing in his duty to prevent the listed crimes. Parks, *supra* note 50, at 4 (citing Waldamer Solf, *A Response To Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 AKRON L. REV. 43 (1972)).

Parks also gives several other examples of early command responsibility cases in U.S. military history. Actions were taken against U.S. Army commanders in domestic courts for failing to supervise their troops in the War of 1812, the Black Hawk War of 1832, the War with Mexico in 1846, the Modoc Indian campaign in Northern California. A young Captain Abraham Lincoln was convicted and sentenced to carry a wooden sword for two days during the Black Hawk War of 1832 for failing to control his men. It seems the troopers opened the officers' supply of whiskey and freely helped themselves while others straggled on a march. *See* Parks, *supra* note 50, at 6 (citing C. SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS 30 (1961)). *See also* FRIEDMAN, *supra* note 43, at 783. The author explains that Captain Henry Wirz, a Swiss born physician and Confederate commander of the infamous Andersonville Confederate Prisoner of War Camp, was convicted and ordered to hang by a military commission. Captain Wirz violated the Lieber Code by ordering and permitting the torture, maltreatment, and death of Union prisoners of war in his custody.

me. The interior of Samar must be made into a howling wilderness."[57] In affirming General Smith's conviction, President Theodore Roosevelt stated:

> The findings and sentence are approved . . . . The very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates. . . . Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong.[58]

The first attempt to codify the customary concept of command responsibility in international law appears in the Fourth Hague Convention of 1907.[59] In addition to requiring that belligerents be commanded by a person responsible for his subordinates, a belligerent party in violation of the treaty was to pay compensation for all improper acts committed by members of its armed forces.[60]

At the end of World War I, the Allies established a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The Commission concluded: "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of Staff, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."[61] Although the Japanese and American delegations expressed concerns with some of the findings and recommendations of the Commission,[62] Article 227 of the Treaty of Versailles contemplated arraigning and trying the German Emperor William II of Hohenzollern.[63]

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57. Green, *supra* note 18, at 326 (citing 7 JOHN MOORE, A DIGEST OF INTERNATIONAL LAW 187 (1906)).

58. S. Doc. 213, 57th Cong. 2nd Session, at 5.

59. Hague IV, *supra* note 27, art 3.

60. *Id.*

61. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, DIVISION OF INTERNATIONAL LAW, PAMPHLET NO. 32, *reprinted in Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 117 (1920).

62. Green, *supra* note 18, at 323.

63. Treaty of Versailles, June 28, 1919, art. 227, 225 Consol. T.S. 189, 285 [herein-

Article 228 of the Treaty of Versailles required the German authorities to surrender Germans accused of violations of the laws and customs or war.[64] However, no one was ever tried in accordance with the treaty.[65] Very few war crimes trials were held in connection with World War I. None of the Leipzig Trials, as they came to be known, involved the doctrine of command responsibility.[66]

In the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Article 26 recognized that the commander had "the duty . . . to provide for the details of execution of the foregoing articles."[67] Other than the Hague Conventions of 1907 and the Geneva Conventions of 1929, the world entered World War II with very little treaty law on the doctrine of command responsibility. The concept was generally defined by domestic law and by the traditions of "military professionals tried and tested on the many battlefields of the human experience."[68]

B. Post-World War II War Crimes Trials

Following World War II, there was a virtual explosion of war crimes trials, both domestic and international, in Europe and in the Far East.[69]

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63. (continued) after Treaty of Versailles]. At the outset of the War, the Kaiser stated:

> My soul is torn but everything must be put to fire and sword: men women and children and old men must be slaughtered and not a tree or house left standing. With these methods of terrorism, which are alone capable of affecting a people as degenerate as the French, the war will be over in two months, whereas if I admit considerations of humanity it will be prolonged for years. In spite of my repugnance, I have therefore been obliged to choose the former system.

HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 18 n.75 (1993).

64. Treaty of Versailles, *supra* note 63, art. 228.

65. Green, *supra* note 18, at 324.

66. *Id.* at 325.

67. Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Geneva, art. 26 (12 July 1929).

68. Eckhardt, *supra* note 45, at 3; Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, n.13 (1996).

69. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 21 (1992); Mathew Lippmann, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Human-*

These prosecutions represented the first time in history that the international community possessed the determination and ability to punish those accused of the atrocities of war. Perhaps this was because there was a perception that Nazi Germany and Imperial Japan were terribly evil organizations and there was a tremendous need for specific and general deterrence against the potential for future misconduct of this magnitude.[70]

Even before the United States entered the War, reports began to surface regarding the barbaric acts of the Japanese and German armies. The Japanese rape of Nanking in 1937 and the German genocidal practices shocked the conscience of the civilized world.[71] The United States and the international community issued warnings during the War to both the Axis Powers in Europe and Japan that they intended to prosecute those responsible for war crimes after the War was over.[72] Representatives of states victimized by the Nazis issued the St. James Declaration in January 1942, which placed the Germans on notice that they intended to prosecute violators through "channels of justice."[73]

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69. (continued) *itarian Law of War*, 15 DICK. J. INT'L L. 1 (1996). For example, some 5700 Japanese were tried for war crimes and approximately 920 were executed. RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIALS 6 (1971).

70. TAYLOR, *supra* note 69; ROBERT H. JACKSON, THE CASE AGAINST NAZI WAR CRIMINALS 3 (1946). In his opening statement before the Nuremberg Tribunal, Justice Robert H. Jackson said:

> The privilege of opening the first trial in history for crimes against the peace of the world impose a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. . . . The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.

TRIALS OF THE MAJOR WAR CRIMINALS, 2 INTERNATIONAL MILITARY TRIBUNAL NUREMBERG 98-99 (1947).

71. Parks, *supra* note 50, at 14.

72. *Id.* at 15 (citing 89 CONG. REC. 1773 (Mar. 9, 1943)).

73. FRIEDMAN, *supra* note 43, at 778; UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 51, 52 (1948); THE UNITED NATIONS SECRETARIAT, HISTORICAL SURVEY OF THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION 8-12, U.N. Doc. A/CN.4/7Rev. 1 (1949).

The atrocities continued after the United States entered the War in Asia as well. The Allies began receiving reports of atrocities committed by the Imperial Japanese Army, such as the infamous Bataan Death March, the Japanese abuse of Filipino civilians, and Japan's refusal to allow the U.S. government to send food and supplies to American and Filipino prisoners. On 29 January 1944, Secretary of State Cordell Hull and British Foreign Secretary Anthony Eden sent messages over Japanese radio, warning Japanese leaders and citizens that individuals would be held accountable for these acts.[74] Upon his return to the Philippines in October of 1944, about the same time General Yamashita assumed command over the Japanese forces in the Philippines, General Douglas MacArthur communicated to the Japanese that he would hold them responsible for the mistreatment of prisoners of war (POW) and civilians. This message was recorded in the Japanese Ministries.[75]

Up until the post-World War II war crimes trials, the doctrine of command responsibility in international law was limited to the brief pronouncements in treaty law relating to the requirement that responsible commanders lead lawful belligerents.[76] However, on 8 August 1945, the Allies signed an agreement to establish an International Military Tribunal at Nuremberg to try war criminals. The agreement, known as the London Charter, expressly provided: "The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment."[77]

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74. 203 JUDGMENT OF THE INTERNATIONAL JAPANESE WAR CRIMES TRIALS IN THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 49,748 (1948). Secretary Hull stated:

"According to the reports of cruelty and inhumanity, it would be necessary to summon the representatives of all the demons available anywhere and combine their fiendishness with all that is bloody in order to describe the conduct of those unthinkable atrocities on the Americans and Filipinos." *Id.* Several Allies sent numerous messages to the Japanese Government protesting the illegal treatment of prisoners of war and civilians. *Id.* at 49,738-71.

75. *Id.* at 49,749; FRIEDMAN, *supra* note 43, at 1118.

76. W.J. Fenrick, *Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 112-13 (1995).

77. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 7, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288 (London Charter; sometimes referred to as the Nuremberg Charter) [hereinafter London Charter].

Not only did the charter open the door to prosecute individuals for war crimes,[78] but it also cleared the way to prosecute senior military and civilian officials that were, "Leaders, organizers, instigators, and accomplices participating in the formation or execution of a common plan or conspiring to commit any of the foregoing crimes are responsible for all acts performed by any persons in the execution of such plans."[79]

Similar regulations were promulgated in every allied theater of operations in Asia for the prosecution of war crimes. For example, the statutes in the Pacific and China theaters mirrored each other and looked remarkably similar to the London Charter. Jurisdiction existed over, "leaders, organizers, instigators, accessories, and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."[80] Generals Yamashita and Homma were tried pursuant to this regulation.[81]

Neither of the above-cited statutes, on their faces, authorized the tribunals to prosecute commanders who failed to prevent the commission of atrocities.[82] Based on the plain language of the two statutes, prosecution of leaders was only permissible under the regulations where the commanders actively participated as conspirators, principals, or accomplices. That is, a commander had to share in the design or purpose of the subordinates involved. Criminality then, for a mere failure to effectively command, was not specifically present in the statutes themselves.

In addition to the Nuremberg and Asian Tribunals, other alleged war criminals were prosecuted after the war pursuant to Law No. 10 of the Allied Control Council. This statute permitted the prosecution of any leader that was a principal, accessory, aider or abettor, or any leader that, "took a consenting part therein. . . ."[83] The "consenting" language is

78. *Id.* art. 6; Martins, *supra* note 37, at 152.

79. London Charter, *supra* note 77, art. 6.

80. Parks, *supra* note 50, at 17 (quoting United States Armed Forces, Pacific, Regulations Governing the Trial of War Criminals (24 Sept. 1945); United States Armed Forces China, Regulations (21 Jan. 1946)).

81. *Id.*

82. Fenrick, *supra* note 76, at 112.

83. Parks, *supra* note 50, at 18 (citing TRIALS OF WAR CRIMINALS BEFORE NUERMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, art. II (2) (1946-1949)).

slightly broader than the conspiracy requirement in the London Charter. In conspiracy, the parties share a common mens rea; they have the same intent. Consent suggests that the accused need not share the same intent as the perpetrator, but carries connotations of tacit approval, and would certainly seem to require actual knowledge on the part of the commander.

Perhaps the World War II trial regulation that most closely resembles the current customary international law doctrine of command responsibility is Article 4 of the French Ordinance of 28 August 1944.[84] Persons in command over those that committed war crimes in France, Algeria, and then existing French colonies in Africa, were subject to prosecution if they "tolerated the criminal acts of their subordinates."[85] Here, the accused was not required to conspire, directly participate, or even consent to the crimes. Consent, as a standard, suggests actual knowledge, agreement, and an affirmative grant of permission. Toleration on the other hand, may exist even where one is personally opposed to the conduct but takes no affirmative action to prevent the behavior. However, toleration requires actual knowledge

It was during the war crimes trials themselves that the doctrine of command responsibility developed.[86] This was the basis for the defense allegation in the case against General Yamashita that prosecution based on a command responsibility theory was tantamount to ex post facto law.[87]

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84. *Id.* at 16-19. Parks lists several ordinances from World War II. One such ordinance is Article 4 of the French Ordinance of August 28, 1944. The ordinance reads in part, "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have tolerated the criminal acts of their subordinates." UNITED NATIONS WAR CRIMES COMMISSION, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 87 (1948) [UNITED NATIONS WAR CRIMES COMMISSION].

85. UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 87.

86. Wu & Kang, *supra* note 44, at 274; Parks, *supra* note 33, at 74.

87. In its request for clemency to General MacArthur, the defense in *Yamashita* alleged that:

> This is the first time in modern history that a commanding officer has been held criminally liable for acts committed by his troops. It is the first time in modern history that any man has been held criminally liable for acts, which according to the conclusion of the Commission therefore by its findings created a new crime. The accused could not have known, nor could a sage have predicted, that at some time in the future a Military Commission would decree acts which involved no criminal intent or gross negligence to be a crime, and its is unjust, therefore, that the punishment for that crime should be the supreme penalty.

1. The Trial of Tomoyuki Yamashita

The most controversial post-World War II war crimes trial[88] was the case of Japanese General Tomoyuki Yamashita.[89] On 7 December 1945, General Yamashita was sentenced to hang by a military commission made up of non-attorney general officers.[90] This was the first time a military commander had been found guilty of war crimes committed by his soldiers because of his failure to adequately supervise them.[91] In *Yamashita*, there was no doubt that Japanese soldiers in the Philippines had committed horrific atrocities.[92] However, there was no direct evidence that the general had ordered their commission or even knew of their commission.[93]

On 9 October 1944, General Yamashita[94] took command of the Japanese 14th Area Army. He was responsible for the defense of the Philippines against an anticipated United States and British invasion.[95] Eleven days later, on 22 October 1944, the United States invaded Leyte.[96] Yamashita continued to serve as the commander of Japanese Forces in the Philippines and as the military governor until his surrender on 3 September

87. (continued) RICHARD L. LAEL, THE YAMASHITA PRECEDENT, WAR CRIMES AND COMMAND RESPONSIBILITY 97 (1982) (quoting Defense Clemency Petition, Y119-3, Book 34, at 2, Washington National Records Center, Suitland, MD); *see also In re* Yamashita, 327 U.S. 1, 43 (1946) (Rutledge, J., dissenting).

88. Parks, *supra* note 50, at 22. Parks lists various reasons including: (a) the opinion was ill worded and *sua sponte* by a lay court; (b) one of the defense counsel involved wrote a critical book of the trial; and (c) it was one of the first war crimes trials and was reviewed by the Supreme Court. There were also very spirited dissents by Justices Murphy and Rutledge of the Supreme Court. *See Yamashita*, 327 U.S. at 41-81 (Murphy and Rutledge, J.J, dissenting).

89. *United States of America v. Tomoyuki Yamashita*, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces Western Pacific, 1 Oct. 1945 [hereinafter *Yamashita* Commission].

90. Parks, *supra* note 50, at 30.

91. LAEL, *supra* note 87, at xi; REEL, *supra* note 43, at 8.

92. REEL, *supra* note 43, at 4; Parks, *supra* note 50, at 24.

93. Fenrick, *supra* note 76, at 113.

94. General Yamashita was a military professional. He was born in 1885 and had become a lieutenant general in 1937 after serving for thirty-one years in the Japanese Army. About the time the Japanese attacked Pearl Harbor, Yamashita was leading the 25th Army on an invasion of Malaya. Yamashita, despite being critically low on supplies and ammunition, was able to secure the surrender of a British force over twice the size of his own. He became known as the "Tiger of Malaya." *See* LAEL, *supra* note 87, at 6, 7.

95. *Id.*; Parks, *supra* note 50, at 22; Lippman, *supra* note 68, at 71; Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995).

96. Landrum, *supra* note 95, at 293 (citing LAEL, *supra* note 87, at 8).

1945.[97] The fight for the Philippines had been costly for both sides. Tens of thousands of American and Japanese soldiers were killed.[98] Between thirty and forty thousand Filipino civilians were slain by Japanese soldiers in the struggle for Manila and southern Luzon.[99]

During the time General Yamashita was in command, his soldiers abused civilians, internees, and prisoners of war on an indescribably large scale.[100] General Yamashita claimed that as a result of the success of American forces in disrupting his command and control, he had no knowl-

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97. Parks, *supra* note 33, at 22; Landrum, *supra* note 95, at 295.

98. LAEL, *supra* note 87, at 37.

99. *Id.*

100. The crimes committed by troops under Yamashita's command were divided into three categories:

> (1) Starvation, execution or massacre without trial and mal-administration generally of civilian internees and prisoners of war;
> (2) Torture, rape, murder, and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives;
> (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of worship, hospitals, public buildings, and educational institutions. In point of time, the offenses extended throughout the period the accused was in command of Japanese troops in the Philippines.

UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 4.

> Sixteen thousand unarmed non-combatant civilians were killed in Batangas Province, Luzon Island, alone between November 1944 and April 1945. Individuals were shot, bayoneted and buried alive. Three hundred Filipinos were forced to leap into a deep well into which heavy weights were dropped. Those who survived were shot. Three to four hundred civilians were bayoneted, shot and immolated in another incident. Prisoners of war were mistreated and were compelled to catch and consume cats, pigeons and rats. Over fifteen hundred Americans were crowded into the cramped cargo hold of a Japanese steamship. They were starved and driven to dementia, wildly attacking one another and sucking their victims' blood.

