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Contemptuous Speech Against the President

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During the Clinton Administration, a number of military officers have been disciplined for making disrespectful comments about President Clinton. Early in the Clinton presidency an Air Force General was fined, reprimanded, and forced into early retirement for referring to the President as “‘gay-loving,’ ‘womanizing,’ ‘draft-dodging,’ and ‘pot-smoking,’” during an Air Force banquet speech.¹ Three years later, another Air Force general was reprimanded for telling an inappropriate joke about President Clinton during a speech at an Air Force base in Texas.² More recently, two Marine Corps officers were administratively punished for published letters to newspapers that were disrespectful to the President,³ and military officials warned the remainder of the Armed Forces against engaging in similar misconduct.⁴

President Clinton is not the only chief executive to have been the object of public criticism by individual members of the Armed Forces. Indeed, the President stands in good company. History shows that members of the military have been prosecuted for openly criticizing Presidents Lincoln, Wilson,

Coolidge, Roosevelt, Truman, and Johnson. In the early 1970s, Army officials considered, but declined, criminal action against an officer for exhibiting a bumper sticker that read “Impeach Nixon.”⁵

The current prohibition against contemptuous speech directed against the President is contained in Article 88 of the Uniform Code of Military Justice (UCMJ). From its earliest days, this military prohibition has been a mechanism to ensure the foundational cornerstone of our Republic that military power is subordinate to the authority of our civilian leadership.⁶ Additionally, like other punitive articles that criminalized disrespect and insubordination to military superiors,⁷ this provision of military law serves to enhance discipline and to protect the hierarchical system of rank within the military.⁸

Historical Background

The punitive article prohibiting contemptuous speech is rooted in the British Articles of War of 1765, which were mod-

1. John Lancaster, *General Who Mocked Clinton Set To Retire, Punishment Follows Remarks At Banquet*, WASH. POST, June 19, 1993, at A1.
2. Bryant Johnson & Jim Wolffe, *Air Force General Reprimanded For Joke*, NAVY TIMES, Sept. 9, 1996, at 11.
3. Rowan Scarborough, *Major Gets Punished For Criticizing President*, WASH. TIMES, Dec. 7, 1998, at 1 (noting that a reserve major who was transferred to non-drill reserve status received a letter of caution for calling the President “a ‘lying draft dodger’ and ‘moral coward’ and an active duty Marine major received a letter of caution for referring to the President as an ‘adulterous liar’ . . .”).
4. See *id.*; see also *Contemptuous Words*, WASH. POST, Oct. 22, 1998, at 24 (“The Military brass is now warning servicemen and women to stop demeaning their commander in chief in public comments.”).
5. Eugene R. Fidell, *Free Speech v. Article 88*, U.S. NAVAL INSTITUTE PROCEEDINGS, Dec. 1998, at 2. Courts have upheld the authority of an installation commander to forbid civilians from displaying bumper stickers that embarrass or disparage the commander in chief. *Ethredge v. Hall*, 795 F. Supp. 1152 (M.D. Ga. 1992), *aff’d* 56 F.3d 1324 (11th Cir. 1995).
6. EDGAR S. DUDLEY, *MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL* 343 (3rd ed. 1910) (discussing that Article 19 of the Articles of War “intended to enforce respect for the governing authorities of the United States, and of the State in which any officer or soldier is stationed”); John G. Kester, *Soldiers Who Insult The President: An Uneasy Look at Article 88 of the Uniform Code Of Military Justice*, 81 HARV. L. REV. 1697, 1715 (1968) (noting that in 1912 Brigadier General Enoch H. Crowder, the Judge Advocate General of the Army, testified before Congress that the article was “‘intended to be expressive of the principle of the subordination of the military authority to the civil.’”); Fidell, *supra* note 5, at 2 (Violations of the article “erode civilian control of the military . . .”); see ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 182 (1970) (“In the early days of our new nation the rationale behind Article 88 was an imminent fear . . . that the generals might pull a coup.”). *But cf.* Richard W. Aldrich, *Article 88 of the Uniform Code Of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1197 (1986) (“Fear of punishment under the Article will discourage certain thoughts and repress speech, thus resulting in a threat to stable government.”).
7. See, e.g., UCMJ art. 89 (West 1998) (disrespect toward a superior commissioned officer); *id.* art. 91 (insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer).
8. *United States v. Howe*, 37 C.M.R. 429, 437 (1967) (“The evil which Article 88 . . . seeks to avoid is the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States.”); Fidell, *supra* note 5, at 2 (Article 88 violations “also threaten the hierarchical system *within* the military. Compliance with Article 88 is a baseline measure of obedience and loyalty; officers who violate it set a poor example.” (emphasis in original)); Kester, *supra* note 6, at 1734 (“An extra prop to the Army’s already formidable system of internal discipline . . .”).

ified and applied to the Continental Army during the Revolutionary War.⁹ The British Code had “provided for the court-martial of any officer or soldier who presumed to use traitorous or disrespectful words against ‘the Sacred Person of his Majesty, or any of the Royal Family.’”¹⁰ British military law also provided punishment for “any officer or soldier who should ‘behave himself with [c]ontempt or [d]isrespect towards the [g]eneral, or other Commander in Chief of Our Forces, or shall speak [w]ords tending to his [h]urt or [d]ishonour.’”¹¹

The Articles of War, originally adopted by the United States in 1775, punished “any officer or soldier who behaved himself with ‘contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor.’”¹² In 1776, with the creation of “The United States of America,” the article was modified to subject to court-martial “any officer or soldier who ‘presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled, or the

legislature of any of the United States in which he may be quartered’”¹³ Further prohibited was behavior that exhibited “contempt or disrespect towards the general, or other commander-in-chief of the forces of the United States, or speak words tending to his hurt or dishonor.”¹⁴ With the exception of an 1806 revision specifically enumerating the President and Vice President as prohibited objects of disrespect, this provision of military law remained substantially unchanged until the enactment of the UCMJ’s Article 88 in 1950 when the article was made applicable to officers only.¹⁵ Significantly, Article 88 was made applicable to the sea services, who had no comparable punitive provision and instead had prosecuted such misconduct as conduct unbecoming an officer and gentleman or under the general article.¹⁶

Historically, approximately 115 prosecutions under Article 88’s predecessors have been identified, the majority of which occurred during the Civil War and the two World Wars.¹⁷ During the Civil War, at least twenty-two Union courts-martial

9. *Howe*, 37 C.M.R. at 434; COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 565 (2d ed. 1920).

10. *Howe*, 37 C.M.R. at 434 (citation omitted). The First English article of war specifically prohibiting speech hostile to the king appeared in 1513 during the reign of Henry VIII. Kester, *supra* note 6, at 1702. The provision punishing disrespectful language against the Monarchy was eventually removed from British military law in 1955. *Id.* at 1708.

11. *Howe*, 37 C.M.R. at 434.

12. *Id.* (citation omitted).

13. *Id.*; The 1776 military provision was taken from the British Code by a committee that included, among others, Thomas Jefferson and John Adams. See Detlev F. Vagts, *Free Speech In the Armed Forces*, 57 COLUM. L. REV. 187 (1957), reprinted in (Bicent. Issue) MIL. L. REV. 541, 546 (1975).

14. *Howe*, 37 C.M.R. at 434-5; Kester, *supra* note 6, at 1709-10.

15. One legal commentator suggested that the Article was limited to officers “perhaps on the theory that only officers as leaders in the military could challenge the preeminence of civilian control.” Aldrich, *supra* note 6, at 1208. A second commentator opined that the limitation reflects the reduced effect on morale and discipline if enlisted personnel violate the prohibition. Major Michael A. Brown, *Must The Soldier Be A Silent Member Of Our Society?*, 43 MIL. L. REV. 71, 101 (1969).

[I]t is probable that the drafters of the Code realized that the detrimental effect upon morale and discipline because of an enlisted man’s contemptuous reference to high-level government officials would be much less than that of an officer, whom the enlisted men and subordinate officers have been taught to respect and obey.

Id. In 1956 the word “commissioned” was inserted before officer “for clarity.” 10 U.S.C.A. § 888, at 407 (West 1998). Because Article 88 applies only to commissioned officers, legal commentators are split as to whether enlisted service members may be charged under other articles for contemptuous words. Compare CHARLES A. SHANOR & L. LYNN HOGUE, *MILITARY LAW IN A NUTSHELL* 85 (2d ed. 1996) (“[S]imilar conduct by enlisted personnel and warrant officers can be sanctioned under other Articles such as Article 134 (service-discrediting conduct), Article 89 (disrespect), and Article 91 (insubordination).”) with Kester, *supra* note 6, at 1735 (“Of very questionable legality has been the Army’s occasional resort to the general article to punish enlisted men, whom Congress in 1950 exempted from Article 88, for statements disrespectful of the President.”); *id.* at 1735 n.239 (noting that military case law holds “that the general article cannot be used to avoid proving an essential element of a crime dealt with in a specific article of the UCMJ.”) and Brown, *supra* at 102-3 (noting that unlike an officer, “the enlisted soldier enjoys the same rights as his civilian brethren with regard to using contemptuous words towards high-level civilian authority.”) and ROBERT S. RIVKIN, *GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE’S GUIDE TO MILITARY LIFE AND LAW* 111 (1970) (“[I]f an enlisted man called the President an abusive name, it would probably amount to a deprivation of his constitutional free speech rights to punish him for it.”). In 1962, an Army private was convicted of violating Article 134 after using obscene language with respect to President Kennedy. Kester, *supra* note 6, at 1735 n.239.