Lippmann, *supra* note 69, at 72 (citing General Headquarters United States Army Forces, Pacific Office of The Theater Judge Advocate, Review of the Record of Trial by a Military Commission of Tomoyki Yamashita, General, Imperial Japanese Army, *reprinted in* COURTNEY WHITNEY, THE CASE OF GENERAL YAMASHITA: A MEMORANDUM 60, 69 (1959)). In Manila:

edge of the crimes committed by his soldiers.[101] However, the similarities of the crimes in various areas of the Philippines manifested a pattern, which in turn suggested a common plan.[102] Yamashita's headquarters were located in or adjacent to two prisoner of war camps where a number of violations occurred.[103] Yamashita personally ordered the summary execution of 2000 Filipinos in Manila suspected of being guerrillas.[104] He also gave various orders relating to destroying segments of the population that were pro-American.[105]

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100. (continued)

> Eight thousand residents were killed and over seven thousand were mistreated, maimed and wounded without cause of trial. Hundreds of females were beaten and raped, their breasts and genitals abused and mutilated. The military Commission concluded that the Filipino people, including thousands of women and children, were tortured, starved, beaten, bayoneted, clubbed, hanged, burned alive and subjected to mass executions rarely rivaled in history, more than 30,000 deaths being revealed by the record. Prisoners of war and civilian internees suffered systematic starvation, torture, withholding of medical and hospital facilities and execution in disregard of the rules of international law. . . . [There] were systematic. . . [executions] with indescribable bestiality of little girls and boys only months or even days old . . . .

Id. at 72-73.

101. Lippman, *supra* note 69, at 72; Landrum, *supra* note 95, at 296; Green, *supra* note 18, at 336; Parks, *supra* note 50, at 24; UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 23-29.

102. UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 30, 34-35.

103. Parks, *supra* note 50, at n.89. Parks points out:

> General Yamashita's headquarters were at Fort McKinley until December 23, 1944 where four hundred disabled American prisoners of war were held from October 31, 1944 until January 15, 1945. The prisoners were crowded into one building, furnished no beds or covers and kept within the enclosure of a fence extending thirty feet beyond each side of the building. Their two meals a day consisted of one canteen cup of boiled rice, mixed with greens; once a week the four hundred men were given twenty-five to thirty pounds of rotten meat, filled with maggots. Occasionally they would go a day or two without water and at times were reduced to eating grass and sticks they dug in the yard. These conditions within walking distance of General Yamashita's headquarters . . . .

Id.

104. *Id.* at 27; Landrum, *supra* note 95, at 297.

105. Parks, *supra* note 50, at 27.

In sentencing General Yamashita to death, the Military Commission opined:

> The Prosecution presented evidence to show that the crimes were so extensive and wide-spread, both as to time and area, that they must have been willfully permitted by the Accused, or secretly ordered by the Accused . . . The Accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army . . . It is absurd, however to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops . . . .
>
> . . . .
>
> The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against the people of the United States, their Allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.[106]

The United States Supreme Court affirmed the decision of the military commission.[107] In addition to affirming the validity of the military commission, the Court affirmed that commanders

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106. FRIEDMAN, *supra* note 43, at 1596 (quoting *Yamashita* Commission, *supra* note 89; UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 34-35).

107. *In re* Yamashita, 327 U.S. 1 (1946). The fact that the Supreme Court reviewed the application of the doctrine of command responsibility as applied by the military commission in the trial of General Yamashita, gives great precedential value to both the Court gives great precedential value to both the Court decision and the trial conducted by the commission. Although the *Yamashita* trial is controversial, it is the only command responsibility case to have been reviewed by the Supreme Court. It also stands for the proposition that military commissions are competent to try soldiers in war for command responsibility based violations.

> have a duty to control their soldiers and prevent war crimes.[108] Commanders in charge of forces involved in occupation, are further required to take affirmative steps to protect civilians and prisoners of war.[109]

From *Yamashita*, it is clear that some degree of knowledge is required. However, the commission's decision is not absolutely clear in terms of the *mens rea* required for a conviction based on command responsibility. One conclusion that might be drawn from the opinion, is that the commission, considering the circumstantial evidence, concluded that the accused had actual knowledge of the crimes, and was actually involved in the planning and even secretly ordered them.[110] Another possible interpretation of the decision is that the accused "must have known" of the activity but did nothing to stop it.[111] Although there are some that argue that Yamashita was held strictly liable,[112] the evidence indicates otherwise.[113]

2. Command Responsibility in War Crimes Trials in Europe

There were several war crimes trials in addition to *Yamashita* following World War II that dealt with the issue of command responsibility.[114] Two such examples will be considered. *United States v. Wilhelm von Leeb (High Command Case),* and *United States v. Wilhelm List (Hostage Case),* are two of the more important trials dealing with command responsibility. Some writers suggest that these two cases are of greater importance than Yamashita because these decisions were rendered by professional jurists

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108. *Id.* at 14-15. The court wrote: "[W]e conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war and that the Commission had authority to try and decide the issue which it raised." *Id.*

109. *Id.* at 16.

110. Landrum, *supra* note 95, at 296-98.

111. Wu & Kang, *supra* note 44, at 275.

112. REEL, *supra* note 43; *see also* Parks, *supra* note 33, at 74. Although Parks strenuously disagrees that Yamashita was held to a strict liability standard, he addresses the arguments made by those that assert that General Yamashita was strictly liable.

113. Parks, *supra* note 33, at 74.

114. For example, distinguished jurists from eleven countries sat on the International Tribunal for the Far East in Tokyo. Twenty-eight of the former leaders of Japan were charged with various war crimes, many related to command responsibility. Some have suggested that the opinions from these trials are more carefully worded than *Yamashita*. There were a number of trials in Europe involving lesser commanders as well. *See generally* Parks, *supra* note 50, at 64-73; Lippmann, *supra* note 69, at 85-86.

and long enough after the cessation of hostilities to give the judges adequate time to reflect on the issues.[115]

In the *High Command Case*, thirteen high ranking German officials were charged with crimes against peace, war crimes, crimes against humanity and conspiracy to commit those crimes.[116] In discussing command responsibility, the court stated:

> Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . . A high commander cannot keep completely informed of the details of military operations of subordinates . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed . . . There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.[117]

The language in the opinion implies that the commander must have some knowledge of the crimes committed by subordinates to be guilty of

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115. Parks, *supra* note 50, at 64; Wu & Kang, *supra* note 44, at 275.

116. Fenrick, *supra* note 76, at 113 n.31; Parks, *supra* note 50, at 38-39; Green, *supra* note 18, at 333; German High Command Case, *supra* note 49, at 73-74. With regard to passing on illegal orders, the Tribunal wrote:

> Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers–not lawyers. Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law.

Id.

117. German High Command Case, *supra* note 49, at 73-74. The Tribunal also considered the duties of a commander in managing occupied territory:

> Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Conven

them. It is hard to imagine having a "personal dereliction" or being able to "acquiesce" without some knowledge. However, the "wanton, immoral disregard" language suggests guilt can be established where there is a "willful blindness" on the part of the commander.[118]

The second Nuremberg trial with command responsibility implications was the *Hostage Case*.[119] Like *Yamashita* and the *High Command Case*, there was little doubt that the underlying offenses had occurred.[120] The accuseds, all high-ranking German officers, were charged with being principals and accessories to murder and the deportation of individuals from Greece, Yugoslavia, Norway, and Albania.[121]

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117. (continued)

> tion, a military commander of an occupied territory is *per se* responsible within the area of his occupation . . . We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander *must have knowledge of these offenses and acquiesce* or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.

Id. at 76-77 (emphasis added).

118. *See generally* German High Command Case, *supra* note 49, at 73-77; Wu & Kang, *supra* note 44, at 285 (citing United States v. Jewell, 532 F.2d 697 (9th Cir. 1976)).

119. UNITED NATIONS WAR CRIMES COMMISSION, VIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1948); XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, 757 (1950) [hereinafter Hostage Case].

120. Parks, *supra* note 50, at 63.

121. *Id.*; Hostage Case, *supra* note 119, at 1259-60. With regard to command responsibility and the knowledge required, the Tribunal wrote:

> We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention . . . . We desire to point out that the German Wehrmacht was a well equipped, well trained and well disciplined army. . . . The evidence shows . . . that they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening . . . Any army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime . . . .

The *Hostage Case* stands for the proposition that knowledge may be presumed where reports of criminal activity are generated for the relevant commander and received by the commander's headquarters.[122] This suggests that knowledge of crimes committed by subordinates may be constructive; and therefore, somewhat similar to the *Yamashita* "knew or should have known" standard. Possession, then, of reports by the commander's staff may create a constructive or presumptive basis of the awareness required for prosecution.

C. The Indo-China War

1. Command Responsibility Prior to the Indo-China War

The decisions of the post-World War II war crimes trials were based largely on customary rather than treaty-based international law.[123] Command responsibility had not been codified prior to World War II. Even the post-World War II, 1949 Geneva Conventions say nothing directly about command responsibility. As the Indo-China War broke out in the late 1940s and early 1950s, there was no treaty-based standard for command responsibility.

The war crimes doctrine of command responsibility did not, however, go unnoticed, and had, in the United States, been reduced to policy. Perhaps in response to the post-World War II trials, the United States Army,

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121. (continued) *Id.* General List, one of the accuseds, asserted that he was gone during the time of many of these reports came in. The Tribunal responded:

> Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made to their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf. . . . The reports made to . . . List . . . charge him with notice of the unlawful killing of thousands of innocent people. . . . His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility.

Id. at 1271-72.

122. *Id.* This is the standard adopted in Protocol I, *supra* note 27, art. 86(2).

123. Green, *supra* note 18, at 341.

in 1956, published *Field Manual 27-10, The Law of Land Warfare.*[124] Paragraph 501, "Responsibility for Acts of Subordinates," incorporates the doctrine of command responsibility. It reads:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.[125]

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124. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 501 (July 1956) [hereinafter FM 27-10].

125. *Id.* Although the manual has been in publication since 1956, with Change No. 1 in 1976, it is still current Army doctrine. Note the sentence discussing massacres does so in the context of occupation or prisoners of war. Virtually all of the command responsibility cases following World War II dealt with occupation or cases involving the custody of prisoners of war. Although, for example, the treatment of civilians by U.S. Army forces in My Lai in Vietnam could be characterized as a massacre of civilians, it did not occur during an occupation and may therefore be outside the scope of this paragraph.

This apparent limitation to situations involving prisoners of war or occupation may be based on the definition of "grave breach" of one of the Geneva Conventions. As correctly noted in paragraph 502 of *FM 27-10,* to have a grave breach, the victim must be a protected person under one of the four Geneva Conventions. *Id.* para. 179 (citing Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWSS]; GPW, *supra* note 27, art. 130; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]). Civilians are "protected persons" if they are in the "hands of a Party to the conflict or Occupying Power of which they are not nationals. . . . Nationals of a neutral State . . . . and nationals of a co-belligerent State shall not be regarded as protected persons. . . ." GC, *supra*, art. 4. Certainly the slaughter of innocent Vietnamese at My Lai was a war crime, but not a grave breach as defined above. The Vietnamese were civilians belonging to a co-belligerent, and thus not "protected." *Id.*

The field manual informs its readers that commanders may be guilty of war crimes if they order their commission or if they fail to act under certain circumstances where they "knew or should have known" that troops under their command were committing violations of the law of war. Therefore, *FM 27-10* appears to have adopted the *Yamashita* standard as it is generally understood.[126] However, *FM 27-10* is not a penal code and does not in and of itself create any basis for criminal liability in domestic courts-martial.[127] It is a statement as to the status of the law of war, the purpose of which is to inform operators and attorneys in the field.[128] By informing soldiers of the law, the intent is to prevent violations thereof. Therefore, the "knew or should have known" standard enunciated in *FM 27-10* might more accurately be viewed along the lines of a statement as to what the U.S. Army believes the status of the customary international law doctrine of command responsibility to be, rather than a basis for prosecution in United States domestic courts.[129]

2. My Lai and Captain Ernest Medina

Over twenty years after the World War II war crimes trials, the United States suddenly found itself in the difficult position of having to apply these principles in the judicial and non-judicial activities that followed in the wake of the My Lai Massacre in Vietnam.[130] However, for reasons that will be explored, the *Yamashita* "knew or should have known" standard of

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125. (continued) Perhaps, therefore, the drafters of *FM 27-10* were trying to limit holding commanders liable for crimes committed by subordinates to cases where the underlying war crimes committed by the subordinates were grave breaches of the Geneva Conventions.

126. Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 16 (1972); Roger S. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 RUT-CAM. L.J. 59, 71 (1973).

127. FM 27-10, *supra* note 124, para. 1, states:

> The purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare . . . .
>
> This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.

128. *Id.*

129. *Id.*

command responsibility was not applied in the U.S. Army court-martial of Captain Ernest Medina.

In the afternoon of 15 March 1968, Lieutenant Colonel Frank A. Barker, U.S. Army, commander of Task Force Barker, a battalion sized element of the 11th Infantry Brigade, Americal Division, brought his three company commanders and his staff together for a briefing.[131] The brigade commander, Colonel Oran K. Henderson, was present as Lieutenant Colonel Barker gave the final orders. Colonel Henderson told the men that they were to close with the enemy rapidly and aggressively. They were encouraged by the brigade commander to eliminate the Viet Cong 48th Local Force Battalion, known to be operating in their area, "once and for all."[132] The brigade commander left and the commanders and staff were then briefed by the task force intelligence officer and the operations officer.

Task Force Barker's three infantry companies were to conduct an assault on the 48th Local Force Battalion believed to be in the area of a village known as My Lai in the Quang Ngai Province of the Republic of Vietnam.[133] The Quang Ngai Province has been described as being beautiful situated on the South China Sea with its deep blue waters, palm trees, and white sandy beaches.[134] Despite this beauty, the Province had been a center of revolt and rebellion for many years. Ho Chi Minh regarded the capital, Quang Ngai City, as an area of strong support for the Viet Minh.[135] Members of the National Liberation Front (NLF) were infiltrated back into the Quang Ngai Province from North Vietnam after many of these forces had moved north after the Geneva Accords of 1954.[136]

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130. Landrum, *supra* note 95, at 299; *see generally* Eckhardt, *supra* note 45, at 12-13; Addicot & Hudson, *supra* note 37, at 156-60; MARY MCCARTHY, MEDINA (1972).

131. LT. GEN. W.R. PEERS (USA RET.), THE MY LAI INQUIRY 24, 165 (1979). Lieutenant General Peers headed the "Peers Commission," the official Army investigation into the incident and the actions or lack thereof that followed. *See generally* U.S. DEP'T OF ARMY, REPORT OF THE DEPARTMENT OF ARMY, REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT (Mar. 14, 1970) (copy maintained at The Judge Advocate General's School, U.S. Army, Charlottesville, Va.). The Peers Commission report consists of four volumes and contains over 20,000 pages of interviews and other documents. It is over six feet thick.

132. PEERS, *supra* note 130, at 166.

133. *Id.*

134. *Id.* at 37.