16. *Howe*, 37 C.M.R. at 435-6; Kester, *supra* note 6, at 1718 n.122 (“[T]he [UCMJ], unlike the Articles of War, applies to the Navy and Coast Guard, the individual codes of these services previously did not specifically enumerate such an offense.”); *id.* at 1734 (noting that before 1951, the Navy prosecuted disrespectful or contemptuous words as conduct unbecoming or under the general article.). The Articles of War were applicable to Marine Corps personnel “when detached for service with the armies of the United States by order of the President.” *MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY* 4 (1917) [hereinafter MCM, 1917].

17. Kester, *supra* note 6, at 1720-1 (stating that of the 115 identified courts-martial “all but a handful occurred during the Civil War, World War I, or World War II, or the year or two following each of those conflicts”). With the single exception of a Civil War general of volunteers who was acquitted of contemptuous speech against a state governor, however, no record exists of “any officer above the rank of major . . . ever tried under this prohibition.” SHERRILL, *supra* note 6, 183; Kester, *supra* note 6, at 1723 & n.141.

were convened, but no records reflecting Confederate prosecutions have been discovered.¹⁸ The vast majority of the Civil War-era cases occurred as a result of comments made against President Lincoln and his administration.¹⁹ No prosecutions were initiated because of language directed solely at the Vice President, Congress, or at a state legislature.²⁰ A single court-martial resulting from language allegedly disrespectful to a state governor ended in an acquittal.²¹

Between the end of the Civil War and the beginning of World War I prosecutions for contemptuous and disrespectful speech were rare.²² The court-martial pace picked up considerably after the United States entered the war. Between 1917 and 1921 at least fifty-two courts-martial were convened under the then 62d Article of War, the vast majority of which involved contemptuous words directed against President Wilson.²³ When America demobilized at the end of the war, prosecutions for violating this article became almost nonexistent.²⁴

Similarly, as the United States approached and fought World War II with its largely conscript Army, the number of courts-martial for contemptuous speech rose exponentially. Between 1941 and the end of hostilities in 1945, thirty-one officers and soldiers were prosecuted.²⁵ With the exception of a single case

involving words directed against the Governor of the Panama Canal Zone, all courts-martial from that era concerned statements against the President.²⁶ After the war, only three pre-UCMJ prosecutions occurred under this article, all of which occurred in 1948 and involved soldiers performing occupation duty.²⁷

Since the UCMJ was enacted in 1950 only a single known court-martial has occurred pursuant to Article 88.²⁸ In *United States v. Howe*, an Army Lieutenant was convicted for carrying a sign during an antiwar demonstration that read “Let’s Have More Than A Choice Between Petty Ignorant Facists In 1968” on one side and “End Johnson’s Facist Aggression In Viet Nam” on the other side.²⁹ Lieutenant Howe did not participate in organizing the demonstration, but merely joined it after it began.³⁰ During the half-hour demonstration, Howe was off-duty, in civilian clothes, and no one at the demonstration knew of his military affiliation.³¹ Howe came to the Army’s attention only because a gas station attendant, who Howe had asked for directions, spotted the lieutenant’s sign and an Army sticker on his vehicle and subsequently notified the local military police.³²

The opinion of the United States Court of Military Appeals (COMA) in *Howe* is not only significant because it is the only

18. Kester, *supra* note 6, at 1721 & n.138. The Confederate Articles of War were virtually identical to the Union articles. *Id.* at n.138.

19. WINTHROP, *supra* note 9, at 565.

20. *Id.* at 565-6 (“No instance has been found of a trial upon a charge of disrespectful words used against Congress alone of the Vice-President alone, although in some examples the language complained of has included Congress *with* the President.”).

21. *Id.* at 566. This particular court-martial involved Brigadier General Paine “who accused the Governor of Kentucky and all his supporters of being ‘rebels.’” Kester, *supra* note 6, at 1723 & n.141. A World War I case involving a state governor ended in a dismissal of the charge. *Id.* at 1727. The soldier insulted the governor of Arkansas, but was stationed in Louisiana at the time. *Id.* (citing De Camp, CM 11488 (1918)).

22. Kester, *supra* note 6, at 1724 (“[T]he article prohibiting contemptuous language lay virtually dormant . . .”). Between 1889 and 1917, four courts-martial were convened with only three resulting in convictions. The acquittal involved a lieutenant who stated that President “Cleveland’s cabinet showed the kind of man he was and that Secretary of War Endicott was about as fit for his job as an office boy.” *Id.* At the time, contemptuous words against the Secretary of War was not prohibited. *Id.* at 1724 n.164.

23. *Id.* at 1724.

24. *Id.* For the next twenty years only one court-martial involving a violation of Article 62 was convened. In 1925 a private was convicted after stating “that President Coolidge ‘may be all right as an individual, but as an institution he is a disgrace to the whole God damned country.’” *Id.* (court-martial citation omitted).

25. *Id.* at 1729. In comparison to the World War I prosecutions, however, this provision of military law was used with far less frequency. *Id.*

26. *Id.* at 1731. The Canal Zone case resulted in an acquittal. *Id.* at 1731 n.216.

27. *Id.* at 1732. At least one of the courts-martial occurred in Korea; after which the accused unsuccessfully raised a “irresistible impulse” defense on appeal. Memorandum Opinions of The Judge Advocate General of the Army, 292 (1949-1950) [hereinafter MO-JAGA]. No Korean War-era prosecutions occurred. Kester, *supra* note 6, at 1732 (“[P]erhaps mainly because the [UCMJ], which confined its application to officers, took effect on May 31, 1951.”).

28. Fidell, *supra* note 5, at 2; see JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE (1974) (“Howe is the only person to have been prosecuted under this article in more than twenty-five years.”).

29. *United States v. Howe*, 37 C.M.R. 429, 432 (1967).

30. *Id.* at 433.

31. SHERRILL, *supra* note 6, at 178-9.

32. *Id.* at 179-80.

known prosecution under Article 88, but also because it is one of two published military appellate decisions addressing this area of military law.³³ Although records of other courts-martial under Article 88's predecessors exist and serve to provide some measure of guidance as to the parameters and meaning of the current article, the results and opinions of these earlier trials are not binding precedent,³⁴ and in many cases appear overly severe. Only the COMA's decision in *Howe* enjoys the full weight of binding legal authority.

Article 88

The current provision of military law criminalizing disrespectful criticism of the President, and other specified civilian officials and institutions, is contained in Article 88, UCMJ. That article provides:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

Generally, the law draws no distinction between language directed at the President in his official or private capacity,³⁵ and the truthfulness of the contemptuous comments is irrelevant as a matter of law.³⁶ The truth or falsity of the statement has been considered irrelevant because "the gist of the offense is the contemptuous character of the language and the malice with which it is used."³⁷ Also, the particular forum in which the words are rendered is not dispositive.³⁸ Further, it is generally not a defense that the accused did not intend his words to be contemptuous,³⁹ and to achieve a conviction the government does not even have to establish that anyone made privy to the contemptuous words knew of the accused's military status.⁴⁰

As noted earlier, with the enactment of the UCMJ Congress limited application of the offense to commissioned officers, which by definition would exclude certain warrant officers, enlisted personnel, cadets, and midshipmen of the military academies. One large and significant body of individuals that are not beyond the reach of this provision is retirees, however. Article 2(a)(4) provides that the military has UCMJ jurisdiction over "[r]etired members of a regular component who are entitled to pay." Albeit only one known court-martial of a military retiree under Article 88 or its predecessors exists,⁴¹ and courts-martial of retirees are rare and require special permission,⁴² no legal prohibition exists precluding application of Article 88 to these members of our land and naval forces.⁴³

33. The second case discussed Article 88's predecessor, the 62d Article of War. *United States v. Poli*, 22 B.R. 151 (A.B.R. 1943).

34. See *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (holding that one district court is not bound by the decision of another); *cf. Morris v. Siemens Components, Inc.*, 938 F. Supp. 277, 279 (D.N.J. 1996) ("[U]npublished state court opinions have no precedential value [in federal court] and are not controlling or binding in any way in the New Jersey State Courts as well."); *Terrell v. Dura Mech. Components*, 934 F. Supp. 874, 882 n.4 (N.D. Ohio 1996) ("An unpublished opinion of another jurisdiction is worth only what it weighs in reason."). Further, because the UCMJ has superceded the earlier Articles of War, pre-Code cases do not constitute binding precedent; such cases merely serve as interpretive guidance for the UCMJ. See *United States v. Allbery*, 44 M.J. 226, 228 (1996) (holding that *stare decisis* applies in the absence of a superceding statute). At least one legal commentator has criticized the military for its supposed propensity to follow pre-UCMJ charging practices. RIVKIN, *supra* note 15, at 100 (criticizing the military justice system's "approach to any statement traditionally punishable during the barbaric 'preconstitutional' days of World Wars I and II, when almost any critical remark could be punished as 'contemptuous' or 'disloyal'").

35. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 12c (1998) [hereinafter MCM]; see also WINTHROP, *supra* note 9, at 566 ("It would not constitute a *defence* to a charge under this Article, to show that the person was spoken of . . . not in his official but in his individual capacity" (emphasis in original)).