135. *Id.*

136. *Id.*

The tactics used during the Strategic Hamlet Program[137] in the early 1960s had unexpectedly served to further alienate the people of Quang Ngai from their government. Many of the people living in the province were forcibly removed from their homes and the homes were destroyed. Many of the techniques used to attempt to rid the area of the NLF ironically caused many in the area to be more sympathetic to the Communist cause.[138]

During the operation, Alpha Company was to set up a blocking position the night of 15 March, north of the village of My Lai. Charlie Company, commanded by Ernest Medina was to land on the west side of the village. They were to attack the enemy which they expected to find in and around the hamlet. An artillery preparation of the area was to occur before they went in. Bravo Company would be placed south of the village and would move north, eventually linking up with Charlie Company. The China Sea to the east was a natural obstacle preventing an enemy escape in that direction. An aero scout team from B Company, 123rd Aviation Battalion was to screen Charlie and Bravo Companies' southern flank and a group of U.S. Navy Swift boats was to screen the waters off My Lai.[139]

The commanders and staff present at Lieutenant Colonel Barker's briefing were told that the civilians in the area were either Viet Cong or sympathetic to the Viet Cong. They were also told that by the time the assault was to take place, the civilians in the hamlet would be off to market in the area of Quang Ngai City. Although there is some dispute on the exact orders given by the Task Force Commander, there is evidence that the Commander ordered the subordinate commanders to burn the village, kill the livestock, and destroy the crops and foodstuffs.[140] The group was told by the intelligence officer that there were approximately two hundred to two hundred and fifty members of the 48th Local Force Battalion somewhere in the vicinity of My Lai and they were expected to meet strong resistance.[141]

The company commanders then returned to their units to brief their men regarding the operation. Captain Medina recounted much of the information he had received at the task force headquarters. He told his men they would be outnumbered two to one and that there would be no

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137. *Id.*
138. *Id.*
139. *Id.* at 167.
140. *Id.*
141. *Id.*

civilians in town. Although it is not clear, the "preponderance of evidence indicated that Medina told his men they were to burn the houses, kill the livestock, and destroy the crops and foodstuffs."[142] He went on to remind them that they had lost several men to mines and booby traps in the area, that this was a chance for the men to get even, and he repeated Colonel Henderson's guidance to be aggressive and close with the enemy rapidly.[143] A memorial service for Staff Sergeant Cox, a very popular NCO in the company, took place either just before Captain Medina's briefing, or a day or so earlier. He had been killed by a land mine.[144]

On 16 March 1968, the artillery commenced firing in and around the landing zone (LZ) to be used by Charlie Company. The artillery preparation began at 7:24 a.m. and lasted about five minutes. Civilians in the area began taking cover in their homes or next to rice-paddy dikes. Charlie Company's 1st Platoon was commanded by First Lieutenant William J. Calley, Jr.[145] The 1st Platoon was to be the first unit inserted into the LZ. Just before the arrival of the 1st Platoon and after the artillery fire had ceased, helicopter gunships attacked the area around the LZ. Although they were told the LZ would be "hot," the men did not receive any enemy fire.[146]

Captain Medina arrived in one of the first lifts and set up his headquarters in the area of the LZ. At about 7:50 a.m., the three platoons of Charlie Company began moving east toward the village of My Lai. The 1st Platoon was not at full strength. It consisted of two squads and had a total of about twenty-five men. As they moved toward the village, the slaughter began. Even though they were not taking any enemy fire, the members of 1st Platoon began shooting and bayoneting numerous fleeing Vietnamese, throwing hand grenades in homes, and killing livestock. They began rounding up groups of civilians, mostly old men, women and children, and moving them to a southeastern part of town. One group consisted of about twenty to twenty-five Vietnamese. Another group of approximately seventy noncombatants was placed in a ditch. Soon, approximately fifty or so more were moved into the ditch with the original seventy. The group of twenty to twenty-five was shot down by the men

142. *Id.* at 169.

143. *Id.* at 170.

144. *Id.*

145. *Id. See generally* RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY (1971) (providing more detail on Lieutenant Calley's participation and subsequent court-martial).

146. PEERS, *supra* note 130, at 172. One helicopter did report they were receiving fire from the area of the LZ.

guarding them. The men rounded up another ten or so civilians and moved them to the ditch. Lieutenant Calley arrived at the ditch at about 9:00 a.m. and at about 9:15 the seventy-five to one hundred and fifty civilians in the ditch were killed by the soldiers after being told to do so by Lieutenant Calley.[147]

Shortly thereafter, 2nd Platoon, led by Lieutenant Steven K. Brooks linked up with the 1st Platoon in the village of My Lai. As the platoons moved through the town, many more fleeing civilians were killed, maybe as many as fifty to one hundred. There were at least two rapes committed by members of 2nd Platoon.[148]

During this time, Captain Medina was located at his headquarters at the LZ, approximately 150 meters from the village. For reasons that are still unclear, Captain Medina suddenly ordered 2nd Platoon, and only 2nd Platoon, to "stop the killing" or words to that effect.[149] First Platoon continued to fire on the civilians. At about 10:30 a.m., Lieutenant Barker's helicopter was used to evacuate an American soldier who had intentionally shot himself in the foot. The pilots that brought the wounded soldier back to camp and reported to the operations officer that they had seen piles of bodies. The operations officer returned to the scene with the helicopter. Before the helicopter arrived back at the scene, the task force commander gave an order to "stop the killing" or "stop the shooting." This was passed on to Captain Medina.[150]

Captain Medina moved into the hamlet about 11:00 a.m. His platoon leaders provided him with casualty reports. Captain Medina was now located about 100 yards from the ditch filled with dead noncombatants; however, he claims not to have seen the ditch or its ghastly contents. Captain Medina radioed the enemy casualty reports back to the task force headquarters. He did not indicate that those killed were civilians. Charlie Company left My Lai at about 1:30 p.m. The company rounded up and segregated young men, but there is "no conclusive evidence that any additional burnings or killings took place."[151] Captain Medina reported that his unit killed approximately ninety Viet Cong. This number is virtually identical to the total numbers reported during the operations by the subor-

147. *Id.* at 172-75.
148. *Id.* at 175.
149. *Id.*
150. *Id.* at 178.
151. *Id.*

dinate units in the operation.[152] Of these ninety reported killed, only about three could have been considered enemy killed in action according to official U.S. Army investigators.[153]

Based on witness reports and evidence collected by investigators, the noncombatant old men, women, and children residents of My Lai killed has been estimated to be as low as 150 and perhaps as high as 400, maybe more. These figures do not include others killed by 2nd Platoon prior to entering My Lai and non-residents of My Lai that may have been present and killed as well.[154] Based on their criminal actions in My Lai that day, criminal charges pursuant to the UCMJ were preferred against thirteen men, and charges were preferred against another twelve for actions related to the cover-up that followed.[155] However, there was only one conviction, that of Lieutenant Calley.[156]

Lieutenant General Peers, the head of the official Department of the Army investigation, after the official investigation wrote:

> The My Lai incident was a black mark in the annals of American military history. In analyzing the entire episode, we found that

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152. *Id.* at 179.

153. *Id.* at 180.

154. *Id.* at 180, 295.

155. *Id.* at 221, 222, 227. It is possible that others may have been charged. However, some participants in the operation had been killed in action after the incident, and others had been discharged from the military. *See generally id.*; WAR CRIMES ACT OF 1996: REPORT ON H.R. 3680, COMMITTEE ON THE JUDICIARY, 104th Cong. 2nd Sess. (July 24, 1996), H.R. 104-698, 104 HR 698, sec. IIC [hereinafter JUDICIARY COMMITTEE REPORT].

156. PEERS, *supra* note 130, at 227. Lieutenant General Peers was often asked if he thought that Lieutenant Calley was a "scapegoat." He writes:

> On the one hand, I think it most unfortunate that, of the twenty-five men who were charged with committing war crimes or related acts, he was the only one tried by a court martial and found guilty. On the other hand, I think he was fortunate to get out of it with his life. He was in command of his platoon and was fully aware of what they were doing. Above and beyond that, he personally participated in the killing of noncombatants: he was convicted of killing at least twenty-two civilians but his platoon may have killed as many as 150 to 200 innocent women, children and old men. So I don't consider him a scapegoat. On the contrary, I think the publicity given him by the news media and the notoriety he has gained are all wrong. He is certainly no hero as far as I am concerned.

Id. at 227-28.

> the principal breakdown was in leadership. Failures occurred at every level within the chain of command, from individual non-commissioned-officer squad leaders to the command group of the division. It was an illegal operation in violation of military regulations and of human rights, starting with the planning, continuing through the brutal, destructive acts of many of the men who were involved. . . . The pain caused by the My Lai affair will not soon be forgotten.
>
> . . . .
>
> My Lai was a gruesome tragedy, a massacre of the first order. Some of the soldiers participating in the operations did not become involved in the killing, raping, and destruction of property, and should not be considered in the same light as those who committed the atrocities. Similarly, a few men were outraged and tried to report the incident through proper channels, but their efforts were stifled by lack of attention, erroneous interpretation, and improper leadership. These men are to be commended.[157]

3. The Trial of Captain Ernest Medina

At his subsequent court-martial, Captain Medina was charged with five criminal offenses. Based on his own personal participation, he was charged with the premeditated murder of a female adult, the premeditated murder of a small child, and two counts of aggravated assault.[158] He was also charged, however, as a principle to the premeditated murder of an unknown number, but not less than one hundred, of unidentified Vietnamese nationals allegedly murdered by his men.[159] With regard to the deaths caused by Captain Medina's men, the prosecution argued that Medina knew exactly what was going on and that Medina had the power to stop the killing simply by making a radio call.[160]

At his trial, Captain Media admitted to shooting the adult female but claimed it was in self-defense. The judge granted a motion for a finding of not guilty regarding the charge of murdering the small child.[161] Although

157. *Id.* at xi-xii.
158. United States v. Medina, C.M. 427162 (1971).
159. *Id.*
160. *Id.*
161. *Id.*

his reasons are not clearly explained in the record,[162] the judge also reduced the murder of the noncombatants charge to manslaughter under Article 119(b), UCMJ.

This was an opportunity for the court to apply the *Yamashita* "knew or should have known" standard previously enunciated in *FM 27-10*. However, the court elected to apply a more narrow, actual knowledge theory of personal criminal responsibility for Captain Medina.[163] The most relevant portions of the instructions given to the military panel were as follows:

> I now call your attention to the Specification of the additional Charge, both as modified to allege the offense of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice.
>
> . . . .
>
> In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that the troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to inure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus, mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.

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162. *Id.*; Clark, *supra* note 125, at 67; Howard, *supra* note 125, at 8 (the author of this article was the military judge in the *Medina* court-martial).

163. Eckhardt, *supra* note 45.

. . . .

> Considering the theories of the two parties and the general statements of legal principles pertaining to military law, and customs and the law of war, you are now advised that the following is an exposition of the elements of the offense of involuntary manslaughter, an offense alleged to be in violation of Article 119 of the Uniform Code of Military Justice.
>
> In order to find the accused guilty of this offense, you must be satisfied by legal and competent evidence beyond a reasonable doubt, of the following four elements of that offense:
>
> (1) That an unknown number of unidentified Vietnamese persons, not less than 100, are dead;
> (2) That their deaths resulted from the omission of the accused in failing to exercise control over subordinates subject to his command after having gained knowledge that his subordinates were killing noncombatants, in or around My Lai (4), Quang Ngai Provence, Republic of Vietnam, on or about 16 March 1968;
> (3) That this omission constituted culpable negligence; and
> (4) That the killing of the unknown number of unidentified Vietnamese persons, not less than 100, by subordinates of the accused and under his command, was unlawful.
>
> You are again advised that the killing of a human being is unlawful when done without legal justification.[164]

In keeping with United States policy,[165] Captain Medina was not charged with violations of the law of war, but rather, was charged with violations of the UCMJ. Therefore, the judge determined that the appropriate standard of personal culpability for Captain Medina, as a result of the

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164. United States v. Medina, C.M. 427162 (1971), *reprinted in* Howard, *supra* note 125, at 8-12. The prosecutor in *Medina* opined that Judge Howard's summary of the facts quoted in the instructions were both "accurate and concise." Eckhardt, *supra* note 45, at n.49.

165. FM 27-10, *supra* note 124, para. 507. The paragraph reads in part:

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy state. Violations of the law of war committed by persons subject

atrocities committed by the soldiers under his command, was Article 77, Principals, UCMJ.[166] Article 77 reads:

> Any person punishable under this chapter who—
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter;
> is a principal.[167]

Words such as aids, abets, counsels, commands, procures, and causes all reflect positive personal participation. These words also imply an actual knowledge requirement. Based on this provision, a commander can only be liable for murders committed by his subordinates when he has actual knowledge of the crimes and takes an active part in their commission. There is, however, nothing specific in Article 77, UCMJ, that establishes criminal liability for a failure to act; an act of omission.

However, in the *discussion* to Article 77, UCMJ, in the *Manual for Courts-Martial* applicable during the *Medina* court-martial, there was a

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165. (continued)

> to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice, and, if so, will be prosecuted within the United States that code. . . .

Id. The *Manual for Courts-Martial* further explains that "[o]rdinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(2), discussion [hereinafter MCM].

166. Howard, *supra* note 125, at 15.

167. *Id*. The relevant edition of the UCMJ during the *Medina* court-martial was the 1969 MANUAL FOR COURTS-MARTIAL, UNITED STATES app.2 (1969) [hereinafter 1969 MANUAL]. However, Article 77 itself has not changed since the *Medina* trial. The phrase, "this chapter," in UCMJ, Article 77 is referring to chapter 47 of Title 10, Armed Forces, of the United States Code. The punitive articles of the UCMJ, including Article 77, Principals; Article 118, Murder; which Captain Medina was originally charged with, and Article 119(b), Manslaughter; the charge that actually went to the jury are all codified in the United States Code, Chapter 47 of Title 10. *See* 10 U.S.C. §§ 877-934. Article 77 is actually very similar to the statutes used in the World War II tribunals for determining who could be personally responsible for criminal activity. As has been discussed, the "knew or should have known" standard came into being despite the World War II statutes that on their face seem to require actual knowledge. *See generally* discussion *supra* notes 79-85 and accompanying text.

passage that explained that there were certain individuals who, under certain conditions, had an affirmative duty to act if they witnessed a crime. Where there was an affirmative duty to act, failure to do so could have created culpability. The *Manual* explained:

> To constitute one an aider and abettor under this article, and hence as a principal, mere presence at the scene is not enough nor is mere failure to prevent the commission of an offense; there must be an intent to aid or encourage the persons who commit the crime. The aid and abettor must share the criminal intent of purpose of the perpetrator. . . .
>
> While merely witnessing a crime without intervention does not make a person a party to its commission, if he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principal.
>
> One who counsels, commands, or procures another to commit an offense subsequently perpetrated in consequence of that counsel, or procuring is a principal whether he is present or absent at the commission of the offense . . . .[168]

The current version of the *Manual for Courts-Martial* is essentially the same. The discussion of UCMJ, Article 77, Principals, reads:

> (b) *Other Parties.* If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:
>
> (i) Assist, encourage, advise, instigate, counsel, command or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and
>
> (ii) Share in the criminal purpose or design.
>
> One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime . . . In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a nonin-

168. 1969 MANUAL, *supra* note 166, at 28-4, 28-5.

> terference is intended to and does operate as an aid or encouragement to the actual perpetrator.
>
> (3) Presence.
> (a) *Not Necessary.* Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal . . .
> (b) *Not Sufficient.* Mere presence at the scene of a crime does not make one a principal. . . .[169]

In general, both versions require actual knowledge on the part of the principal and an affirmative act in furtherance of the underlying criminal activity. However, both versions of the discussion point out that some individuals have a lawful duty to act in the face of criminal activity. For some, inaction is tantamount to an affirmative act.

Based on the passage above, an argument can be made that a commander has an affirmative duty to act to prevent criminal activity perpetrated by subordinates. It would seem based on military custom, a commander has a duty to control subordinates and prevent crime. However, according to the discussion, criminal culpability for failure to prevent a crime can only exist where the failure to act is intended to encourage the subordinates. Mere failure to act is not, by itself, grounds for criminal liability.

To be criminally responsible for an omission, a failure to act to prevent war crimes by subordinates, there are three requisite criteria. First, to be held criminally responsible for failing to take action to prevent another from committing a crime, a person must first have a legal duty to intercede.[170] Second, accepting for the sake of analysis that a commander does have a lawful obligation to prevent crimes committed by subordinates, the failure to act must be tantamount to encouragement and intended to act as such.[171] Finally, the aid or encouragement intended actually does aid or encourage the wrongdoer.[172] This means that the commander must intend to encourage the subordinate and the subordinate must believe the commander is providing aid or encouragement.

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169. UCMJ art. 77 (LEXIS 2000).
170. *Id.*
171. *Id.*
172. *Id.*

This seems to be the rationale relied on by Judge Howard in issuing the jury instructions in *Medina* and in refusing to apply the *Yamashita* "knew or should have known" standard.[173] In his article explaining the standard he applied in the *Medina* court-martial, Judge Howard concluded:

> [I]f the commander gains actual knowledge and does nothing, then he may become a principal in the eyes of the law in that by his inaction he manifests an aiding and encouraging support to his troops, thereby indicating that he joins in their activity and wishes the end product to come about.[174]

One critic of the *Medina* court-martial argues that the judge's instruction regarding Article 77 and the unlawful killings was too stringent.[175] In his article on the trial, Professor Clark first explains that a conviction for murder under Article 118, UCMJ, can be had where a person unlawfully kills another when the accused "is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life. . . ." He goes on to assert that where a commander *knows* his troops are unlawfully killing noncombatants, and if the commander chooses to do nothing, the omission, the failure to attempt to prevent further violations, is a wanton disregard for human life.[176] Even Professor Clark admits then, that the prosecutor would still have to establish actual knowledge, which is consistent with Judge Howard's instruction in the case.

During the trial, the judge reduced the original charge of murder with regard to the noncombatants killed by Captain Medina's men to manslaughter, Article 119(b), UCMJ. Conviction pursuant to this article can occur where:

> (b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—
> (1) by culpable negligence; or
> (2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person; is guilty of involun-

173. Howard, *supra* note 125, at 17-21.
174. *Id.* at 22.
175. *See generally* Clark, *supra* note 125.
176. *Id.* at 74.

> tary manslaughter and shall be punished as a court-martial may direct.[177]

Professor Clark goes on to explain that because the judge had reduced the charge to manslaughter, the standard relied on by the judge was too restrictive.[178] A conviction for manslaughter is permissible where there is an unlawful killing based on a culpably negligent omission. Therefore, according to Professor Clark, where an incompetent commander did not know but should have known that his soldiers were unlawfully killing noncombatants, a conviction for manslaughter may be appropriate if the commander failed to take action to prevent the deaths. However, if the intent is to hold commanders liable as principals for the crimes committed by their subordinates, in this case premeditated murder, a conviction for manslaughter would not accomplish that goal.

While there was some question as to what standard should apply[179] and although there are certainly those critical of the judge's interpretation of the law and instructions to the jury,[180] Captain Medina was acquitted of all charges at the trial level.[181] Therefore, *Medina* is of little precedential value. However, this case continues to be examined by scholars in determining the correct standard for command responsibility in domestic courts-martial settings.

Finally, even if the *Yamashita* standard had been applied in the *Medina* trial, Captain Medina would likely have been acquitted. A panel may well have concluded that there was insufficient evidence to establish that Captain Medina "knew or should have known" of the atrocities at My Lai. The "should have known" standard is primarily linked to time. Where reports are received over time or where large numbers of crimes are committed by large numbers of subordinates, creating a basis of constructive notice, it is reasonable to say that the commander should have known.

In *Yamashita*, the atrocities were widespread and systematic, occurring over several months. The crimes in My Lai, on the other hand, although certainly horrendous, all took place at one location within a matter of hours. Because all the crimes occurred in one place and time, it would be difficult to conclude that he should have known. Medina either

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177. UCMJ art. 119(b) (LEXIS 2000).
178. *See generally* Clark, *supra* note 125.
179. *See generally* Eckhardt, *supra* note 45.
180. *See generally* Clark, *supra* note 125.

knew or he did not know, and the panel concluded that he did not. A "should have known" instruction would not likely have altered the result. Put another way, the *Medina* panel may have convicted Yamashita even with the *Medina* instruction because there was overwhelming circumstantial evidence that Yamashita knew exactly what was happening.

III. *Yamashita* as the Internationally Recognized Norm of Command Responsibility

The *Yamashita* "knew or should have known" test for command responsibility is the one currently recognized by the international community. as customary international law.[182] In addition to *Yamashita* and the other post-World War II international tribunal decisions, post-World War

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181. United States v. Medina, C.M. 427162 (1971).

182. The *Restatement (Third) of the Foreign Relations Law of the United States* explains that there are essentially three sources of international law:

> (1) A rule of international law is one that has been accepted as such by the international community of states
> (a) in the form of customary law;
> (b) by international agreement; or
> (c) by derivation from general principles common to the major legal systems of the world.
> (2) Customary international law results from a general and constant practice of states followed by them from a sense of legal obligation . . . .

RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987). Perhaps the definitive guide for determining what constitutes international law is Article 38 of the Statute for the International Court of Justice, which states:

> 1. The Court, whose function is to decide in accordance with international law, such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilian nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of . the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945) [herinafter ICJ Statute].

II treaties and the statutes for the modern international criminal tribunals all rely *on Yamashita.*

Even the U.S. Army, as far back as 1956, adopted the *Yamashita* standard of command responsibility as a matter of policy.[183] Although *Field Manual 27-10* does not create criminal liability, it does inform service members of the U.S. Army interpretation of the law of war.[184] Certainly then, including the *Yamashita* standard in the field manual can be seen as recognition by the U.S. Army that the *Yamashita* standard reflects customary international law.[185]

A. Protocols to the 1949 Geneva Conventions

1. Protocol I

Since the *Medina* trial, there has been virtually no change to the domestic doctrine of command responsibility. *Field Manual 27-10* is still doctrine and the military courts have not been required to decide cases relating to command responsibility.[186] The first international attempt to

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182. (continued) United States federal courts have determined the status of customary international law following a similar set of factors. In *Filartiga v. Pena-Irala*, the United States Court of Appeals wrote:

> The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."
>
> . . . .
>
> *The Paquete Habana* reaffirmed that where there is no treaty, and no controlling or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations; and as evidence of these works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well aquatinted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but trustworthy of evidence of what the law really is.

Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980) (citations omitted).

183. FM 27-10, *supra* note 124, para. 501.

184. *Id.* para. 1.

185. *Id.*; ICJ Statute, *supra* note 181.

186. Eckhardt, *supra* note 45, at 16.

codify command responsibility appears in the 1977 Additional Protocol I to the 1949 Geneva Conventions (Protocol I).[187]

Article 86 of Protocol I requires that parties to a conflict "repress grave breaches, and take measures necessary to suppress all other breaches of the conventions or of this Protocol which result from a failure to act when under a duty to do so."[188] Paragraph 2 of Article 86 codifies a standard very similar to the Yamashita standard.[189] Paragraph 2 states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[190]

Protocol I requires either actual knowledge or the possession of information that should have enabled a commander to know. Therefore, analysis of the actions of a commander under Protocol I is both subjective and objective. First, there would have to be a subjective determination that the commander actually knew or had information; for example, reports received by his headquarters. Second, the "should have enabled them to conclude" language is objective in that a trier of fact would have to consider whether a reasonable commander, in the same situation as the accused, should have known of the subordinate misconduct as a result of the information available to the commander. Finally, if the mens rea

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187. Protocol I, *supra* note 27, art. 86.

188. *Id.* art. 86(1).

189. *Id.* art. 86(2); Parks, *supra* note 33, at 76.

190. Protocol I, *supra* note 27, art. 86(2). The "had information" requirement is reflective of the standard applied in the *Hostage Case*. *See* discussion *supra* note 121. In analyzing this provision, the Official Commentary states:

> This provision, which should be read in conjunction with paragraph 1 and Article 87 (*Duty of Commanders*), which lays down the duties of commanders, raises a number of difficult questions. The strongest objection which could be raised against this provision perhaps consists in the difficulty of establishing intent (*mens rea*) in case of a failure to act, particularly in the case of negligence. For that matter, this last point gave rise to some controversy during the discussions in the Diplomatic Conference, particularly due to the fact that the Conventions do not con-

aspects are met, the commander must take "all feasible measures" to prevent or suppress criminal acts of subordinates.

Article 87 of Protocol I addresses the "duty of commanders."[191] Commanders are obligated under this provision to prevent, suppress, and report violations of the Conventions and Protocol I.[192] Commanders also have the affirmative duty to instruct their subordinates on the law of war.[193] Paragraph 3 of Article 87 requires:

> The High contracting Parties and Parties to the conflict, shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or this Protocol, and where appropriate, to initiate disciplinary or penal action against violators thereof.[194]

Somewhat complicating matters, the French version of Article 86(2) replaces "information which should have enabled them to conclude" with "information enabling them to conclude."[195] The French version comes

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190. (continued)

> tain any provision qualifying negligent conduct as criminal. However, one delegate, referring to the concept expressly reflected in the English version (which was not included in the French text, curiously enough, namely, information which "should have" enabled them to conclude that a subordinate was committing or was going to commit a breach, remarked that this was undoubtedly a case of responsibility incurred by negligence, and that it was important to make this clear. However, this does not mean that every case of negligence may be criminal. For this to be so, the negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place. . . .

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 1011, 1012 (S. Pictet et al. eds., 1958) [hereinafter OFFICIAL COMMENTARY PROTOCOLS] (citations omitted).

191. Protocol I, *supra* note 27, art. 87.
192. *Id.* art. 87(1).
193. *Id.* art. 87(2).
194. *Id.* art. 87(3).
195. The Official Commentary explains:

> In the first place, it should be noted that there is a significant discrepancy between the English version, "information which should have enabled them to conclude," and the French version, "des informations leur per

closer to requiring actual knowledge. It creates a standard that is more subjective in nature rather than the more objective English version. The focus is on the information received rather than the interpretation of that information by the relevant commander. Dropping the word "should" arguably means that actual knowledge, or a mens rea very close to actual knowledge is required, in the French version.

The commentary to Protocol I provides some additional insight regarding the drafters' intent:

> In the case of the "High Command Trial" the Tribunal found that the responsibility of a superior was involved "where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." In the *Yamashita* case, the Tribunal declared: "where murder and rape and vicious revengeful actions are widespread offenses and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. . . ."[196]

The standard ultimately selected in Article 86 was only agreed to after much debate. The International Committee of the Red Cross proposed that a commander should be held liable for the violations of their subordinates if "they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach."[197] Not only was this proposal rejected, so was the version submitted by the United States, which read, "if they knew

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195. (continued)

> mettant de conclue," which means "information enabling them to conclude." In such a case the rule is to adopt the meaning which best reconciles the divergent texts, having regard to the object and purpose of the treaty, and therefore the French version should be given priority since it covers both cases. . .

OFFICIAL COMMENTARY PROTOCOLS, *supra* note, at 1013-14.

196. *Id.* at 1014.

197. DRAFT, ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ICRC OFFICIAL RECORDS, vol. 1, pt. 3, at 25.

or should reasonably have known in the circumstances at the time."[198] Knowledge is and will continue to be the primary issue in command responsibility cases.[199]

2. Protocol II

While Protocol I codifies command responsibility in international armed conflicts, Protocol II, which relates to non-international armed conflict,[200] is completely silent on the issue.[201] The drafters may have recognized the difficulty in determining chains of command in irregular forces. There may have been a reluctance to even recognize the concept of command in insurgent forces because to do so arguably grants some legitimacy to the insurgents and represents a step toward some sort of status for such a group. In terms of the government forces, in an internal armed conflict, criminal culpability decisions may have been intended to be left to the state. The traditional reluctance of the international community to involve itself in internal armed conflict stems from the notion that international law flows from the "fundamental concept of sovereign equality."[202] Unless collective security issues are involved, the United Nations, for example, is prohibited from intervening in matters that are essentially domestic.[203]

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198. *Id.*; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, I/306 vol. III, at 328 (1974-77); OFFICIAL COMMENTARY PROTOCOL, *supra* note 184, at 1013.

199. Eckhardt, *supra* note 45, at 18.

200. Protocol II, *supra* note 28, art. 1(1):

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

201. *Id.*

202. Duncan B. Hollis, *Accountability In Chechnya—Addressing Internal Matters With Legal and Political International Norms*, 36 B.C. L. REV. 793, 794 (1995).

203. U.N. CHARTER art. 2, para. 7.

B. Modern International Criminal Tribunals

Not since the post-World War II war crimes trials did the international community have an opportunity to apply the doctrine of command responsibility at the international level until the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The establishment of these two tribunals gave the United Nations an opportunity to determine what it believed the status of customary international law. There is no question; the intent of the United Nations Security Council (Security Council) was to create, by statute, international criminal tribunals that would apply the customary international law standard of command responsibility.

The Secretary General of the United Nations wanted to ensure that, "[t]he international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[204] As will be seen, *Yamashita* is the rule in both tribunals, even though the Security Council apparently viewed the conflict in the former Yugoslavia as being of an international character and the armed conflict in Rwanda as being purely internal in nature.[205] Although these tribunals and their statutes have no legal binding authority outside their respective geographical locations, the reliance on the *Yamashita* standard in the statutes

204. Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Report of the Secretary-General Pursuant toParagraph 2 of Security Council Resolution 808 (1993)), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159, 1170 (1993) [hereinafter Report]. The Statute itself is at 32 I.L.M. 1192 (1993), unanimously adopted by the UNSC at its 3217th meeting, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute].

205. Evidence of this can be found in the commentary and the statutes creating the two tribunals themselves. The Tribunal for the former Yugoslavia has jurisdiction to hear cases involving grave breaches of the Geneva Conventions while the Tribunal in Rwanda does not. The Tribunal for the former Yugoslavia has the authority to prosecute individuals for violations of the laws and customs of war, whereas the tribunal in Rwanda has no such authority. Further, the Rwandan Statute permits holding individuals responsible for violations of Common Article 3 of the Geneva Conventions, conflicts not of an international nature, where there is no such language in the Yugoslav statute. This suggests that the Security Council was of the opinion that the conflict in the former Yugoslavia was, during at least part of the conflict, an international armed conflict while the conflict in Rwanda was purely internal. The absence of certain categories of crimes in the Rwanda statute also suggests that the Security Council likely questioned the legality of the tribunals to prosecute individuals for grave breaches and violations of the laws and customs of war in purely civil

of these modern international criminal tribunals is powerful evidence that the standard has risen to the level of customary international law.[206]

1. The International Criminal Tribunal for the Former Yugoslavia

As a result of the atrocities in the former Yugoslavia, the United Nations Security Council, relying on Chapter VII of the United Nations Charter as authority, created the International Criminal Tribunal for the Former Yugoslavia.[207] The Security Council felt that there was a nexus between the maintenance of peace in the former Yugoslavia and the restoration of justice.[208] A statute was drafted giving the court both substantive and personal jurisdiction over certain individuals and particular types of criminal activity.[209]

The statute for the tribunal in the former Yugoslavia included a provision for holding commanders criminally responsible for the acts of their subordinates. Article 7(3) of the Statute reads:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[210]

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205. (continued) war like settings. *See generally* Report, *supra* note 203, at 1192. The Statute for the Rwanda Criminal Tribunal is printed in Security Council Resolution 955 Establishing the International Tribunal for Rwanda (1994), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/955 (1994) *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

206. ICJ Statute, *supra* note 181, arts. 38, 59; Landrum, *supra* note 95, at 75; Thomas G. Robisch, *General William T. Sherman: Would the Georgia Campaign of the First Commander of the Modern Era Comply with Current Law of War Standards?*, EMORY INT'L L. REV. 459, 484-85 (1995); Lung-Chu Chen, *Panel II, Comparative Analysis of International and National Tribunals*, 12 N.Y.L. SCH. J. HUM. RTS. 545, 564 (1995); R. Peter Masterton, *The Persian Gulf War Crimes Trials*, ARMY LAW., June 1991, at 7, 16.

207. UNSC Res. 808 (Feb. 22, 1993); UNSC Res. 827 (May 25, 1993).

208. UNSC Res. 808 (Feb. 22, 1993); UNSC Res. 827 (May 25, 1993).

209. ICTY Statute, *supra* note 203.

210. *Id.* art. 7(3). The difficulty in defining "commander" or "superior" for the purposes of criminal responsibility is exacerbated in conflicts short of war or where paramilitary forces are involved. In the case of *Prosecutor v. Zejnil Delali*, IT-96-21-T (16 Nov. 1998) (*Celebici Case*) (Celebici was the name of the town where the offenses took place),

Codifying the *Yamashita* "knew or should have known" standard in Article 7(3) establishes that the United Nations believed it to be the generally accepted rule for holding commanders responsible for the acts of subordinates during international armed conflicts.[211]

2. International Criminal Tribunal for Rwanda

Following its handling of the crises in the former Yugoslavia, the United Nations Security Council next turned its sights on the humanitarian

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210. (continued) the International Criminal Tribunal for the Former Yugoslavia took up the issue of command responsibility in cases involving individuals other than actual military commanders. As pointed out above, Article 7(3) of the Yugoslav Tribunal Statute, establishes liability for "superiors" that "knew or should have known" their "subordinates" were involved in criminal activity and do nothing to stop them. *See* discussion *supra* note 198. The Statute does not limit the doctrine to military commanders, but includes civilian superiors as well.