36. See MCM, *supra* note 35, pt. IV, para. 12c ("The truth or falsity of the statements is immaterial."); see also WINTHROP, *supra* note 9, at 566 (not a defense); Vagts, *supra* note 13, at 547 (no defense).

37. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 167, at 28-17 (1969) [hereinafter MCM, 1969]; accord MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 150, at 204 (1949) [hereinafter MCM, 1949].

38. See Aldrich, *supra* note 6, at 1219 ("Article 88 applies to contemptuous words "whether the audience is a squadron of military recruits or a classroom of civilian students . . . whether the words were spoken on-duty or off-duty, whether on a military installation or off."). The location where the words are uttered, however, should be a factor in determining whether the words were uttered in private or were part of a political discussion. *Cf.* MCM, *supra* note 35, pt. IV, para. 12c (recognizing limited exceptions for political discussions and private conversations).

39. *United States v. Howe*, 37 C.M.R. 429, 444 (1967). ("Neither the *Manual* nor the Code make 'intent' an element of the offense."); see also WINTHROP, *supra* note 9, at 566 ("[T]he mere fact that no disrespect was *intended* will not constitute a defense"). Winthrop notes, however, that the accused's intent may be an issue in two instances: (1) when the words are not contemptuous per se, but under the circumstances surrounding their use may make them so, and (2) during a political discussion when the accused does not intend his or her criticism of an official to be personally disrespectful. WINTHROP, *supra* note 9, at 566.

40. See, e.g., *United States v. Howe*, 37 C.M.R. 429 (1967); see also Aldrich, *supra* note 6, at 1219 ("[U]nder Article 88 an officer is culpable . . . whether the audience is aware of the speaker's military association or not"). No one at the demonstration in which Howe used contemptuous words against President Johnson, and which formed the basis of his Article 88 charge, was even aware that he was in the Army. See *supra* notes 31-32 and accompanying text.

What Is “Contemptuous” Speech?

The *Manual for Courts-Martial (Manual)* explains that language violating Article 88 may be contemptuous per se or may become so by virtue of the circumstances in which it is rendered.⁴⁴ Unfortunately, the *Manual* provides only limited guidance in defining what constitutes “contemptuous words” and under what circumstances neutral verbiage may become contemptuous.

When describing offensive language under this provision of law, Colonel Winthrop, in his seminal work *Military Law and Precedents*, offered as examples: “abusive epithets, denunciatory or contumelious expressions, [and] intemperate or malevolent comments”⁴⁵ Subsequent *Manual* descriptions of the offense parroted Winthrop’s description.⁴⁶ Additionally, although the legislative history is sparse on point, contemptuous words include at least “disrespectful” speech.⁴⁷ The Military Judges’ *Benchbook* posits that contemptuous “means insulting, rude, disdainful or otherwise disrespectfully attributing to another qualities of meanness, disreputableness, or worthlessness.”⁴⁸

Records of prior courts-martial suggest that this element of the offense has been easily satisfied. During the Civil War, convictions resulted for referring to President Lincoln as “a ‘loafer,’ a ‘thief,’ a ‘damned tyrant,’ and a ‘damned black republican abolitionist.’”⁴⁹ However, convictions were obtained for considerably less offensive comments such as “that Jeff Davis was as good a man as Abraham Lincoln,” and [for] criticizing Lincoln’s policies toward the Negroes and then sarcastically calling him ‘our worthy President.’”⁵⁰

Similarly, World War I and II-era convictions ran the gambit of what was considered contemptuous and disrespectful. Not surprisingly, Army personnel suffered convictions for referring to President Wilson as “a ‘grafter,’ ‘the laughing stock of Germany,’” and “a ‘God damn fool.’”⁵¹ Also, convictions occurred for referring to President Roosevelt as “a crooked, lying hypocrite,” “the biggest gangster in the world next to Stalin,” and “Deceiving Delano.”⁵² Officers and enlisted personnel were also convicted, however, for such innocuous comments as President Wilson is “either an anarchist or a socialist,” “that there were men in Germany just as smart as [President Wilson]”, and “Woodrow Wilson is no more a Christian than you fellows, as no Christian would go to war.”⁵³

41. See Kester, *supra* note 6, at 1726 (stating that in 1918, a retired Army musician was charged, but acquitted, of “calling [President] Wilson and the government subservient to capitalists and ‘fools to think they can make a soldier out of a man in three months and an officer in six’”). “This was the only case discovered in which a retired member of the was prosecuted for violation of the article.” *Id.* at 1726 n.183. However, in 1942 charges were preferred, but withdrawn, against a retired lieutenant colonel for giving “a speech impugning the loyalty of President Roosevelt” *Id.* at 1733 (stating that they were withdrawn because of publicity concerns).

42. “[E]xtraordinary circumstances” must exist before a retired member of the Army may be subject to court-martial. U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-2b(3) (24 June 1996). Before referral of charges, approval must be obtained from the Criminal Law Division, Office of The Judge Advocate General. *Id.*

43. Many retirees do not appear to be aware that they remain subject to the UCMJ, including Article 88. See, e.g., Paul Richter, *Military Personnel Warned Not To Denigrate Clinton*, ATLANTA J.-CONSTITUTION, Oct. 20, 1998, at A4 (stating that a recently retired Army colonel and retired Army lieutenant colonel working in the White House wrote newspaper articles criticizing President Clinton); John R Baer, Letters to the Editor, *I Returned Clinton’s Certificate*, ARMY TIMES, Oct. 12, 1998, at 36, 38.

44. MCM, *supra* note 35, pt. IV, para. 12b(4) (“That the words used were contemptuous, either in themselves or by virtue of the circumstances under which they were used.”). One legal commentator suggests that the contemptuous nature of the words is measured by “how the words are taken by those who see or hear them.” R. TEDLOW, UNITED STATES COURT OF MILITARY APPEALS DIG. 48 (Supp. 1971) (discussing *Howe*).

45. WINTHROP, *supra* note 9, at 566.

46. MCM, 1949, *supra* note 37, para. 150 (“[W]ords which are disrespectful or contemptuous in themselves, such as abusive epithets, denunciatory or contemptuous expressions, or intemperate or malevolent comments upon official or personal acts”); see MCM, 1917, *supra* note 16, para. 413, at 206; MCM, 1969, *supra* note 37, para. 167, at 28-16.

47. Aldrich, *supra* note 6, at 1198-9 (“One may infer that ‘contemptuous encompasses at least the term ‘disrespectful,’ because a 1956 amendment to Article 88 struck the word from the statute for being redundant.”) (citing 10 U.S.C.A. § 888 explanatory notes (1969)).

48. DEP’T OF ARMY, PAM 27-9, MILITARY JUDGES’ BENCHBOOK, para. 3-12-1(d) (30 Sept. 1996).

49. Kester, *supra* note 6, at 1722 (court-martial citations omitted).

50. *Id.*

51. *Id.* at 1724-5.

52. *Id.* at 1730-1. During World War II an Army lieutenant was convicted for referring to President Roosevelt as a “‘son-of-a-bitch’” SHERRILL, *supra* note 6, at 183-4.

53. Kester, *supra* note 6, at 1725.

Potential Defenses

Political Discussion

Historically, certain forms of political discussions, although critical of the President, have been considered beyond the reach of military law.⁵⁴ To prosecute an officer or soldier for engaging in a purely political conversation was considered “inquisitorial and beneath the dignity of the [g]overnment.”⁵⁵ This exception has not always been honored in practice, however.⁵⁶ Indeed, the political discussion defense has been interpreted so narrowly that commentators have questioned its very existence.⁵⁷

The current *Manual* continues this limitation on Article 88’s scope stating: “If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article.”⁵⁸ Unfortunately, the *Manual* fails to define the parameters of a “political discussion.”

Adding to this defense’s lack of clarity is the language of the *Manual* itself. Commentators have pointed out a number of ambiguities. For example, the political discussion exception implies that it applies only to actions by the official in an offi-

cial capacity, but how does a court distinguish between contemptuous words directed against an individual in his official versus personal capacity?⁵⁹ Frequently, the two capacities are inextricably intertwined. Additionally, can contemptuous speech *ever* be personally contemptuous of an elected body, that is, a legislature?⁶⁰

The available legislative history is equally unenlightening. With respect to the latter question, Brigadier General Enoch Crowder, Judge Advocate General of the Army, testified before a congressional subcommittee in 1916 concerning revisions to the Articles of War, including what was to become Article 62. When asked what he considered inappropriate criticism of Congress, General Crowder opined that some criticism was acceptable but an officer could be subject to court-martial if he “should come out in the public press and characterize Congress as an incompetent body, or a body which is not patriotic.”⁶¹ Under Crowder’s view, merely writing a letter to the editor of a newspaper expressing criticism of Congress’ ability to govern could be enough to generate court-martial charges; a low threshold indeed.⁶²

In the only known case of an Article 88 violation since the UCMJ was enacted, the accused unsuccessfully raised the political discussion defense. Unfortunately, the opinion of the court offers little in the way of clarification. In *United States v.*

54. WINTHROP, *supra* note 9, at 566 (“Thus an adverse criticism of the Executive expressed in emphatic language in the heat of a political discussion, but not apparently intended to be personally disrespectful, should not in general be made the occasion of a charge under this Article.”); LIEUTENANT COLONEL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 376 (1898).