One of the issues in *Celebici* was who is a "superior." Is superior a *de jure* status or can it be *de facto* based on effective control? The court examined the history of the doctrine of command responsibility and noted that generally it was applied only to actual commanders. *Celebici*, IT-96-21-T, paras. 366, 367, 373, 385, 389 (citing United States v. Wilhelm von Leeb et al., vol. XI, TWC, 462, 513-514 [High Command Case]); United States v. Wilhelm List et al., vol. XI, TWC, 1230, 1286, 1288 [Hostage Case]); United States v. Soemu Toyoda, Official Transcript of Record of Trial, at 5012. However, there have been some cases where both civilian leaders and military staff officers were held accountable under a command responsibility standard during the post World War II war crimes trials. *Celebic*, IT-96-21-T, paras. 368-378 (citing Trial of Lieutenant General Akira Muto, Tokyo Trial Official Transcript, 49,820-1); United States v. Oswald Pohl et al., vol. V, TWC 958; United States v. Koki Hirota, Tokyo Trial Official Transcript, 49,791. The Tribunal concluded:

> Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having *material ability to prevent and punish the commission of these offenses.* With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.

Celebici, IT-96-21-T, para. 378 (citing ILC Draft Code Report of the International Law Commission on the work of its Draft Code of Crimes against Peace and Security of Mankind, 49th Sess. 6 May-26 July 1996, GAOR, 51st Sess. Supp. No. 10 UN Doc. A/51/10).

211. ICTY Statute, *supra* note 203, art. 7(3).

catastrophe in Rwanda. Although the strife in Rwanda was internal, the United Nations Security Council viewed the genocide and massive human rights violations as a threat to international peace and security.[212] After receiving a request from the Rwandan government, the United Nations Security Council established an international criminal tribunal for the prosecution of persons responsible for "Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible."[213]

Like its Yugoslavian sibling, the Rwandan court was also authorized by the United Nations Security Council to hold individuals liable on a theory of command responsibility. The International Criminal Tribunal for Rwanda (ICTR) Statute reads:

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[214]

The treatment of command responsibility was virtually identical in both the ICTY Statute and the ICTR Statute which suggests that the customary international law standard for holding commanders liable in internal armed conflicts is now the same as that for international armed conflicts. Both statutes were created by the United Nations Security Council and both tribunals, the only international tribunals since World War II and the only currently sitting international criminal tribunal, codify the *Yamashita* standard.

C. The International Criminal Court

Although the International Criminal Court (ICC) is still in the planning stages, the proposed statute sheds further light on the status of the doctrine in the international community. In terms of criminal jurisdiction, the ICC will hear cases involving genocide, crimes against humanity, war

212. ICTR Statute, *supra* note 204.
213. *Id.*
214. *Id.* art. 6(3).

crimes, and the crime of aggression.[215] The crime of aggression has yet to be defined. Within the category of crimes known as war crimes, some violations may only be prosecuted during conflicts of an international nature, while others may be brought against perpetrators in either international or internal armed conflicts.[216] Neither genocide nor crimes against humanity will require the existence of an armed conflict.[217]

The statute includes a provision regarding command and superior responsibility.[218] The ICC statutory scheme for holding commanders and other superiors responsible for the acts of their subordinates appears in Article 28 of the statute. It reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by

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215. Rome Statute of the International Criminal Court, as corrected by the proc'es-verbaux of 10 November 1998 and 12 July 1999, UN DOC. A/CONF. 183/2/Add.1 (1998) [hereinafter ICC Statute]. As of 14 March 2000, 95 countries have signed the treaty and 7 nations have ratified it. *See* Rome Statute of the International Criminal Court, *Ratification Status (14 Mar. 2000)* (visited Mar. 14, 2000) <http://www.un.org/law/icc/statute/status.htm>.

216. ICC Statute, *supra* note 214, art. 8.

217. *Id.* arts. 6, 7. For crimes against humanity however, the abuses must be widespread and systematic or ICC jurisdiction will not attach.

218. *Id.* art. 28.

> subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[219]

Other than the fact that the drafters of the ICC Statute clearly intended to establish the *Yamashita* "knew or should have known' standard of command responsibility, one of the most interesting aspects of the ICC Statute is that it created a separate and arguably stricter standard for holding non-military superiors liable under a theory of superior responsibility.[220] For civilian superiors, the "knew or should have known" standard gives way to the "knew or consciously disregarded information which clearly indicated" test of liability for the criminal acts of subordinates.[221]

IV. Applying the *Yamashita* Standard in Domestic Courts-Martial

Assuming that Judge Howard applied the correct standard in the case of *United States v. Medina*,[222] the United States should take steps necessary to assimilate or incorporate the international standard into domestic law. This article now examines possible methods available to incorporate the *Yamashita* standard into domestic courts-martial.

The international standard should be incorporated so that it does not appear that our commanders have a greater degree of immunity in military

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219. *Id.* art. 28.

220. *Id*. There is no distinction, in terms of a standard, to be drawn between military commanders and civilian supervisors in the International Criminal Tribunal for the Former Yugoslavia. ICTY Statute, *supra* note 203, art. 7(3).

221. ICTY Statute, *supra* note 203, art. 7(3).

222. United States v. Medina, C.M. 427162 (1971). Because this was a trial court case that resulted in an acquital, it can hardly be seen as binding precedent in United States court-martial practice.

operations than those from the rest of the world. If we are to hold ourselves out as an armed force that supports the rule of law, the internationally accepted "knew or should have known" standard of command responsibility should be followed domestically. But most importantly, the international standard, because it is based on a "knew or should have known" basis rather than the domestic "actual knowledge" test, is more likely to prevent war crimes because it places a greater burden on commanders to pay attention to the acts of subordinates, an affirmative duty to stay informed. Moreover, adopting the *Yamashita* standard will bring the United States courts-martial practice in line with the customary international law of war.

International law, both conventional and customary, is, generally, incorporated into United States domestic law. When the United States was barely a quarter century old, Chief Justice Marshall wrote that United States courts "are bound by the law of nations, which is part of the law of the land."[223] The U.S. Constitution explains:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[224]

Although this constitutional provision, the Supremacy Clause, on its face, appears to only require the incorporation of treaties, agreements signed by the President and consented to by the Senate,[225] into United States law, customary international law is also generally considered to be the law of the land.[226] In 1865, the Attorney General of the United States opined:

> That the law of nations constitutes a part of the laws of the land must be admitted. . . . 'The law of nations, although not specifically adopted by the Constitution, is essentially part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of

223. The Nereide, 13 U.S. (9 Cranch) 388 (1815).

224. U.S. CONST. VI, cl. 2.

225. *Id.* art. II, § 2, cl. 2.

226. *See generally* Lewis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). Professor Henkin asserts:

> indifference.' The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as part of the law of the land. . . .
>
> That the law of nations constitutes a part of the laws of the land is established from the face of the Constitution, upon principle and by authority.[227]

Further support for the proposition that the Framers intended to incorporate customary international law into domestic law can be found in Article I, Section 8, clause 10 of the Constitution itself. In this provision, Congress is given the power "[t]o define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations . . ."[228] Of significance is the Framer's choice of the word "define." Congress was not granted the power to make or declare the law of nations, but only the power to define it.[229] This suggests that the law of nations was already in existence at the time the Constitution was drafted, and that the community of nations, not Congress, creates the law of nations. Moreover,

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226. (continued)

> Much is made also of the fact that, unlike treaties, customary law is not mentioned expressly in the Supremacy Clause or in the constitutional listing of U.S. law in article III. I do not consider that omission significant for our purposes. The Supremacy Clause was addressed to the states, and was designed to assure federal supremacy. The federal law whose binding quality was mentioned in the Supremacy Clause included the Constitution and the laws and treaties made under the authority of the United States—acts taken under the authority of the new United States Government, authority which had to be impressed on the states and state courts. The law of nations of the time was not seen as something imposed on the states by the new U.S. government; it had been binding on and accepted by the states before the U.S. government was even established. It was "supreme" over federal as well as state laws, and binding on federal as well as state courts. There was no fear that the states would flout it, and therefore no need to stress its supremacy.

Id. at 1565-66.

227. 11 Op. Att'y Gen. 297, 299 (1865) (citation omitted). In this opinion, the Attorney General of the United States opined that a military commission could be used to try persons charged with the offense of having assassinated President Abraham Lincoln.

228. *Id.*; U.S. CONST. art. I, § 8, cl. 10.

229. 11 Op. Att'y Gen. 297, 299 (1865).

giving Congress the power to define the law of nations presupposes an obligation to comply with the law. If there were no obligation to comply with the law, there would be no purpose in trying to define it.

In one of the most significant cases regarding the application of international law in United States courts, the Supreme Court pointed out:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .[230]

This passage makes clear that customary international law is the law of the land; and, at least where there is not a treaty or statute to the contrary, U.S. courts must apply the applicable customary international law.

Although some disagree,[231] as a general proposition, customary international law is generally thought to be domestically inferior to statutory law and will not be enforced in U.S. courts where there is a statute contrary

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230. The Paquete Habana, 175 U.S. 677, 700 (1900). Echoing the language of *The Paquete Habana*, The Restatement of the Foreign Relations Law of the United States includes a section that states:

> (1) International law and international agreements of the United States are law of the United States and supreme over the law of the several States.
> (2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United states and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of federal courts.
> (3) Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.

RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 (1987).

231. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665 (1986); Jordan Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy Custom*, 28 VA. J. INT'L L. (1988); Jordan Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990).

to the international rule.[232] Therefore, because there is a statute on point describing the standard to be applied in a domestic court-martial, Article 77 will reign supreme over the customary international standard in a court-martial. This does not, however, change the fact that the "knew or should have known" standard is international law. Should one of our commanders ever be tried before an international tribunal, the *Yamashita* rather than the Medina standard would be applied.[233]

Therefore, if U.S. courts-martial practice is to conform to international law, it appears that Congress must amend Article 77 of the UCMJ to mirror the international standard. Congress would need to expand the culpability of commanders where their subordinates are committing violations of the law. A proposed amendment is provided in the next section of the article.

However, in the event that Congress fails to amend Article 77, there is another option already available in the UCMJ. This option would call for the United States, despite current policy,[234] to consider trying persons for violations of the law of war pursuant to Article 18 of the UCMJ rather than the equivalent punitive articles of the UCMJ.

A. Amending Article 77 of the UCMJ

The Constitution specifically gives Congress legislative authority "[t]o make Rules for the Government and Regulation of the land and naval forces."[235] Congress did so in the UCMJ. The UCMJ is effectively a reprint of Chapter 47 of Title 10, United State Code (U.S.C.).[236] Article 77 of the UCMJ is codified in the United States Code at 10 U.S.C. § 877. Therefore, like any other statute, an amendment to Article 77 would have to be generated by Congress.

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232. United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988); Jack M. Goldklang, *Back on Board The Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984).

233. FM 27-10, *supra* note 124, para. 511. This provision warns readers that "[t]he fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." *Id.*

234. FM 27-10, *supra* note 124, para. 507(b). MCM, *supra* note 164, R.C.M. § 307.

235. U.S. CONST. art. 1, § 8, cl. 14.

236. *Compare* 10 U.S.C. §§ 801-946 *with* UCMJ arts. 1-146.

Perhaps the best way to resolve the perceived *Medina/Yamashita* domestic/international disconnect would be for Congress to amend Article 77, UCMJ, to comport with the international standard. Among others, one significant advantage in following the amendment approach would be that the international standard for command responsibility would be clearly codified as domestic law. Such an amendment would allow the United States to continue its preference and policy of trying service members alleged to have committed violations of the law of war in domestic courts by applying the domestic punitive articles of the UCMJ,[237] while providing a basis to prosecute commanders similar to that of an international tribunal. If Article 77 were amended to match *Yamashita*, that standard would trigger culpability when the underlying violations are violations of the UCMJ rather than just the law of war.

Amending Article 77 to reflect the international standard should be relatively simple in terms of selecting the proper verbiage. What could be more difficult, however, is determining whether the expanded standard should apply only in cases where there is an allegation of a violation of the law of war, or whether a change to Article 77 should apply to all violations of the UCMJ. Because, however, there is no specific charge in the UCMJ that specifically covers law of war violations, limiting the coverage of Article 77 to violations of the law of war may in effect cancel the value of such an amendment out. In the event that an expanded basis of command responsibility were added to Article 77 which covered only law of war violations, a specific punitive Article criminalizing law of war violations would also have to be added. Currently, violations of the law of war must either be charged as a violation of a punitive article of the UCMJ, and therefore subject to Article 77, or as a violation of Article 18, which is not subject to Article 77 limitations.

Interestingly, the standard for command responsibility in the ICC Statute[238] is virtually identical to the standard of command responsibility

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237. FM 27-10, *supra* note 124, para. 507(b). It is perhaps beneficial from a policy standpoint for the military to try those that violate the law of war as common criminals rather than war criminals which may trigger a host of international legal requirements based on United States treaty obligations; for example, the Geneva Conventions requirement to prosecute or extradite those that commit Grave Breaches of the Conventions. GWS, *supra* note 124, art. 49; GWSS, *supra* note 124, art. 50; GPW, *supra* note 27, art. 129; GC, *supra* note 124, art. 146. Moreover, asserting that domestic jurisdiction exists to cover alleged violations of the law of war may prevent jurisdiction from being asserted by another country or an international tribunal.

238. ICC Statute, *supra* note 214, art. 28.

proposed by the United States for the 1977 Protocol I to the 1949 Geneva Conventions.[239] Therefore, incorporating something very similar to the ICC Statute's standard into Article 77 is a seemingly reasonable tack to follow. Article 77 should therefore be amended to include a third basis of culpability similar to:

> (3) in the case of a military commander or a person effectively acting as a military commander, while on a military operation outside the territory of the United States, however the operation is characterized, where forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise proper control over such forces, where
> (i) That military commander or person either knew or owing to the circumstances as the time, should have known that the forces were committing or about to commit a crime under this chapter; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission;
> is a principal.

Such an amendment should be limited to situations where the commander is deployed overseas on a military operation, however these operations might be characterized. Or, the amendment could include language that would trigger the amendment only during times of war, or international armed conflict, or perhaps during an arguably broader category, "armed conflict."[240]

As a final option, the amendment could be drafted in such a way as to create command responsibility at all times and in all circumstances where

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239. *See supra* notes 196-197 and accompanying text.

240. Such a limitation could be very difficult in terms of defining what an armed conflict would be for the purposes of such a statute. For example, DOD DIR. 5100.77, *supra* note 46, para. 5.1, 5.3 requires, "The heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." CJCS INST. 5801.01A, *supra* note 45, para. 5A states: "The Armed Forces of the United States will comply with the law of war during all armed conflicts however such conflicts are characterized and unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations . . . ."

a commander "knows or should have known" of the criminal activities of subordinates, whether overseas or not, irrespective of the presence of a conflict.

Limiting the expansion of liability to overseas operations, regardless of how the operations are characterized, is the best construct. First, there would be no requirement to define what constitutes an armed conflict, and commanders would not wonder what standard to apply in an overseas operation. Second, the traditional domestic concept of principal would apply in all situations except those where international law may be triggered. Third, holding a commander to a higher level of supervision overseas on an operation balances the international humanitarian concerns with due process protections for the commander. Fourth, and perhaps most importantly, the law of war does not apply in all operations. Many MOOTW do not rise to the level of armed conflict and, therefore, the law of war is not triggered in such operations.

There are, however, some drawbacks in relying on a possible amendment to Article 77 to solve the problem. First, Congress may never amend the statute. The legislative branch may not feel that such a change is important, or even if it does, may elect not to amend the article. There may be some resistance in the Department of Defense to the idea of expanding liability for commanders, especially if such an expansion covers all underlying UCMJ offenses in all circumstances, peacetime in garrison, as well as wartime overseas.

Another option would be to fashion an actual but separate crime for criminal responsibility where the penalties are the same as for the underlying offenses committed by subordinates rather than amending the scope of the definition of principal.[241] This would have an advantage in that, depending on how it was drafted, liability could be limited to specific underlying violations, such as murder and other crimes against persons, in

240. (continued) Although both of these policies require that the law of war be applied in all armed conflicts, neither policy attempts to define "armed conflict." Further, these policies do not create criminal liability in and of themselves. Even Common Article 3 of the Geneva Convention of 1949 specifically deals with armed conflicts of a non-international nature. However, the article does not define the term "armed conflict." Where common crime ends and internal armed conflicts begin is not clear looking solely to Common Article 3. *See* GWS, *supra* note 124, art. 3; GWSS, *supra* note 124, art. 3; GPW, *supra* note 27, art. 3; GC, *supra* note 124, art. 3.

241. Wu & Kang, *supra* note 44, at 288-89.

very limited circumstances such as during international or internal armed conflict or in MOOTW overseas.

B. Charging Violations of the Law of War Pursuant to Article 18 of the UCMJ

Because Article 77 of the UCMJ has not to date been amended, and may never be amended, another alternative should be considered in the interim. By charging soldiers that commit war crimes and their commanders that allow them to do so with violations of the law of war pursuant to Article 18, UCMJ, rather than their parallel violations of the punitive articles of the UCMJ, a court could ignore the limitations of Article 77 altogether. If war crimes were charged for what they are, violations of the law of war, the internationally recognized standard for command responsibility, commonly referred to as the *Yamashita* standard, could be applied in a domestic courts-martial, obviating the need to amend Article 77.

> Article 18 of the UCMJ, Jurisdiction of General Courts-Martial, provides:
>
> > Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.[242]

242. UCMJ art. 18 (LEXIS 2000).

The first sentence of Article 18 grants jurisdiction to general courts-martial over individuals "subject to this chapter" for violations made "punishable by this chapter." The chapter referred to in this sentence is Chapter 47 of Title 10 of the United States Code, the UCMJ.[243] Therefore, for the purposes of the first sentence, general courts-martial have jurisdiction over cases involving persons "subject to the code," the UCMJ, who allegedly violate one of the punitive articles of the code. Article 2 of the UCMJ, lists those that are subject to the personal jurisdiction of a general courts-martial.[244] Articles 77 through 134 make up the punitive articles, or offenses, "made punishable by this chapter."[245]

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243. Sections 801 through 946 of Title 10 are reprinted as Articles 1 through 146 of the UCMJ and reprinted in the *Manual for Courts-Martial*.

244. UCMJ art. 2. The issue of personal jurisdiction over civilians si beyond the scope of this paper. This paper focuses on substantive criminal jurisdiction for uniformed commanders. Members of the uniformed armed forces are clearly within the jurisdiction of such a court, as are uniformed mbembers of the enemy captured as prisoners of war. *Id.* With regard to United States civilians who are subject to UCMJ jurisdiction in certain cases, the U.S. Supreme Court has decided a series of cases, based on constitutional grounds, which suggest a civilian cannot be tried by a courts-martial for violations of domestic law during conflicts short of war. *See generally* McElroy v. Guagliardo, Wilson v. Bohlender, 361 U.S. 281 (1960); Grisham v. Hagen, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 345 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

In 1970, the U.S. Court of Military Appeals, now referred to as the Court of Appeals for the Armed Forces, examined the issue of courts-martial jurisdiction over civilians based on the language of the UCMJ itself. United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970). The court noted: "The concept of military jurisdiction over specified classes of civilians in time of peace and war was continued in the enactment of Article 2(10) and (11) of the Uniform Code of Military Justice." *Id.* The court explained that Article 2(10) jurisdiction over civilians existed according to the statute "in time of war." *Id.* The court concluded that "in time of war" means "a war formally declared by Congress." *Id.* at 365. The court further explained:

> We do not presume to express an opinion on whether Congress may constitutionally provide for court-martial jurisdiction over civilians in time of a declared war when these civilians are accompanying the armed forces in the field. Our holding is limited—for a civilian to be triable by court-martial in "time of war," Article 2(10) means a war formally declared by Congress.

Id. This case however does not decide whether a civilian could be tried in a court-martial for violations of the law of war rather than the punitive articles in conflicts short of declared war. The limitations of Article 2(10) only apply when the jurisdiction of the court is based on the punitive articles of the UCMJ. *See generally supra* notes 241, *infra* notes 249-263 accompanying text. When the court-martial jurisdiction is based on the law of war jurisdiction, the jurisdiction of the court is identical to military tribunals that have the authority to

The second sentence of Article 18, however, creates an entirely separate and distinct basis for general court-martial jurisdiction from the punitive articles of the UCMJ. Not only does a general court-martial have the authority to try persons subject to the code for violations of the code, it *also* has the authority to try persons subject to the jurisdiction of a military tribunal for violations of the law of war.[246] The use of the word *also* clearly indicates that the law of war is an altogether separate substantive theory of court-martial jurisdiction. This means that both Article 2, Persons subject to this chapter, UCMJ, and Article 77, Principal, are irrelevant when a court-martial is trying someone for a violation of the law of war because they are limitations related to the punitive articles of the UCMJ. The personal and substantive jurisdiction for law of war violations, according to Article 18, is determined by the law of war.

Rules for Courts-Martial 201(f), Jurisdiction in General, further explains:

(f) Types of courts-martial.
(1) *General courts-martial.*
(A) *Cases under the code.*
(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the code for any offense made punishable under the code . . . .
(B) *Cases under the law of war.*
(i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against:
(a) The law or war; or
(b) The law of the territory occupied as an incident of war . . . .[247]

The two bases of jurisdiction are clearly separated out in this provision. Moreover then, if, hypothetically, a court were hearing a case involving alleged violations of the law of war, the international "law of war"

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244. (continued) try civilians. Of course, the constitutionality of trying U.S. citizens at court-martial is another issue altogether. It appears that U.S. citizens may not be tried in courts-martial during peacetime for violations of domestic law. *Averette*, 41 C.M.R. at 363; *Kinsella*, 361 U.S. at 234; *McElroy*, 361 U.S. at 281; *Wilson*, 361 U.S. at 281; *Grisham*, 361 U.S. at 278; *Reid*, 345 U.S. at 1; *Toth*, 350 U.S. at 11.

245. UCMJ art. 77-134.

246. UCMJ art. 18.

247. MCM, *supra* note 164, R.C.M. art. 201(f).

standard, the *Yamashita* "knew or should have known" test should be applied. The domestic *Medina* standard based on Article 77, a punitive article of the UCMJ, the "chapter" referred to in the first sentence of Article 18, could be ignored when jurisdiction is based on the law of war jurisdiction in the second sentence of Article 18.

Further evidence that violations of the law of war are a completely different jurisdictional basis from the punitive articles appears in the discussion to Rule of Court Martial 307(c)(2), Preferral of Charges.[248] The discussion provides a sample specification as to how a violation of the law of war might be drafted pursuant to Article 18. The discussion then goes on to remind the military practitioner that where a "person subject to the code" is to be charged, there is a preference for using a "violation of the code rather than a violation of the law of war."[249]

This option, exercising Article 18 authority, has two significant advantages. The first is that courts-martial have jurisdiction over virtually anyone, including those not members of the U.S. Armed Forces, for violations of the law of war.[250] Second, it is international law that determines what the law of war is and the violations thereof, commanders of soldiers involved in the commission of violations of the law of war would be subject to criminal liability standards established by conventional and customary international law. [251] Applying the law of war in war crimes trials makes more sense than trying to fit the law of war "square peg" into the "round hole" of the domestic criminal regime and punitive articles. Because *Yamashita* is a law of war theory of command responsibility, it should then replace the domestic Article 77, UCMJ, standard when a court is proceeding according to its law of war jurisdiction.

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248. *Id.* R.C.M. 307(c)(2), discussion.

249. *Id.*

250. The issue of trying civilians charged with war crimes in a court-martial or military commission is beyond the scope of this paper. *See generally* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, WAKE FOREST L. REV. 509 (1994); Mark S. Martins, *Comment: National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VA. J. INT'L L. 659 (1996) (discussing the issues involved).

251. MCM, *supra* note 164, pt. 1, pmbl., art. 1. "The sources of military jurisdiction include the Constitution and International law. International law includes the law of war." *Id.*

1. The Law of War Jurisdiction of Military Tribunals and Courts-Martial

In exercising its authority "[t]o make Rules for the Government and Regulation of the land and naval forces,"[252] and its power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,"[253] Congress has given the authority to courts-martial and military commissions, and tribunals, to hear cases alleging violations of the law of war.[254]

By operation of Article 18, UCMJ, a court-martial may try an individual charged with a war crime where jurisdiction over the person would exist before a military tribunal alleging a violation of the law of war. Congress has granted the authority to certain commanders to convene "military commissions, provost courts, and other military tribunals" for violations of "statute" or the "law of war."[255] Military tribunals have been used under many different circumstances to try individuals for alleged violations of the law of war. Civilians, as well as uniformed members of the armed forces, have been forced to answer for violations of the laws of nations before such tribunals.[256] "Indeed it was for this very purpose of trying

252. U.S. CONST. art I, § 8, cl. 14.

253. *Id.* art. I, § 8, cl. 10.

254. UCMJ arts. 18, 21.

255. UCMJ art. 21. Commanders competent to convene general courts-martial are also authorized to convene military commission or tribunals. *In re* Yamashita, 327 U.S. 1, 16 (1946). Article 22, UCMJ, explains who has the authority to convene a general court-martial. Included are the President, the Secretary of Defense, the service secretaries, and commanders generally at the flag level. UCMJ art. 22.

256. *See generally* Everett & Silliman, *supra* note 249. The authors point out several examples of where military tribunals have been used historically. Military tribunals were used extensively following World War II in Germany and Asia. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of Major War Criminals of the European Azis, the London Charter, *supra* note 77, *reprinted in* 41 AM. J. INT'L L. 172, 331-33 n.13 (1947); ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987). Some othercases cited by the authors include: *Yamashita*, 327 U.S. at 1; Madsen v. Kinsella, 343 U.S. 341, 348 (1952) (native born American citizen civilian convicted by a military commission for the murder of her U.S. Air Force husband in occupied Germany); Johnson v. Eisentrager, 339 U.S. 763 (1950); Duncan v. Kahanamoku, 327 U.S. 304, 312-14 (1945); *Ex Parte* Quirin, 317 U.S. 1 (1942) (the trial of German saboteurs, one of whom claimed to be an American citizen).

civilians for war crimes that military commissions first came into use."[257]

The Supreme Court, in *Johnson v. Eisentrager,* a case involving a military commission, pointed out:

The jurisdiction of military authorities during and following hostilities, to punish those guilty of offenses against the laws of war is long-established. This court has characterized as "well established" the "power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." And we have held in the *Quirin* and *Yamashita* cases . . . that the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war.[258]

In this passage, the Supreme Court supports the notion that the personal jurisdiction of a military commission or tribunal is limited only to the substantive limits of the law of war. "Having violated the law of war in an area where it obviously applies, offenders are subject to trial by military tribunals wherever they may be apprehended."[259]

The focus of this article is holding United States service members facing a court-martial, not civilians, to the international law standard of command responsibility. One thing is clear: courts-martial have jurisdiction over the uniformed members of armed forces.[260] Equally obvious is that general courts-martial also have the authority to hear allegations of violations of the law of war against U.S. service members.[261]

2. What Constitutes a Violation of the Law of War?

The many honorable gentleman who hold commissions in the army of the United States, and have been deputed to conduct war according to the laws of war, would keenly feel it as an insult to their profession of arms for any one to say that they could not or

257. *Quirin*, 317 U.S. at at 24 (citing WINTHROP, MILITARY LAW AND PRECEDENTS 831-41 (1920)).

258. *Johnson*, 339 U.S. at 786 (quoting *Duncan*, 327 U.S. at 312-14 (citing *Quirin*, 317 U.S. at 1; *Yamashita*, 327 U.S. at 1)).

259. *Quirin*, 317 U.S. at 25.

260. UCMJ art. 2(a)(1).

261. Martins, *supra* note 249, at 40 (citing UCMJ art. 18).

> *would not punish a fellow soldier who was guilty of wanton cruelty to a prisoner or perfidy towards the bearers of a flag of truce*.[262]

If the second jurisdictional prong of Article 18, UCMJ, requires that an accused be charged with a violation of the law of war, then defining the law of war becomes of critical importance. This can be a very arduous task. If international law in general is difficult to discern, the law of war is even more difficult to define with precision.[263]

"The so called law of war is a species of international law analogous to common law."[264] As a former U.S. Attorney General once noted:

> But the laws of war constitute much the greater part of the law of nations. Like other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. No one has ever glanced at the many treatises that have been published in different ages of the world by great, good, and learned men, can fail to know that the laws of war constitute a part of the law of nations, and that those laws have been prescribed with tolerable accuracy.[265]

Nearly eight years later, the Supreme Court reiterated this point in *Yamashita* when it wrote: "Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment."[266] Perhaps the difficulty in defining violations of the law of war explains why Congress has with great specificity

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262. 11 Op. Att'y Gen. 297, 304 (1865).

263. The law of war is oftentimes referred to in recent times as international humanitarian law. The ICRC defined the law of war as:

> [T]he expression of international humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.

OFFICIAL COMMENTARY PROTOCOLS, *supra* note 186, at xxvii.

264. *Quirin*, 317 U.S. at 12.

265. 11 Op. Att'y Gen. 297, 299-300 (1865).

266. *In re* Yamashita, 327 U.S. 1, 30 (1946).

defined crimes for which military members may be charged within the punitive articles of the UCMJ,[267] but has elected to refrain from providing any specificity as to the definition of the law of war.[268]

The Supreme Court in *Ex parte Quirin* explained that Congress has been intentionally vague in defining offenses triable under the law of war. The Court wrote:

> Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Congress has the choice of crystallizing in permanent from and in minute detail every offense against the law of war, or of adopting the system of common law applied by the military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.[269]

And in *Yamashita*, the Court similarly explained:

> We further note that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law or war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts . . . .[270]

There is therefore no one source that one can turn to determine what the law of war actually is. Like any other body of international law:

> The law of war is derived from two principal sources:

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267. UCMJ arts. 77-134 (LEXIS 2000).

268. *Id.* arts. 18, 21. Congress has the specific constitutional authority to define the law of nations. U.S. CONST. art. I, § 8, cl. 10.

269. *Quirin*, 317 U.S. at at 29 (citations omitted).

270. *Yamashita*, 327 U.S. at 12, 13.

> a. *Lawmaking Treaties (or Conventions),* such as the Hague and Geneva Conventions.
> b. *Custom.* Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. . . .[271]

Further, the *Manual* continues, "Evidence of customary law of war, arising from the general consent of States, may be found in judicial decisions, the writings of jurists, diplomatic correspondence, and other documentary material concerning the practice of States . . . ."[272]

The *Restatement (Third) of the Foreign Relations Law of the United States* explains: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."[273] According to the Department of the Army, under international law, violations that may be tried before a war crimes tribunal include crimes against peace, crimes against humanity, and war crimes.[274] "The term 'war crime' is the technical term for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[275] Grave Breaches of the Geneva Conventions of 1949, as well as certain other types of war crimes are violations of the law of war.[276]

To determine the current status of the punitive provisions of the law of war, considering the jurisdiction of the modern international tribunals is helpful. During the establishment of the International Criminal Tribunal for the former Yugoslavia, the drafters were forced to define the current status of crimes under the law of war. The Secretary General of the United Nations opined that the "part of conventional international humanitarian law which has beyond doubt become part of international customary law" is the law of war contained in the Geneva Conventions for the Protection

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271. FM 27-10, *supra* note 124, para. 4.

272. *Id.* para. 6.

273. RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1987).

274. FM 27-10, *supra* note 124, para. 498.

275. *Id.* para. 499.

276. *Id.* paras. 502, 504.