[I]t has been held that adverse criticisms of the acts of the President, occurring in political discussions, and which, though characterized by intemperate language, were not apparently intended to be disrespectful to the President personally or to his office, or to excite animosity against him, were not in general to be regarded as properly exposing officers or soldiers to trial under this Article.

Id. See also MCM, 1917, *supra* note 16, para. 413, at 206; MCM, 1949, *supra* note 37, para. 150, at 203 (specifically included “the President or Congress”); MCM, 1969, *supra* note 37, para. 167, at 28-16 (“[A]dverse criticism of one of the officials or groups named in the article . . .”).

55. DAVIS, *supra* note 54, at 376. Winthrop attributes this opinion to General Holt, The Judge Advocate General of the Army. WINTHROP, *supra* note 9, at 566 n.66.

56. Kester, *supra* note 6, at 1722 (noting that during the Civil War “a private political discussion enjoyed no sanctity . . .”) (citing two courts-martial only one of which resulted in a conviction); *id.* at 1730 (“As during World War I, however, some [WWII] commanders tried men under the article for casual remarks and statements made in private conversations and political discussions.”).

57. Aldrich, *supra* note 6, at 1206 (“Article 88’s exception for political discussions has been interpreted so that it appears in fact to exempt nothing.”); *cf.* BISHOP, *supra* note 28, at 158. “[T]he Court of Military Appeals, though it as stated eloquently that servicemen are protected by the First Amendment, has in practice been very ready to find that their utterances are so dangerous as to be removed from that protection, at least where their speech was politically inspired.” *Id.* (discussing *Howe*).

58. MCM, *supra* note 35, pt. IV, para. 12c.

59. *Cf.* Aldrich, *supra* note 6, at 1201 (“This statement is incongruous because Article 88 only applies to ‘adverse criticism’ if it *is* contemptuous, and it is difficult to imagine how contemptuous words against an *individual* could ever be anything but ‘personally’ contemptuous.”); SHERRILL, *supra* note 6, at 189. In *Howe*, “the Court of Military Appeals decided to ignore Johnson the politician and treat him strictly as Johnson the Commander in Chief . . .” *Id.*

60. Aldrich, *supra* note 6, at 1201 (“How contemptuous words levied against a group can ever be ‘personally’ contemptuous is equally perplexing.”).

61. Kester, *supra* note 6, at 1717 (citing *Hearings Before a Subcomm. of the House Comm. on Military Affairs on an Act to Amend Section 1342 and Chapter 6, Title XIV, of the Revised Statutes*, 64th Cong. 1st Sess. 18 (1916)).

62. During World War I, a soldier was convicted of using contemptuous words against Congress merely because he stated that “the United States had no business to enter this war . . .” Aldrich, *supra* note 6, at 1200 (citing Flentje, CM 114159 (1918), and noting that the legal commentator found this conviction to be shocking).

Howe, the accused argued that the antiwar demonstration in which he displayed his placard constituted a political discussion.⁶³ Assuming for purposes of its analysis that the demonstration constituted a political discussion, the COMA summarily rejected the defense argument, holding that the political discussion language contained in the *Manual* “cannot be equated to the contemptuous language prohibited by this Article.”⁶⁴ As explained by one member of the board of review, “it was not the expression of Lieutenant Howe’s political views that constituted his offense, but his public display of contempt for his Commander in Chief.”⁶⁵

In reaching its decision, the court in *Howe* relied, in part, on an Army Board of Review decision from World War II that had interpreted the 62d Article of War.⁶⁶ In *United States v. Poli*, an Army Lieutenant was convicted of using contemptuous and disrespectful words against President Roosevelt after distributing leaflets that referred to the President as “Deceiving Delano” and characterized various Presidential statements as “moronic dribble” and “oral garbage.”⁶⁷ The accused argued that the statements in his leaflets were “merely political expressions” and that the “words ‘Deceiving Delano’ . . . were not coined by him but were copied from a newspaper and were merely employed as political terms by him, referring to the promises of the political party concerned which had not been fulfilled.”⁶⁸ The board quickly dispatched Poli’s political expression argument, holding that the language contained in the leaflets was “contemptuous and disrespectful per se.”⁶⁹

Taken together, these two cases indicate that the political discussion defense will fail as a safe harbor for any service member who uses words contemptuous on their face, even if uttered in heated political debate and even if the accused did not intend the words to be personally contemptuous. Further, unless the official and personal capacities of the official are clearly severable, the courts will treat the offensive words as personally contemptuous.

Private Conversations

To constitute a crime the contemptuous words must ordinarily have a public component to them.⁷⁰ As an element of an Article 88 offense, the *Manual* requires that the words “came to the knowledge of a person other than the accused.”⁷¹ No particular manner of dissemination is required; the words may be spoken, contained in a letter, displayed on a sign, or published in a book, newspaper, or leaflet.⁷²

The *Manual* also provides, however, that “expressions of opinion made in a purely private conversation should not ordinarily be charged.”⁷³ Indeed, in his treatise, Colonel Winthrop opined that investigating disrespectful language uttered during a private conversation as a potential violation of military law would be even more offensive than pursuing a criminal conviction for unintentionally disrespectful criticism of the President rendered during a political discussion.⁷⁴ Unfortunately, the *Manual*,⁷⁵ learned treatises, and reported case law provide no definitive standard for determining what constitutes a purely

63. *United States v. Howe*, 37 C.M.R. 429, 443 (1967). Because he did not intend the contemptuous words used to be personally disrespectful, the accused argued that the law officer should have given the panel a political discussion defense instruction. *Id.*

64. *Id.* at 444.

65. Brown, *supra* note 15, at 102 (citing remarks made in a speech before the Brooklyn Bar Association by Lieutenant Colonel Jacob Hagopian). *But cf.* SHERRILL, *supra* note 6, at 189 (“[T]he Court of Military Appeals decided to ignore Johnson the politician and treat him strictly as Johnson the Commander-in-Chief, a military man and not the top politician in the country.”)

66. *Id.* “Neither the legislative history of the [UCMJ] nor interpretation of comparable Articles of War lend themselves to any different interpretation.” *Id.* (citing *United States v. Poli*, 22 B.R. 151 (1943)).

67. 22 B.R. 151 (1943).

68. *Id.* at 156. Poli testified that he had no intention of ridiculing the President in his private or official capacity and that the leaflets’ contents were similar to newspaper articles and statements by various members of Congress. *Id.*

69. *Id.* at 161.

70. *See* Kester, *supra* note 6, at 1738 (“Implicit in the article has always been the idea that it deals exclusively with public utterances . . .”).

71. MCM, *supra* note 35, pt. IV, para. 12b(3).

72. WINTHROP, *supra* note 9, at 566 (“[M]ay be either spoken, or written, as in a letter, or published, as in a newspaper.”); DUDLEY, *supra* note 6, at 343 (“[W]hether spoken in public, or published, or conveyed in a communication designed to be made public . . .”); *see* *United States v. Howe*, 37 C.M.R. 429 (1967) (displayed on placard); *United States v. Poli*, 22 B.R. 151 (1943) (leaflets).

73. MCM, *supra* note 35, pt. IV, para. 12c.

74. WINTHROP, *supra* note 9, at 566 n.66 (“It would, ordinarily, be still more inquisitorial to look for the same in a private conversation.”); *see* Kester, *supra* note 6, at 1737 (“The least defensible of all prosecutions under the article . . .”).

private conversation for purposes of this Article⁷⁶ and under what circumstances privately spoken or written words should generate punitive action.

Historically, the private conversation defense has been construed narrowly. At least one Union soldier was charged—but later acquitted—based upon derogatory comments about President Lincoln contained in a personal letter.⁷⁷ During World War I, a letter written to a soldier's parents, that contained disrespectful language, was deemed a public statement because the soldier had submitted the letter to military censors, although he was required to do so.⁷⁸ A World War II-era Army officer was tried, but acquitted, for calling the President derogatory names during a conversation with civilian friends in their home.⁷⁹

Although the defense remains largely undefined, in its most restrictive form, the defense appears to permit at least private conversations with civilians⁸⁰ and a conversation between two service members of equal rank⁸¹ with no third party present.⁸² Further, the law of privileges should apply to appropriate conversations even if the confidential communications are disrespectful.

Nevertheless, under some circumstances literally applying such a restrictive standard can lead to absurd results. Should it be appropriate for two officers of equal rank, who are friends of long-standing, to be permitted to engage in a private conversation on one day, but find themselves subject to court-martial the next day merely because one has been promoted sooner than the other? Under such circumstances, no violation of Article 88 should be found, suggesting that permissible private conversations should extend to conversations between service members of *relatively* equal rank, who possess some form of personal relationship.

Even if a conversation is considered private, not all such conversations are, or should be, beyond the Article's reach. Significantly, the language used in the *Manual* is permissive rather than mandatory. It only provides that private conversations "should not ordinarily" be charged; no absolute prohibition against charging exists.⁸³ In cases when no long-standing personal relationship between the conversing parties exists and/or the contemptuous words are unsolicited and unwelcome, prosecution may be appropriate.⁸⁴

75. Because the *Manual* provides both a political discussion defense and a private conversation defense, it should be safe to assume that a private conversation need not be limited to political discussions; otherwise the two terms would be redundant.

76. See Vagt, *supra* note 13, at 572 ("[T]he delineation between [private and public pronouncement] has not been clearly worked out . . .").

77. Kester, *supra* note 6, at 1722.

78. *Id.* at 1726 (citing Coomba, CM 134107 (1919)).

79. *Id.* at 1730.

80. WINTHROP, *supra* note 9, at 566 ("In a case of spoken words, it will also be a material question whether they were uttered in a private conversation or in the presence of officers or enlisted men."); see Kester, *supra* note 6, at 1738 (stating that private letter to parents should not be prosecuted); Vagt, *supra* note 13, at 572 (stating that a conversation with "family and friends" should be considered private); cf. Kester, *supra* note 6, at 1722 (stating that a Civil War soldier who wrote personal letter that was critical of President Lincoln was acquitted); *id.* at 1726 (noting that the conviction of World War I-era soldier who wrote letter to his mother containing disrespectful language against the President was disapproved); *id.* at 1730 (noting that a World War II officer who made disrespectful remarks about the President while engaged in conversations with civilian friends in their home was acquitted).

81. Communicating the offensive words in the presence of military inferiors is merely an aggravating circumstance of the offense rather than serving to define it, further suggesting that there can be no private conversation among military members of different rank. Winthrop, *supra* note 9, at 566 ("And any disrespect will be aggravated by being manifested before inferiors in rank in the service."); see MCM, 1969, *supra* note 37, para. 167, at 28-16 ("[T]he utterance of contemptuous words of this kind in the presence of military subordinates, would constitute an aggravation of the offense."); cf. Kester, *supra* note 6, at 1726 n.185 (noting that a World War I private was court-martialed for criticizing President in conversation with his non-commissioned officer).

82. The term "in the presence of officers or enlisted men" used by Winthrop suggests the presence of more than the two principals to the conversation. See Kester, *supra* note 6, at 1724. In 1925, a soldier was convicted when his conversation with a friend in which he criticized President Coolidge was overheard by a third party. *Id.* The language of the 1969 *Manual*, however, upon which Article 88 was based, does not limit purely private conversations to only two parties, suggesting that a conversation may still be private if conducted within a small group of service members of equal rank. MCM, 1969, *supra* note 37, para. 167, at 28-16; cf. Kester, *supra* note 6, at 1738 (stating that the Article should not extend to discussion among "a few barracks-mates . . .").

83. See Aldrich, *supra* note 6, at 1206 & n.110 ("[E]ven words spoken in a private context *could* be charged." (emphasis in original)).

84. Cf. *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) (affirming the conviction for communicating indecent language despite freedom of speech defense and stating: "The conduct of an officer may be unbecoming even when it is in private . . ."); *United States v. Gill*, 40 M.J. 835, 837 (A.F.C.M.R. 1994) (holding that the First Amendment right to freedom of speech does not protect unwanted comments of a sexual nature from a charge of communicating indecent language even if communicated in a private setting). To the extent a conversation between only two people is considered a private conversation, some court-martial precedent appears to exist suggesting that contemptuous words uttered to strangers can violate this military prohibition. See *MO-JAGA*, *supra* note 27, at 296 (citing *United States v. Ravins*, JAGY CM 328976) (noting that a soldier convicted for "assert[ing] to a person . . . a stranger whose connections were unknown to him, sentiments to the effect that the President of the United States and all those supporting the government were murderers."); cf. Kester, *supra* note 6, at 1736 (stating that a World War II soldier convicted for shouting complaints about the President "to a passing sentry").

Further, private correspondence with members of Congress is not necessarily immune from prosecution. Title 10, United States Code, § 1034 provides: “No person may restrict a member of the armed forces in communicating with a Member of Congress. . . .” In enacting this statute, Congress sought to ensure that a service member could communicate with his Congressman or Senator “without sending [the] communication through official channels.”⁸⁵ Further, the military courts have indicated that they will take corrective action when it appears the military justice system has been used to retaliate against a service member “for having exercised a right fully protected by statute; a right deeply rooted in the American concept of representative government.”⁸⁶

A distinction exists between misusing the military justice system to retaliate against a service member for writing his Congressman and punishing a service member for illegal activity conducted through the forum of a letter to a member of Congress.⁸⁷ Indeed, § 1034 specifically cautions that a service member’s statutory right to contact his Congressman “does not apply to communication that is unlawful.”⁸⁸ Whether the unlawful communication addressed by the statute includes contemptuous words has yet to be determined. At least in theory, however, if a service member were to communicate to a member of Congress about a protected official or legislative body using contemptuous words, and the member became offended at such verbiage and turned the correspondence over to military

authorities, such communication could be pursued as violating Article 88.

Void For Vagueness

Generally, a statute is constitutionally infirm “when it fails to provide a person of ordinary intelligence with notice of its meaning and the conduct it prohibits.”⁸⁹ Legislatures must provide guidelines sufficient to “prevent arbitrary and discriminatory enforcement.”⁹⁰ The constitutional standards of review normally applicable in the civilian community are modified, and “substantial judicial deference is required,” in the military context,⁹¹ even when the challenged military restriction involves “a direct penalization of speech.”⁹²

Appealing his conviction, Howe argued unsuccessfully that Article 88 was void for vagueness. Seemingly conceding that the Article was no model of clarity,⁹³ the court nevertheless rejected the defense argument, reasoning that the word “contemptuous” is used in its ordinary sense in the *Manual* and satisfied constitutional requirements.⁹⁴

The decision in *Howe* was reinforced by the subsequent Supreme Court opinion of *Parker v. Levy*,⁹⁵ in which the Court articulated a deferential standard for review of military punitive articles against constitutional vagueness challenges. In *Parker* the accused, an Army physician in the rank of captain, was con-

85. *Brown v. Giles*, 444 U.S. 348, 359 (1980); *accord Secretary of Navy v. Huff*, 444 U.S. 453, 458 (1980).

86. *United States v. Schmidt*, 36 C.M.R. 213, 216 (C.M.A. 1966) (ordering all charges dismissed). In his more strongly worded concurring opinion, Judge Ferguson stated:

[W]hen [military justice] is perverted into an excuse for retaliating against a soldier for doing only that which Congress has expressly said it wishes him to be free to do, this Court would be remiss in its duty if it did not immediately condemn the effort to persecute him and stand as a shield between him and his superiors.

Id. at 217 (Ferguson, J., concurring).

87. *Cf. Moore v. Schlesinger*, 384 F. Supp. 163,166 (D. Col. 1974) (discussing a suit by an Air Force officer who alleged, in part, that he was relieved of his duties at the Air Force Academy in retaliation for letters he wrote to his congressman, which was dismissed after the plaintiff failed to prove an abuse of discretion).

88. 10 U.S.C.A. § 1034(a)(2) (West 1998).

89. *United States v. Helmy*, 951 F.2d 988, 993 (9th Cir. 1991) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *see General Media Comm., Inc. v. Cohen*, 131 F.3d 273, 286 (2d Cir. 1997); *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) (“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”).

90. *Parker v. Levy*, 417 U.S. 733, 752 (1973) (citation omitted); *see General Media*, 131 F.3d at 286 (holding that the government must “provide explicit standards for those who apply them.”).

91. *General Media*, 131 F.3d at 286.

92. *Id.* at 287 (citing *Parker*, 417 U.S. at 756-7).

93. *United States v. Howe*, 37 C.M.R. 429, 442 (1967) (“[W]e do not consider Article 88 so vague and uncertain on its face that it violates the due process clause of the Fifth Amendment.”).

94. *Id.* at 443.

95. 417 U.S. 733 (1974).

victed of Articles 133 and 134 after making public statements to African-American enlisted men encouraging them to refuse orders to Vietnam and referring to Special Forces soldiers as “liars and thieves and killers of peasants and murderers of women and children.”⁹⁶ On a writ of habeas corpus, Levy challenged the convictions on the basis that the punitive articles were void for vagueness.⁹⁷

Due to the differences between the military and the civilian sector, the Court held that “the proper standard of review for a vagueness challenge to the articles of the UCMJ is the standard which applies to criminal statutes regulating economic affairs.”⁹⁸ Looking at the conduct actually charged did the defendant “reasonably understand that his contemplated conduct [was] proscribed?”⁹⁹ In Levy’s case, the Court determined that he did have “fair notice from the language of each article that the particular conduct which he engaged in was punishable.”¹⁰⁰

Applying the *Parker* standard, at least one legal commentator has posited that *Howe* was wrongly decided. In *Parker*, the void for vagueness challenge to Articles 133 and 134 failed “because the significant case history surrounding each lent concreteness to their amorphous terms.”¹⁰¹ In contrast, “Article 88 has no similar case history.”¹⁰² Looking at actual court-martial convictions, the commentator concluded that “[n]o cognizable definition of ‘contemptuous’ emerges under Article 88 from these past cases.”¹⁰³

Further, in *Howe* the COMA rejected the vagueness argument by explaining that “contemptuous” was “used in the ordinary sense,” citing the dictionary definition of contemptuous in support of its position.¹⁰⁴ As pointed out by this commentator, however, the definition actually shed little light on the term’s meaning.¹⁰⁵

In *Parker*, the court did counter the vagueness argument, in part, by noting that military case law or other authorities had “at least partially narrow[ed] [the articles’] otherwise broad scope.”¹⁰⁶ In contrast, the unreported courts-martial convictions for Article 88 and its predecessors have cut a wide swath of what may constitute impermissible expression. It is questionable whether these courts-martial—or even the decision to charge certain utterances as contemptuous—would be decided similarly today. Further, only two military appellate decisions exist that interpret Article 88 or the comparable Article of War, and neither provide meaningful limitations on the scope of the Article.