277. ICTY Statute, *supra* note 203, commentary, para. 34, 32 I.L.M. at 1170. The Charter referred to by the Secretary General is commonly referred to as the London Charter.

of War Victims of August 12, 1949, the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land annexed Regulations of October 18, 1907, the convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, and the Charter of the International Military Tribunal of August 8, 1945.[277]

The Yugoslav Tribunal Statute includes grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity as the categories of crime for which defendants before the Tribunal may be tried.[278] In Rwanda, because of its internal nature, the United Nations Security Council limited the jurisdiction of the Tribunal to hearing cases alleging genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.[279] Based on these two statutes then, genocide, crimes against humanity, grave breaches of the Geneva Conventions, violations of the law and customs of war, violations of Article 3 Common to the Geneva Conventions, and violations of Protocol II Additional to the Geneva Conventions, are all substantive jurisdictional bases for law of war centered prosecutions. Finally, although it is not yet in force, the ICC Statute provides additional evidence as to what offenses constitute violations

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277. (continued) *See* London Charter, *supra* note 77. The London Charter defined the crimes that would be heard by the Nuremberg Tribunal, which included: Crimes Against Peace; Crimes Against Humanity, which was "murder, extermination, enslavement, deportation, before or after the war, or persecution on political, racial or religious grounds"; and War Crimes, which included "murder, ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." *Id.* art. 6, at 286-88. Although not mentioned by the Secretary General, and although the United States is not a party to either treaty, many provisions of the 1977 Additional Protocols I and II to the Geneva Conventions of 1949 have risen to the level of customary international law and therefore part of the law of war. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 62-70, 75-78 (1989).

278. ICTY Statute, *supra* note 203, arts. 2-5. Of course, like the London Charter, each of the categories of crime is further defined in the statute.

279. ICTR Statute, *supra* note 204, arts. 2-4. The Violations of Article 3 common to the Geneva Convention basis for prosecution will be discussed *infra* notes 303-343 and accompanying text.

of the law of war. The ICC will have jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[280]

If the second basis of jurisdiction listed in Article 18 of the UCMJ is to be used, an accused must be charged with a violation of one of the above listed crimes rather than one of the punitive articles of the UCMJ.[281] What about command responsibility? Is it part of the law of war? Is it a theory of culpability, or is it also a separate criminal offense under the law of war as well? The Supreme Court asked the same question in *In re Yamashita:*

> The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[282]

The defense in *Yamashita* urged the Court to conclude that the government had failed to state an offense in the law of war because it was his subordinates that had committed the atrocities, not the accused.[283] The Court decided that the law of war specifically includes a responsibility for commanders to control their troops. Failure to do so is, according to the Court, an offense under the law of war. In response to the defense argument that command responsibility does not state an offense, the court explained: "But this overlooks the fact that the gist of the charge is an unlawful breach of duty by the petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified."[284]

In reaching its decision, the Court determined:

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280. ICC Statute, *supra* note 214, art. 5. Of significant interest is that war crimes are defined in Article 8. The article further allows for some offenses to be charged in both international and internal armed conflicts, while permitting some offenses to be charged only in international conflicts. *Id.* art. 8.

281. UCMJ art. 18 (LEXIS 2000).

282. *In re* Yamashita, 327 U.S. 1, 14-15 (1946).

283. *Id.*

284. *Id.*

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[285]

After running down a list of the treaties covering the law of war at the time of the decision, the court then concluded:

> These provisions plainly imposed on petitioner, who at the time specified was the military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals.[286]

Assuming then that command responsibility is firmly rooted in the law of war, both as a substantive charge and as a theory of culpability, the next question to consider is when does the law of war apply? For a court-martial to have jurisdiction to try a commander pursuant to the law of war for violations committed by his subordinates, the law of war must first be triggered. In other words, if a soldier were to murder a civilian at a time and place where the law of war is not applicable, the soldier could be charged with murder based on the laws of the sovereign that has territorial jurisdiction, or, at a court-martial pursuant to Article 118, UCMJ, Murder, but not with a violation of the law of war.[287]

For the full body of the law of war to apply, there must be an armed conflict of an international character.[288] That is to say, that the warring fac-

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285. *Id.* at 16.

286. *Id.*

287. UCMJ art. 18 (LEXIS 2000).

288. With the exception of Article 3, common to the Geneva Conventions of 1949, the Conventions only apply to "cases of declared war or any any armed conflict

tions must be states. It must be state against state, not non-state against non-state or even non-state against state. Therefore, if the law of war is the basis relied on for court-martial jurisdiction, the jurisdiction may be more limited in the MOOTW context where there is normally no state against state conflict. The extent of the court-martial jurisdiction then may be completely dependent on the nature or character of the operation involved. In MOOTW then, which is often short of armed conflict, the law of war will not generally provide a basis for law of war jurisdiction, rendering Article 18, UCMJ, virtually irrelevant. Thus, the need for an amendment to Article 77, UCMJ is crucial.

In analyzing the status of the law of war domestically, perhaps the most important recent legal development in the United States related to individual criminal responsibility for violations of the law of war is the War Crimes Act of 1996.[289] The statute reads in part:

> (a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or

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288. (concluded) which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Only states can be parties to the Conventions, therefore, armed conflict for the purposes of triggering the Convention means war between states. GWS, *supra* note 124, art. 2. GWS, *supra* note 124, art 2; GPW, *supra* note 27, art. 2; GC, *supra* note 124, art. 2 (Article 2 is Common to the Geneva Conventions of 1949). Hague Convention No. III Relative to the Opening of Hostilities, (Oct. 18, 1907) art. 3, 36 Stat. 2259; T.I.A.S. 538. Article 3 of Hague III says, "Article 1 of the present Convention shall take effect in case of war between two or more of the Contracting Powers. Article 2 is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention." Hague IV, *supra* note 27, art. 2, states, "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." Protocol I explains that the treaty applies to situations referred to by Common Article 2 of the Geneva Conventions, and armed conflicts of an internal nature but where they involve fights against racist regimes, colonial domination, or alien occupation. Protocol I, *supra* note 27, art. 1(3), (4). Protocol II applies during armed conflicts short of international armed conflict but where the conflict is more than riots or "isolated and sporadic acts of violence." Typically this involves fights between some sort of insurgent group and a nation's armed forces. Protocol II, *supra* note 28, art. 1. The United States is neither a party to Protocol I nor to Protocol II.

289. 18 U.S.C. § 2441. Although, in terms of international law, Congress got it right when it passed the War Crimes Act of 1996, the House Committee on the Judiciary Report on the legislation incorrectly reported certain jurisdictional aspects of the UCMJ with regard to law of war violations at courts-martial. Under Section II(C) of the report, the Committee accurately lays out the history of military commissions and correctly notes that there has been very little use of military commissions. JUDICIARY COMMITTEE REPORT, *supra*

> imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> (b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States . . . .
> (c) Definition. As used in this section the term "war crime" means any conduct—
>
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

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289. (continued) note 155, sec. IIC. It also correctly reports that courts-martial have jurisdiction over military members for violations of the law of war. *Id.* The report is not completely accurate, however, with regard to courts-martial jurisdiction where it states:

> Their limitation, however, is that they apply to very circumscribed groups of people: generally members of the United States armed forces serving with or accompanying armed forces in the field, and enemy prisoners of war. . . . The most famous example of a court-martial for war crimes is probably that of William Calley, who was prosecuted by court-martial for his part in the My Lai massacre during the Vietnam War. . . . A member of the U.S. armed forces who commits a war crime is only subject to court-martial for so long as he or she remains in the military.

Id.

The problem with this statement is that it mingles the two separate and distinct jurisdictional bases for court-martial jurisdiction into one standard and misconstrues the relevant jurisdictional facts regarding the *Calley* court-martial. UCMJ art. 18; United States v. Calley, 46 C.M.R. 1131 (C.M.A. 1973). The alleged jurisdictional limitations cited in the report do not apply when a court-martial is trying individuals for law of war violations as opposed to violations of the punitive articles of the UCMJ. While it is true, courts-martial jurisdiction for prosecutions based on violations of the punitive articles is limited by Article 2, and such jurisdiction ceases when a soldier leaves the service, these limitations are not present when an action is based on Article 18, UCMJ, law of war jurisdiction. UCMJ art. 2; *see supra* note 243 and accompanying text.

Lieutenant Calley was not charged with "war crimes"; he was not charged with violating the law of war. Although he was charged with acts that could have been charged as war crimes, such as crimes against humanity, violations of the laws and customs of war, or the Hague Regulations, he was instead charged and convicted for the domestic crimes of premeditated murder, and assault with the intent to commit murder. As the trial court explained: "Although all charges could have been laid as war crimes, they were prosecuted under the UCMJ." *Calley*, 46 C.M.R. at 1138.

> (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.[290]

The War Crimes Act of 1996 is the best current legal pronouncement of the status of war crimes under U.S. domestic law. However, because it controls federal civilian courts, it is not necessarily controlling in the courts-martial arena.

V. Conclusion

The most important factor in the reduction of war crimes is an assertive and proactive command structure that aggressively seeks to prevent its subordinates from committing atrocities. Recognizing this fact, the international community seeks to hold commanders personally liable for the crimes committed by subordinates if the commander "knows or should know" that the subordinates are involved in criminal conduct and the commander fails to take action to stop the more junior troops. The doctrine of command responsibility serves as a deterrent to the commission of war crimes by forcing commanders to internalize some of the cost for directing or acquiescing to atrocities committed by their troops. The commensurate anticipated reduction in war crime-like atrocities should also result in greater legitimacy of the operations participated in by U.S. forces.

In the United States domestic court-martial practice however, the international standard of command responsibility has not been applied to violations of the UCMJ. To conform to the international standard, the UCMJ should be amended to create a basis of culpability for commanders equal to the international *Yamashita* standard. Until Congress amends the UCMJ, military practitioners should consider charging those who violate the law of war with violations of the law of war pursuant to Article 18,

290. 18 U.S.C. § 2441.

UCMJ rather than the punitive articles of the UCMJ. The *Yamashita* standard should apply when a court is relying on its law of war jurisdiction because *Yamashita* is the law of war standard.

CAMOUFLAGE ISN'T ONLY FOR COMBAT: GENDER, SEXUALITY, AND WOMEN IN THE MILITARY[1]

BATTLE CRIES AND LULLABIES: WOMEN IN WAR FROM PREHISTORY TO THE PRESENT[2]

REVIEWED BY COLONEL FRED L. BORCH III[3]

Over the last ten years, sexual harassment, fraternization, and other gender-related issues have emerged as the biggest single challenge for Army leaders. As the percentage of female soldiers in the Army is likely to increase in the future, and since the Army is committed to a gender integrated force, it follows that commanders—and the judge advocates advising them—must understand what it means to be a woman in the military. This is because the men and women leading the Army, and those male and female lawyers counseling them, will arrive at better solutions for male-female problems if they understand the gender issues faced by women soldiers.

Two recent books about women in uniform, while very different in their subject-matter, are worth reading. Judge advocates looking to enhance their ability to deal with the thorny male-female issues that face today's Army will want to look at both. Not only will they be more effective in assisting commanders, but they may find that both books help them in managing and leading their own legal operations.

One cannot really understand the present, or begin to think about the future, without looking at the past. In looking for a broad survey of women in war, Linda DePauw's *Battle Cries and Lullabies* is a good place to start, particularly as it tries to compile just about everything known about females in armed conflict. DePauw, a professor of history at George Washington University, writes about women as warriors. She also examines

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1. MELISSA S. HERBERT, CAMOUFLAGE ISN'T ONLY FOR COMBAT: GENDER, SEXUALITY, AND WOMEN IN THE MILITARY (1998). New York Univervisty Press, hardcover, 205 pages; $35.00.

2. LINDA G. DEPAUW, BATTLE CRIES AND LULLABIES: WOMEN IN WAR FROM PREHISTORY TO THE PRESENT (1998). University of Oklahoma Press, hardcover, 395 pages; $24.95.

3. Judge Advocate General's Corps, U.S. Army. Currently serving as Staff Judge Advocate, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia.

women as casualties of war, and as "camp followers" (wives, cooks, nurses, and prostitutes). Her narrative begins in prehistory with the Mesolithic epic (12,000 to 4500 BC), runs through Greek and Roman warfare (5th Century BC to AD 476), and conflict in medieval and early modern Europe and America (AD 1000 to 1900). The last 100 pages of *Battle Cries and Lullabies* focuses on Twentieth Century wars.

The greatest strength of DePauw's book is that she shows conclusively that women have been a part of military life—as soldiers and as non-combatants—throughout recorded history. This is an important point, as modern readers are often under the mistaken impression that, with a few exceptions, women combatants are a part of recent history only. Linda DePauw proves otherwise. She shows that in the Netherlands in the early 1600s, women fought alongside men in defending their walled towns. They helped to pour boiling tar from city walls, and two Dutch sisters put on swords and organized a battalion of 300 women who fought outside the walls. Similarly, hundreds of Russian women served in all-female "Battalions of Death" in World War I. Women fought in national Resistance movements in World War II. During the war in Southeast Asia, North Vietnamese women trained in hand-to-hand combat and were the core of village self-defense teams. *Battle Cries and Lullabies* thoroughly documents these and other instances of female soldiering, and the author should be praised for proving that women have always been an integral part of combat.

Additionally, the wide focus of DePauw's book means that she also looks at the many non-combat roles played by women. DePauw writes about women as nurses during the Crimean War, as telephone operators in World War I, and as humanitarian workers during the 1994 genocide in Rwanda. Again, the author should be commended for demonstrating the multi-faceted roles played by woman in military history.

The principal weakness of *Battle Cries and Lullabies* is that it is more a collection of anecdotes rather than history; it is definitely not a comprehensive look at women in war. As surprising as it may be, DePauw devotes only one paragraph to the Gulf War, even though thousands and thousands of female soldiers deployed to Saudi Arabia and one, Army Major Rhonda Cornum, was decorated for "heroism and bravery beyond the call of duty." Additionally, DePauw's book is not balanced. She devotes some ten pages to women in prehistory (necessarily speculative, as no written record sur-

vives), five pages to discussing the "image" of Molly Pitcher (probably not a real person), but only seven pages to the Vietnam conflict.

Finally, the author's ideological perspective diminishes the overall value of the narrative. In her introduction, Professor DePauw asks: "What is a woman?" She answers the question by explaining that a woman "is any human who self-identifies as female, whatever her race, class, behavior, or physical appearance." Gender identity is a "social construct"—we should not link it to biological features. For those familiar with Rene Descartes's famous maxim, DePauw's assertion seems to be similar: "I think I am a woman, therefore I am one." Some readers will find this to be psycho-babble and, because DePauw's discussion of what it is to be a woman is not necessary to the telling of the story of women at war, it has a negative effect. Judge advocates who are interested in her views on lesbians, cross-dressing, transsexuals, and transvestites will find it in her book, but these are not positive features.

In her concluding pages, DePauw talks about the future of women in war. She hopes that "warriors for a new millennium" will be men and women who can "go into combat zones to implement nondestructive methods of conflict resolution."[4] In her opinion, soldiers of the future should focus their efforts on peace-making and peace-keeping; they should not train "to kill people and break things." While DePauw's views on the future of conflict are interesting, one wishes that she had devoted more pages to topics that will directly affect women in the near future. The author evidently believes that women should be on equal footing with men in the profession of arms. Consequently, she should have answered the following: Should all military occupations be open to women? Should the "combat exclusion" policy be discarded? Should the U.S. armed forces set a single gender-neutral standard for each job, and then ignore gender in filling those jobs? Should we open the infantry to women recruits who meet the same physical and mental standards required of males? To what extent should religious or cultural beliefs affect who gets to be a combat soldier? *Battle Cries and Lullabies* would be better if the author had addressed these and similar questions, particularly as they remain controversial both in and outside European and American military establishments.

Melissa Herbert's *Camouflage isn't Only for Combat* is a much more interesting book, if only because of its controversial conclusion: that

4. DEPAUW, *supra* note 2, at 300.

women will forever be "marginalized" in the American Army as long as the institution retains its inherently masculine character. As she explains in the introduction to the book, female soldiers seeking full acceptance in the Army face two barriers. Herbert identifies the first obstacle as the "institutional" barrier of combat exclusion, that is, no women in ground combat roles. The second hurdle she identifies as "interpersonal," with sexual harassment and individual discrimination falling into this category. According to Melissa Herbert, however, a third barrier is the greatest obstacle: "a gender ideology that views military service as the domain of men, and that affirms masculinity as one mechanism by which men become soldiers."[5] As long as the Army remains wedded to masculinity—as long as soldiering is about not only war, but being a man—women will not be fully integrated.