Nevertheless, in light of *Parker*’s deferential standard of review and the judicial deference traditionally afforded to the military in this area, Article 88 should still pass constitutional muster. Further, regardless of any academic arguments to the contrary, the COMA’s decision in *Howe* stands as binding precedent for all military trial and intermediate appellate courts. It will remain binding until it is altered by the U.S. Court of Appeals for the Armed Forces, reversed by the Supreme Court, or legislatively changed by Congress.¹⁰⁷

96. *Id.* at 736-7. Captain Levy was also convicted of Article 90 for refusing an order to conduct dermatology training for Special Forces aide men. *Id.* at 736.

97. *Id.* at 740-1, 752.

98. *Id.* at 756.

99. *Id.* at 757 (citations omitted); *see* United States v. Hoard, 12 M.J. 563, 567 (A.C.M.R. 1981) (“Did he have fair notice from the language that the particular conduct in which he engaged was punishable?”); Aldrich, *supra* note 6, at 1218 (“This less rigorous ‘economic affairs’ standard, while not clearly defined by the Court, seems to hold that a statute is unconstitutionally vague only if the defendant against whom it is applies could not reasonably have known that his particular conduct was within the proscription of the statute.”)

100. *Id.* at 755.

101. Aldrich, *supra* note 6, at 1216 n.167.

102. *Id.* In contrast, Article 88’s “terms remain unclarified because of erratic application and a muddled history of expansion and contraction.” *Id.* at 1219.

103. *Id.* at 1200.

104. United States v. Howe, 37 C.M.R. 429, 443 (1967) Generally, it is an acceptable legal practice for courts to rely on dictionary definitions of terms to determine their meaning. New Jersey Dept. of Envir. Protection v. Gloucester Env. Mgt. Serv., 800 F. Supp. 1210, 1215 (D.N.J. 1992) (“In order to determine the ‘usual meanings’ of a particular term, courts have approved the use of a recognized standard dictionary.”). If reference to dictionary definitions of a challenged term fails to adequately clarify the term’s meaning, however, a criminal statute may be struck down as void for vagueness. *See, e.g.,* United States v. Poindexter, 951 F.2d 369, 378 (D.C. Cir. 1991) (“‘Vague terms do not suddenly become clear when they are defined by reference to other vague terms.’” (citation omitted)).

105. Aldrich, *supra* note 6, at 1199. The referenced definition defined contemptuous as “manifesting, feeling or expressing contempt or disdain,” and further defined contempt as “the act of despising or the state of mind of one who despises . . . the condition of having no respect, concern, or regard for something . . . the state of being despised.” *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 491 (1981)). Under this definition, the Article would be limited to instances when a service member exhibited *no* respect, but in prior courts-martial the military has applied a considerably more liberal standard of what constituted contemptuous words. *Id.* at 1199-1200 (citations omitted).

106. *Parker*, 417 U.S. at 752.

Freedom of Speech

The First Amendment to the United States Constitution prohibits Congress from making any law that abridges the freedom of speech. Of all the forms of speech protected by the First Amendment, the most prized form is political speech.¹⁰⁸ Because of the unique mission and needs of the Armed Forces, however, civilians enjoy a greater degree of constitutional protection of this right than do service members.¹⁰⁹ Accordingly, courts will subject military laws restricting speech to a more deferential constitutional review than comparable civilian laws would experience.¹¹⁰ Additionally, where, as here, a statute is challenged that was enacted under Congress' "authority to raise and support armies and make rules and regulations for their governance," judicial deference to the military "is at its apogee."¹¹¹

Surprisingly, only two accused raised freedom of speech as a defense during their courts-martial for disrespectful or contemptuous speech are known to have raised freedom of speech as a defense.¹¹² The first accused to raise the defense was Army Private Hugh Callan, who was court-martialed and convicted for stating: "The President of the United States is a dirty politician, whose only interest is gaining power as a politician and safeguarding the wealth of Jews"¹¹³ His second conviction was premised on the comment that "President Roosevelt and

his capitalistic mongers are enslaving the world by their actions in Europe and Asia, by their system of exploiting."¹¹⁴

Callan's freedom of speech defense was unsuccessful before the Army court. Indeed, "the reviewing judge advocate was offended that such a claim should even be raised."¹¹⁵ Subsequently, Callan was ordered released after filing a writ of habeas corpus based on jurisdictional grounds, but this decision was reversed on appeal.¹¹⁶ The United States Court of Appeals for the Fifth Circuit disdainfully noted Callan's freedom of speech argument,¹¹⁷ but was not required to address it.

In *Howe*, the accused posited that Article 88 violated his First Amendment rights.¹¹⁸ Reviewing the long history of this military prohibition—a prohibition "older than the Bill of Rights, older than the Constitution, and older than the Republic itself"¹¹⁹—Congress' repeated enactment of a substantially identical military prohibition since the American Revolution, and the application of the First Amendment to restrictions on the freedom of speech, the court rejected Howe's argument.¹²⁰ The COMA analyzed Howe's Article 88 conviction using the clear and present danger doctrine, which asks "whether the words used are used in such circumstances and are not [of] such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹²¹ That evil in the Article 88 context is the "impairment

107. *United States v. Allbery*, 44 M.J. 226, 228 (1996).

108. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 13-3(N)(3), at 471 (3rd ed. 1992) (citations omitted). Presumably, this societal value is reflected in the "political discussion" exception to Article 88. In contrast, several forms of speech receive no First Amendment protection. *Id.* (citing obscenity, fighting words, and defamation); see *Parker*, 417 U.S. at 759 (holding that in the military, speech that "undermine[s] the effectiveness of response to command" is not constitutionally protected) (citing *Priest*, 45 C.M.R. at 344).

109. *Parker*, 417 U.S. at 758 ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.") *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) ("The need for obedience and discipline within the military necessitates an application of the First Amendment different from that in civilian society."); SCHLUETER, *supra* note 108, at 473 ("Members of the armed forces, by virtue of their status as public employees and the special needs of the military, do not enjoy the degree of protection that the First Amendment affords civilians."); see *Blameuser v. Andrews*, 630 F.2d 538, 542 (7th Cir. 1980) ("As an officer in the military, the plaintiff would be required to accept certain limitations on First Amendment rights he would enjoy as a civilian.").

110. *General Media Comm. Inc. v. Cohen*, 131 F.3d 273 (2d Cir. 1997).

111. *Id.* at 283 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

112. *Kester*, *supra* note 6, at 1731-2.

113. *Sanford v. Callan*, 148 F.2d 376 (5th Cir.), *cert. dismissed*, 326 U.S. 679 (1945).

114. *Id.*

115. *Kester*, *supra* note 6, at 1732 & n.221 (citing *Callan*, CM 223248 (1942)).

116. *Callan*, 148 F.2d at 376.

117. "His brief bristles with his idea that he should be permitted to denounce the [g]overnment and lend aid and comfort to the enemies of the Republic in time of war, and that such conduct is one of his freedoms." *Id.* at 377. The court-martial had also convicted Callan of uttering a number of disloyal statements. *Id.* at 376-7.

118. *United States v. Howe*, 37 C.M.R. 429, 434 (1967).

119. *Id.*

120. *Id.* at 434-8.

of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States.”¹²² Because the United States was engaged in combat operations in Vietnam at the time of Howe’s use of contemptuous words against President Johnson, the court easily found “a clear and present danger to discipline within our Armed Forces”¹²³

One question raised and left unanswered by the COMA’s opinion in *Howe*, is whether the same clear and present danger to discipline would exist if Lieutenant Howe had used contemptuous words against the President when the country was enjoying a period of peace. To the extent earlier courts-martial and modern-day administrative sanctions against service members overly critical of President Clinton have any precedential value, as a matter of practice Article 88’s application is not limited to periods of hostilities. Further, the realities of modern warfare, in which American military units may be required to deploy into combat at a moment’s notice, and the plethora of service members who stand on the brink of harm’s way in places like Kuwait, Bosnia, and Korea, counsel against such a narrow application of the law.

Conclusion

In the fictional movie classic *Seven Days in May*, senior members of the Armed Forces planned a military take-over of the government in response to unpopular policy decisions by the President. Although it is certainly inconceivable that America’s military forces would ever realize the fears of some of our Founding Fathers and attempt a *coup*, contemptuous public pronouncements by disenchanted members of the military can disrupt the orderly functioning of government and undermine

popular support for public policies that effect both national security and the governance and use of the Armed Forces. Article 88 serves as a mechanism for precluding such disruptive conduct by ensuring military subordination to civilian authority.

Article 88 also serves to enforce discipline within the military. The President is more than just another politician. He is the Commander-in-Chief, and as such, is entitled to no less protection under the UCMJ than the most junior officer or noncommissioned officer who suffers disrespect at the hands of an insubordinate private.¹²⁴ Indeed, by virtue of his superior position, the President is entitled to the highest degree of obeisance.

Despite its legitimate and laudable purpose, history has shown that Article 88 possesses the potential of being applied in an uneven and heavy-handed manner. The excesses of the past, ambiguous terms and paucity of modern interpretative case law, makes this concern a legitimate one for both service members and military practitioners. That only a single court-martial has occurred since the enactment of the UCMJ, however, indicates that modern practice is to prosecute Article 88 sparingly, addressing misconduct at the lowest appropriate level.

Albeit passing minimal constitutional requirements, Article 88 continues to retain an element of ambiguity. As one former active-duty military practitioner has recently noted: “Article 88 requires line-drawing. Subtle differences of language, tone, setting, and audience may put a case over the line.”¹²⁵ Judge advocates need to beware of this punitive provision’s history, criticism, limitations, and narrow exceptions, to intelligently advise their clients on where the line is, or needs to be, drawn.

121. *Id.* at 436 (citing *Schenck v. United States*, 249 U.S. 47 (1919)); accord *United States v. Hartwig*, 39 M.J. 125, 127 (C.M.A. 1994).

122. *Howe*, 37 C.M.R. at 437; cf. *Hartwig*, 39 M.J. at 128 (“In the military context, those ‘substantive evils’ are violations of the [UCMJ].”)

123. *Id.* at 438.

124. Cf. UCMJ arts. 89, 91 (West 1998) (stating that disrespectful language is punishable).

125. Fidell, *supra* note 5, at 2.

Getting the Fox Out of the Chicken Coop: The Movement Towards Final EEOC Administrative Judge Decisions¹

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Introduction

A federal employee who files an Equal Employment Opportunity (EEO) complaint can request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) administrative judge (AJ).² The AJ will hear the case and issue a *recommended* decision.³ The agency against which the complaint was filed then makes the *final* decision in the case, accepting or rejecting the AJ's recommended decision.⁴

The EEOC recently proposed changes to the regulations governing federal sector EEO complaints processing.⁵ Perhaps the most significant proposal was to make EEOC AJ decisions final, rather than mere recommendations to the agency.⁶ Congress has made similar proposals in draft legislation called the Federal Employee Fairness Act (FEFA), although none have yet passed muster.⁷

This article analyzes the movement to finalize EEOC AJ decisions. It first provides background information on the current federal sector EEO complaints processing system. It then discusses the latest proposals to give EEOC AJs final decision

authority. Next, it focuses on the EEOC's power to make such a change: are AJ final decisions within the EEOC's statutory authority? Finally, this article analyzes whether empowering AJs with final decision authority is good policy.

This article concludes that the EEOC has the statutory authority to make AJ decisions final and that doing so is wise policy.

Background

Commission regulations govern the processing of federal employee EEO complaints. A brief discussion of these procedures is necessary to understand the proposals to make AJ decisions final.⁸

Federal employees who feel that they have been discriminated against must first file an informal EEO complaint with an agency EEO counselor.⁹ The EEO counselor tries informally to resolve the complaint in a manner suitable for all parties.¹⁰ If the complaint is not resolved at the end of the counseling

1. Evan Kemp, while testifying before Congress as Equal Employment Opportunity Commission Chairman during the Bush administration, described the conflict of interest created by having the very agency accused of discriminating involved in investigating and deciding the case. He likened the process to a fox "right there in the chicken coop, eating the chickens." H.R. REP. NO. 103-599, at 37 (1994) (quoting *Joint Oversight Hearing on the Federal Equal Employment Opportunity Complaint Process Before the Subcomm. On Employment Opportunities of the Comm. On Educ. and Labor and the Subcomm. On the Civil Serv. of the Comm. On Post Office and Civil Serv.*, 101st Cong. 3 (1990)).

2. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.108(b) (1998). The EEOC regulations governing the processing of EEO complaints filed by federal employees (or applicants for employment) are found in 29 C.F.R. pt. 1614. Persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, handicap, or reprisal may file such complaints. See 29 C.F.R. § 1614.103, § 1614.105.

3. See 29 C.F.R. § 1614.109(g).

4. See *id.*

5. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

6. See *id.* at 8598.

7. See, e.g., Federal Employee Fairness Act of 1997, H.R. 2441, 105th Cong., 1st Sess. (1997) (proposing to amend Title VII of the Civil Rights Act of 1964 to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees). See *infra* text accompanying notes 24-34 (discussing the FEFA).

8. This description of the EEO administrative process will be very basic. For a detailed description of every stage of the complaints process, accompanying time deadlines, and various machinations of the EEO process, see John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 190-96 (1995).

9. See 29 C.F.R. § 1614.105(a). The majority of counselors are agency employees who conduct counseling activities as a collateral duty. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FEDERAL SECTOR REPORT ON COMPLAINTS PROCESSING AND APPEALS BY FEDERAL AGENCIES FOR FISCAL YEAR 1997 18 [hereinafter EEOC 1997 REPORT].

10. See 29 C.F.R. § 1614.105(c).

period, the EEO counselor notifies the employee that he may file a formal EEO complaint.¹¹ If the employee “goes formal”¹² and the agency accepts the complaint,¹³ it is investigated by the agency.¹⁴ The agency forwards the completed investigation to the employee.¹⁵ The employee then decides either to request a hearing before an EEOC AJ¹⁶ or request the agency issue a final decision without a hearing.¹⁷ If requested, an AJ will hear the case and make a recommended decision to the agency.¹⁸ This decision will include findings of fact, conclusions of law, and an order for appropriate relief, if necessary.¹⁹

The agency then issues a final decision on the EEO complaint and adopts, rejects, or modifies the AJ’s recommended decision.²⁰ If the agency does nothing after sixty days, the AJ’s recommended decision becomes the final decision in the case.²¹ The employee may appeal the agency’s final decision to the EEOC²² or sue the agency in federal district court.²³

Proposals to Give EEOC AJs Final Decision Authority

Both Congress and the EEOC have proposed removing the figurative agency fox from the EEO complainants’ chicken coop. Agencies would no longer have the ability to issue final decisions on EEO complaints. The new and supposedly more friendly fox would be EEOC AJs, who would issue final decisions in EEO cases.

Federal Employee Fairness Act

Congress has repeatedly expressed dissatisfaction with the way federal sector EEO complaints are administratively processed.²⁴ Congress has proposed legislation, the FEFA, to address its concerns.²⁵ Although not enacted, the FEFA (or some form of the FEFA) has been introduced in every Congress since 1990.²⁶

11. *See id.* § 1614.105(d). The counseling period is normally 30 days from the date the employee brings the matter to the counselor’s attention. *See id.*

12. *See id.* § 1614.106.

13. Agencies are currently required to dismiss complaints or portions of complaints that fail to state a claim, that state a pending claim or one that has already been decided, that fail to comply with time limits, that are the basis of a pending civil action, that have been raised in a negotiated grievance procedure or in a Merit Systems Protection Board appeal, that are moot, when the complainant cannot reasonably be located, when the complainant has failed to provide requested information, and when the complainant refuses to accept a certified offer of full relief. *See id.* § 1614.107. Dismissals for refusal to accept a certified offer of full relief would be eliminated under recent proposed changes to 29 C.F.R. pt. 1614. *See Proposed Final Rule Revising the Federal Sector Discrimination Complaint Processing Regulations (to be codified at 29 C.F.R. pt. 1614) (proposed Dec. 28, 1998) (advanced copy at 8, on file with author).* The proposed changes would add two new grounds for dismissal. Agencies would have the ability to dismiss complaints that allege unfairness or discrimination in the processing of a complaint (“spin-off complaints”) and those that indicate a clear pattern of abuse of the EEO process. *See id.* at 9, 11.

14. *See* 29 C.F.R. § 1614.108.

15. *See id.* § 1614.108(f).

16. *See id.* § 1614.109.

17. *See id.* § 1614.110.

18. *See id.* § 1614.109(g).

19. *See id.*

20. *See id.* §§ 1614.109(g), 1614.110.

21. *See id.* § 1614.109(g).

22. *See id.* § 1614.401(a). Appeals are filed with and decided by one division of the EEOC, the Office of Federal Operations (formerly named the Office of Review and Appeals). *See id.* § 1614.403; ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE 10 (1998 ed.). The EEOC, which is made up of five members appointed by the President with advice and consent of the Senate, does not typically become involved in adjudicating EEO complaints. *Id.* at 11. It may take up a final decision of the Office of Federal Operations on reconsideration, but the decision to grant reconsideration is discretionary on the part of the EEOC. *See id.*; 29 C.F.R. § 1614.407. The overwhelming majority of requests for reconsideration are denied. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8601 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998). In 1997, the EEOC reversed an order on the merits on reconsideration in only seven cases (about four percent of cases). *Id.*

23. *See* 29 C.F.R. § 1614.408.

24. *See, e.g.,* H.R. REP. NO. 103-599, pt. 2, at 22 (1994) (“Congress has amassed a substantial record on the inequity of the current system for processing [f]ederal employee discrimination complaints.”).

25. *See* Federal Employee Fairness Act of 1997, H.R. 2441, 105th Cong., 1st Sess. (1997).