In exploring this theory, Dr. Herbert looks at "how women in the male-dominated world of the military manage sexuality and gender."[6] Do women in uniform, Herbert asks, "feel pressured to be more masculine" to prove that they are not incompetent or "weak?" Do they act "more feminine" to show that they are not a threat to male soldiers, or to demonstrate that they are not lesbians? In short, what camouflage do female soldiers use—consciously or unconsciously—to blend into the Army's male-dominated environment?

Dr. Herbert, a professor of sociology at Hamline University with prior service as a soldier, surveyed almost 300 women (active duty and veteran) in writing her book. Her analysis of their responses led her to conclude that the successful female soldier must be "feminine" enough to be accepted as heterosexual, yet "masculine" enough to be accepted as a soldier. She concludes that women who are perceived as "too feminine" were often seen as being unable to perform "masculine" tasks, and consequently incompetent. But being "too masculine" is no better, as it means running the danger of being perceived as something other than heterosexual, and male soldiers who viewed a women colleague as a lesbian did not respect her or treat her as an equal. Dr. Herbert concludes that this need for women soldiers to have an identity that balances maleness and femaleness—a need that results from the military's "masculine ideology"—ultimately penalizes women because it forces them to camouflage their behavior to "fit" into a male dominated military. Consequently, until the Army stops viewing itself as a mechanism by which men achieve manhood and define their sta-

5. HERBERT, *supra* note 1, at 6.
6. *Id.* at 13.

tus as males in America, Herbert believes that women soldiers will continue to face obstacles to full acceptance as soldiers.

The major problem with Dr. Herbert's view is that she sees the armed forces as one monolithic institution, when it is not. Everyone who has spent even a short time in uniform recognizes that there are considerable "cultural" differences between the Army, Navy, Air Force, and Marine Corps, and each approaches gender-related issues differently. Herbert takes a similar view of each service, and this is also an error. The Army's many branches, for example, are not unified in their opinions on women-related issues. Consequently, while her views on gender and sexuality might be valid when applied to the infantry or armor branches, they have virtually no applicability to the Army Medical Department, personnel service organizations like the Finance or the Adjutant General's Corps, or combat support branches like the Signal Corps or Transportation Corps.

Women now serve routinely as senior NCOs and as company, battalion, and brigade commanders. The number of female general officers continues to increase. Herbert's view of the Army as a hostile, testosterone-laden institution certainly has no applicability to The Judge Advocate General's Corps, where the prevailing view at all levels is that female and male judge advocates are basically interchangeable when it comes to duty assignments. In short, Dr. Herbert's views may not be applicable to some Army institutions. But, to the extent that female soldiers are not yet permitted to serve in direct ground combat roles, and consequently are disadvantaged in competing for higher rank and responsibility, Dr. Herbert's perspective is worth examining.

A second criticism is her view that there is something wrong with the Army being a place where young men define their masculinity—or, as she calls it, a "finishing school" for men. Just as women struggle to find their identity, so too do young men. Some sociologists argue that the rite of passage for men in America was always military service and, that when the draft was abolished, the unintended effect was to deprive young men of a way to "grow up" from boys to men. There is nothing wrong with the Army providing young men a way to learn how to be men—to discover what it means to be a man, and thus to be more productive citizens. Allowing male soldiers to grow and mature as men, however, should not mean that female soldiers are deprived of self-esteem or made to feel they are second-class soldiers. There seems to be no reason that the Army as an

institution cannot accommodate both needs—and that the Army can also be a place for "girls" to grow into "women."

Women have always been a part of war, and always will be. As "knowing the client" is part of the judge advocate creed, it follows that every Army lawyer should seek to better understand the varied roles played by women in the past, and better appreciate how a male-dominated military affects women soldiers. Read *Battle Cries and Lullabies* and *Camouflage isn't Only for Combat.* Both thought-provoking books are a beginning to such an understanding.

A GLIMPSE OF HELL: THE EXPLOSION ON THE USS *IOWA* AND ITS COVERUP

REVIEWED BY MAJOR CHERYL KELLOGG[1]

> At 9:53 a.m. on April 19, the center gun in Turret Two, [USS *Iowa*] blew up. The fireball that surged from the open breach was between 2,500 and 3,000 degrees traveling at a velocity of 2,000 feet per second and at a pressure of 4,000[2] pounds. Forty-seven sailors were killed.
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> A botched investigation began mere hours after the explosion . . . . Evidence was literally tossed overboard. Material as big as two, 2700-pound projectiles simply vanished. Testimony was doctored. Test results were fabricated or misinterpreted. Supposedly reputable institutions turned out suspect autopsy reports and issued conclusions that were scorned by independent medical examiners. Pop psychology supplanted reality.[3]

The Navy began its investigation into the explosion on the battleship USS *Iowa* by appointing Admiral Richard Milligan as the investigating officer (IO). Captain Miceli, his technical advisor, Commander Swanson, his legal advisor, and the Naval Investigative Service (NIS) assisted him. Despite his mandate to determine the cause of the explosion, Admiral Milligan was specifically precluded from opining about the possible misconduct of deceased sailors.[4] Admiral Milligan, nevertheless, concluded that Gunner's Mate Clayton Hartwig intentionally caused the explosion. His report, as well as the NIS report, depicted Hartwig as a probable homosexual who placed a homemade bomb in the breech of a loaded sixteen inch gun to commit suicide because he was depressed over the breakup of a relationship with a fellow shipmate.

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1. United States Army. Written while assigned as a student, 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

2. CHARLES C. THOMPSON II, GLIMPSE OF HELL: THE EXPLOSION ON THE USS IOWA AND ITS COVERUP (1999).

3. *Id*. at preface.

4. *Id*. at 142.

A Glimpse of Hell by Charles C. Thompson II chronicles the events leading up to the explosion and the investigation that followed and spends 403 pages attempting to prove that the investigation was flawed. The title of Thompson's book explains his purpose: *A Glimpse of Hell: The Explosion on the USS Iowa and its Cover-up*. Thompson concludes that the Navy embarked on a vast cover-up of the cause of this incident and precipitated a smear campaign of Hartwig and his alleged paramour, Gunner's Mate Third Class Kendall Truitt, through intentional leaks to the media. Thompson began his investigation into this incident at almost the same time as the Navy. He devoted ten years to the project, reviewed over 25,000 documents, and conducted 143 personal interviews of survivors and family members of the deceased.[5] Thompson obtained much of the information he used from Freedom of Information Act requests to the Navy, and used the documents he received as the framework for the text. The amount of time and effort Mr. Thompson put into researching this subject and his passionate writing style indicate that he is truly committed to his thesis.

Although there are faults with aspects of *A Glimpse of Hell*, it is still a book worth reading. This review addresses the three strength's of the book: insights into the role of judge advocates, insights into leadership, and insights into the human dynamic. Following this discussion, this review addresses the two weaknesses in *A Glimpse of Hell*: lack of organization and lack of objectivity.

Judge advocates can learn a great deal about leadership and their role in avoiding a leadership disaster by reading *A Glimpse of Hell*. Judge advocate involvement from the inception of an investigation of this magnitude is crucial. Not only must the judge advocate participate; he must render sound advice and be the voice of reason. Commander Swanson, the legal advisor for Admiral Milligan, knew that potential evidence was being destroyed and potential witnesses were not being interviewed. Yet, he did nothing. When faced with numerous media leaks of often-erroneous information, he should have acted to stop the leaks. Additionally, Thompson asserts that both Admiral Milligan[6] and Captain Miceli[7] had conflicts of interest and, therefore, had an incentive to conclude that the explosion was

5. *Id.* at 404.

6. *Id.* at 142 (stating that he knowingly participated in unauthorized firing experiments on board the *Iowa* while serving as the Battle Group Commander prior to the explosion).

7. *Id.* at 162 (asserting responsibility for the improper storage and reblending of the powder used in the 16 inch guns on board the *Iowa*).

not an accident. The legal advisor must be vigilant to these potential issues and act to limit any potential problem.

Commander Swanson's biggest problem, however, is that he not only advised the IO, he also performed the legal review of the investigation report at a higher command.[8] This clearly presented a conflict of interest for him and prevented an objective legal review. An objective review would probably have determined that Admiral Milligan had exceeded the scope of his authority when he concluded that the explosion was an intentional act by Clayton Hartwig, a conclusion precluded by his appointing orders.

Service members can gain valuable insight into leadership from reading *A Glimpse of Hell*. The most striking comparison of leadership styles is between Thompson's portrayal of Captain Seaquist and Captain Moosally. Captain Seaquist relinquished command to Captain Moosally over a year before the explosion. Captain Seaquist was well trained for a position as skipper of a battleship because he had commanded three other warships.[9] He had a reputation as a natural and gifted ship handler and his abilities, along with his affable personality, inspired confidence in his subordinates. According to Thompson, Captain Seaquist never attained the rank of Admiral because he was not a politician.[10]

In contrast, Thompson portrays Captain Moosally as the consummate politician. He received command of a battleship because of his political savvy and not his ship-handling abilities.[11] Captain Moosally almost rammed four Navy ships, mired the *Iowa* in mud, dumped 20,000 gallons of fuel oil in the harbor, and almost had a gunnery accident during the eleven months preceding the explosion.[12] Unlike Captain Seaquist, Moosally ruled with an iron fist and a scorched-earth mentality. Subordinates obeyed him out of fear, not respect. During his first speech to the officers of the *Iowa*, Captain Moosally bellowed: "I'm the coach, and you're the team. You can forget everything you learned under Larry Seaquist. I'm calling the plays now. If you guys are out to screw me, you can forget about it!"[13] He also distributed a twelve-page memorandum entitled "My manifesto," which prescribed a loyalty oath, leadership traits, and tactics.

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8. *Id.* at 285.
9. *Id.* at 25.
10. *Id.* at 34.
11. *Id.* at 35.
12. *Id.* at 58.
13. *Id.* at 45.

Regardless of whether Thompson's portrayal of these two leaders is factually accurate, he demonstrates two extreme leadership styles that should prompt readers to analyze what style is more effective and to examine their own leadership style.

In addition to exploring the cover-up theory, another strength of the book is the portrait Thompson paints of the survivors and family members' ordeal. *A Glimpse of Hell* is filled with insights into the human dynamic. Thompson's focus is primarily on the family and friends of Clayton Hartwig. He captures their anguish and anger as their son, brother, and friend was transformed from victim to homosexual to mass murderer. Thompson masterly weaves the angst felt by the families of those killed on the *Iowa* into the book and chronicles the camaraderie and support that developed among the families. Despite the publicity the Navy's theory received, most of the surviving relatives stood behind the Hartwigs in their attempt to clear their son's name. These subplots offer glimpses not into the hell the sailors faced, but into the human dynamic of caring and compassion.

Although Thompson states his thesis clearly in the subtitle, the book's organizational development is haphazard. It is impossible to state with certainty what occurred in Turret Two or what prompted Navy personnel to cover it up. Unfortunately, Thompson's tactic of sprinkling all possible explanations for the explosion and the ensuing cover-up throughout the text leaves the reader waiting for his theory of what occurred and why the Navy wanted to cover it up. Thompson engages in circular logic by asking the reader to conclude that a cover-up existed because he has provided so many possible reasons for it. This leaves the reader frustrated because it would have been possible to offer one plausible explanation.

The reader can piece together both the probable cause of the explosion and the probable reason for the cover-up by sifting through the book. The *Iowa* had been out of service for over twenty years when the Navy recommissioned it. The overhaul of the ship was incomplete, either because of fiscal or time constraints.[14] The powder, which was over forty years old, was improperly blended and stored.[15] The ship's gunners were undertrained and understaffed.[16]

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14. *Id.* at 26.
15. *Id.* at 51.
16. *Id.* at 67.

Based on the Navy's subsequent tests[17] and actions,[18] the probable scenario emerges. The gunner, untrained and inexperienced, rammed the powder, volatile because of improper blending and storage, into the gun too fast causing the powder to ignite prior to the closing of the breech. The probable theory behind the cover-up, besides simply the self-preservation prospective, is the political ramifications of an accident of this magnitude on the already controversial battleship program. The political ramifications coupled with the embarrassment of admitting that the four recommissioned battleships were floating time bombs fostered an atmosphere in which truth was a victim.

Although Thompson thoroughly researched this book, his presentation of the material leaves the reader constantly reviewing previous sections to keep track of its characters. He does not describe the events chronologically. Instead he orders the book primarily by the interviews he conducted. The large number of people involved, and the need to determine when a particular action or inaction occurred, make his theory difficult to follow to a logical conclusion. The reader would have benefited if Thompson had included a cast of essential characters, along with a brief synopsis of their significance.

Additionally, a list of important dates and their significance would help the reader flush out the cover-up theory. The intentional cover-up theory depends on the information possessed and the timing of actions taken by the Navy. A chronological listing of information is imperative for a reasoned opinion that an intentional cover-up existed, as well as for determining when it began, and who was aware of it. Without dates listed in chronological order, it is impossible to determine when the homosexual theory emerged. At least initially, it is possible to look at the Navy's actions in the light most favorable to the Navy and theorize that it conducted a thorough investigation. Consequently, determining when the homosexual theory emerged is critical in delineating the onset of the cover-up.

Another theme throughout *A Glimpse of Hell* is that the media coverage aided the Navy's cover-up attempt. Through intentional leaks, the Navy used the news media to perpetuate the theory that Clayton Hartwig

17. *Id.* at 235.

18. *Id.* at 209 (replacing all the powder on board the *Iowa* with powder that had not been stored on barges). *See also* David Evans, *Navy Aplogozies for Cockamamie Story*, CHI. TRIB., Oct. 19, 1991, at E12 (painting a yellow caution stripe next to the rammer handle on the 16 inch guns).

was a homosexual to support its conclusion that he, and not defective powder or lack of training, caused the explosion. Thompson takes the media to task for its acceptance and subsequent reporting of this theory. He implies that the intensity of the media coverage had more to do with the allegations of homosexuality than the forty-seven sailors who lost their lives. He lambastes the media for losing its objectivity, particularly when the reporters disbelieved the Navy's theory. He attributes one reporter as having said, "You have to report the fact that NIS is doing an investigation, even if it's a lie, because it's news."[19]

Unfortunately, Thompson is also guilty of losing his objectivity. He denigrates the Navy at every opportunity, not only for its handling of the investigation, but for its politicism as well. Although Thompson is a former Navy officer, he makes subtle references in the preface of the book to absurdities he experienced during his own training in 1966.[20] He depicts practically every senior officer in the Navy as a politician more interested in saving his career than telling the truth or doing the right thing.

Furthermore, Thompson appears to lack objectivity because he characterizes individuals that support his theory as outstanding sailors, clearly knowledgeable in their jobs, and upstanding individuals. He characterizes those individuals who didn't support his theory as terrible sailors and incompetent leaders. It appears from his interview list that he failed to interview many of those individuals that may have disagreed with his assessment of the conduct of the investigation or the cause of the explosion. It is simply incredible that almost the entire crew of the USS *Iowa* at the time of the explosion was inept, or that almost all senior leadership in the Navy participated in an intentional cover-up. Yet this is how Thompson portrays it. Perhaps Thompson is right in his assumption that the media gave this story so much play because of its prurient aspects. Perhaps his years as a producer for *60 Minutes* or subsequent instances where the Navy has shown a propensity for covering up other incidents have colored his views.

Overall, Thompson achieves the purpose of his book, despite flaws in his methodology. Readers of *A Glimpse of Hell* will find it hard to come away unpersuaded that: Clayton Hartwig did not commit suicide by inten-

19. THOMPSON, *supra* note 2, at 215.

20. *Id.* at 10 (indicating that while he was a student at the Naval Amphibious Warfare School, he had to memorize things such as how many direct hits by 16 inch high explosive shells could demolish a reinforced bunker when the Navy had not battleships armed with 16 inch guns on active duty).

tionally blowing up Turret Two on the USS *Iowa*, the Navy's assertion that he committed this act while depressed because of a failed homosexual relationship is absurd, and the Navy promulgated this theory to cover-up the real cause of the explosion. Readers will appreciate the true tragedy of this incident. Forty-seven men died, Clayton Hartwig was made the scapegoat of the Navy's bureaucracy, and the 1500 survivors of the accident were made victims when they should have been made heroes.[21]

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21. *Id.* at 367 (comments by Captain Moosally during his change of command ceremony on 4 May 1990).