The FEFA would amend Title VII of the Civil Rights Act of 1964²⁷ to make administrative processing of federal employee discrimination claims more effective.²⁸ The current regulations governing EEO complaints processing are seen not only as ineffective, but also as biased against EEO complainants.²⁹ The federal agency (against which the EEO claim has been filed) conducts the initial investigation and issues the final decision in the case.³⁰ This procedure is viewed as a real as well as a perceived conflict of interest.³¹

The FEFA is designed to “take agencies out of the business of judging themselves.”³² It would accomplish this by transferring the “authority for determining the merits of EEO claims from the agencies to the EEOC, an independent agency with expertise in investigating and evaluating employment discrimination claims.”³³ The EEOC would be required to rewrite its complaints processing regulations to reflect this change in decision authority.³⁴

Proposed Changes to Federal Sector Complaints Processing Regulations

In 1995, then EEOC Chairman Gilbert Casellas initiated a review of the federal sector EEO complaints process.³⁵ A work-

ing group was established to determine the EEOC’s effectiveness in enforcing anti-discrimination statutes in the federal sector.³⁶ The working group recommended many changes to 29 C.F.R. part 1614, the federal sector EEO complaints processing regulations. Probably the most important recommendation (and the most controversial) was to make EEOC AJ decisions final.³⁷

In recommending this change, the working group expressed the same concerns that Congress did when proposing the FEFA. The primary concern was the “inherent conflict of interest” in allowing agencies to decide whether discrimination has occurred.³⁸ Agency involvement in this part of the complaints process is viewed as a “fundamental flaw” in the system.³⁹

The EEOC acted on several of the working group’s recommendations and issued a notice of proposed rulemaking revising 29 C.F.R. part 1614 to make AJ decisions final.⁴⁰ Under the revised regulations, federal agencies would no longer issue final-agency decisions accepting, rejecting, or modifying AJ recommended decisions.⁴¹ Final AJ decisions would be binding, unless the agency or the complainant appeals to the EEOC.⁴²

26. *See id.*; Federal Employee Fairness Act of 1995, H.R. 2133, 104th Cong., 1st Sess. (1995); Federal Employee Fairness Act of 1993, S. 404, 103d Cong., 1st Sess. (1993); Federal Employee Fairness Act of 1992, S. 2801, 102d Cong., 2d Sess. (1992); Federal Employee Discrimination and Equal Employment Opportunity Amendments of 1990, H.R. 5864, 101st Cong., 2d Sess. (1990).

27. Civil Rights Act of 1964 § 717, 42 U.S.C.A. § 2000e-16 (West 1999) (making it unlawful for federal departments and agencies to discriminate against applicants or employees on the basis of race, color, religion, sex, and national origin). The FEFA would also amend the Age Discrimination in Employment Act and the Rehabilitation Act. *See* H.R. REP. NO. 103-599, pt. 2, at 19; Age Discrimination in Employment Act, 29 U.S.C.A. § 633a (West 1999) (prohibiting age discrimination); Rehabilitation Act of 1973, 29 U.S.C.A. § 791 (West 1999) (prohibiting disability discrimination).

28. *See* H.R. REP. NO. 103-599, pt. 1, at 1.

29. *See Casualties of the Federal Equal Employment Opportunity Complaint Process, Joint Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv. and the Subcomm. on Employment Opportunities of the Comm. on Educ. and Labor, 102nd Cong. (1992).*

30. *See* Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.108, § 1614.110 (1998).

31. H.R. REP. NO. 103-599, pt. 1, at 25.

32. 138 CONG. REC. 7480 (1992) (statement of Sen. John Glenn).

33. *Id.* Under the FEFA, AJs and not agencies would issue the “findings of fact,” “conclusions of law,” and a “final order” in cases in which a hearing was requested. *See* H.R. REP. NO. 103-599, pt. 1, at 35.

34. *See id.*, pt. 2, at 13.

35. *See* FEDERAL SECTOR WORKGROUP, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, THE FEDERAL SECTOR EEO PROCESS . . . RECOMMENDATIONS FOR CHANGE I (May 1997).

36. *See id.*

37. *See id.* at 14-16. Other working group recommendations included allowing attorney fee awards for work done in the counseling stage, making training mandatory for agency investigators, giving AJs the authority to calculate attorney fee awards, applying a clearly erroneous standard of review to factual findings of AJs on appeal, eliminating the right to request reconsideration of appeal decisions, allowing complainants to move for class certification at any “reasonable point” in the complaint process, permitting AJs to decide complaints without a hearing in certain limited circumstances, and requiring agencies to establish alternative dispute resolution (ADR) programs. *Id.*

38. *Id.* at 15.

39. *Id.* at 7.

The EEOC received dozens of agency and public comments in response to its proposal to make AJ decisions final.⁴³ In response to agency concerns, the EEOC backed off its original proposal.⁴⁴ The EEOC has now proposed that AJs issue a “decision” after hearing and that *agencies* take final action on the complaint by issuing a “final order.”⁴⁵ If the agency’s “final order” does not fully implement the AJ’s decision (if the agency modifies or rejects it), the *agency* must file an EEOC appeal.⁴⁶

The EEOC believes that this new proposal responds to agency concerns while preserving the “functional goal” of AJ final decisions: “agencies will no longer be able to simply substitute their view of a case for that of an independent decision-maker.”⁴⁷ Under the proposal, agencies would not introduce new evidence or rewrite the AJ’s decision in the “final order.”⁴⁸ This change to the complaints processing regulations is scheduled to take effect ninety days from publication in the Federal Register.⁴⁹

Are AJ Final Decisions within EEOC’s Statutory Parameters?

Whether the EEOC can give its AJs final decision authority is first a question of statutory interpretation. Does the EEOC have the statutory authority to make this change to its rulemaking powers or is new legislation, such as the FEFA, required?

In response to the EEOC’s notice of proposed rulemaking, a number of federal agencies took the latter position.⁵⁰ They argued that Congress meant for federal agencies, and not the EEOC, to have the lead responsibility for eliminating discrimination in federal employment.⁵¹ Allowing AJs to issue final decisions would strip the agencies of the role assigned to them in the Civil Rights Act.⁵²

The EEOC disagrees. It believes it has the “broadest possible authority to restructure” the federal sector complaints pro-

40. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998). Other changes proposed by the EEOC include requiring agencies to make alternative dispute resolution available during the informal complaint process, permitting agencies to make “offers of resolution” to complainants (similar to offers of judgment under the Federal Rules of Civil Procedure), eliminating interlocutory appeals to the EEOC of partially dismissed complaints, giving AJs the authority to dismiss complaints during the hearing process, revising the class complaints procedures, revising the appeals process, and authorizing AJs to calculate reasonable attorney’s fees in cases where a hearing is requested. *Id.* at 8595-8602. These proposed changes have not generated nearly as much controversy as the proposal to give AJs final decision authority. See Proposed Final Rule Revising the Federal Sector Discrimination Complaint Processing Regulations (to be codified at 29 C.F.R. pt. 1614) (proposed Dec. 28, 1998) (advanced copy at 20, on file with author) [hereinafter Proposed Final Rule].

41. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598. A complainant’s right to choose between an AJ hearing or an immediate final agency decision without a hearing would remain unchanged under 29 C.F.R. § 1614.108(f). Agencies would continue to issue final decisions in cases in which the complainant elected not to have a hearing. See *id.* A complainant who elects a final agency decision without a hearing would still have an appeal right to the EEOC’s Office of Federal Operations. Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.401(a) (1998). Alternatively, he could file a civil action in federal district court within 90 days of receipt of the agency’s final decision. *Id.* § 1614.408(a).

42. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598.

43. See Proposed Final Rule, *supra* note 40, at 20. The majority of agencies opposed the change, and non-agency commenters overwhelmingly favored it. *Id.*

44. See *id.* Some agencies argued that the EEOC lacked statutory authority to make AJ decisions final. *Id.* Agencies also argued that the EEOC lacked the resources to handle any increase in hearing requests and that AJ decisions are lacking in quality and consistency. See *id.* at 20-21. One could speculate that the EEOC’s retreat from its proposal for AJ final decision authority stems more from politics and agency pressure than legal and practical concerns. A new EEOC Chairperson, Ida Castro, was confirmed in October 1998. Michael A. Fletcher, *New Opponent Against Discrimination*, NEWSDAY, Dec. 3, 1998, at A69.

45. See Proposed Final Rule, *supra* note 40, at 21. Agencies would take final action on the complaint within 15 days of receipt of the AJ decision. *Id.* Agency final orders would notify complainants whether the agency will fully implement the AJ decision and provide EEOC appeal rights. *Id.* at 22.

46. See *id.* The EEOC has proposed that agency appeals be filed simultaneously with the final order. *Id.* In certain cases, agencies will have to provide complainants with interim relief while the agency appeal is pending. See *id.* Complainant appeals would be filed within 30 days of receipt of the final action. See *id.* at 39, 62.

47. *Id.* at 21.

48. See *id.* at 22; Telephone Interview with Nicholas Inzeo, EEOC Deputy Legal Counsel (Feb. 19, 1999) [hereinafter Inzeo Interview].

49. See Proposed Final Rule, *supra* note 40, at 1. The proposed final rule is currently under review at the Office of Management and Budget and should be published in the Federal Register by mid-year. Inzeo Interview, *supra* note 48.

50. See Proposed Final Rule, *supra* note 40, at 20. While testifying before Congress as EEOC Chairman, U.S. Supreme Court Justice Clarence Thomas took the same view. See *Processing of EEO Complaints in the Federal Sector: Problems and Solutions, Hearing Before a Subcomm. of the House Comm. on Gov’t Operations*, 100th Cong. 51 (1987) (“I would challenge the statutory basis for . . . simply saying that our recommendations are binding when there is no statutory precedent.”).

51. See Memorandum from D. Michael Collins, Deputy for Equal Opportunity, Office of the Assistant Secretary of the Air Force, to Frances Hart, Executive Secretariat, Equal Employment Opportunity Commission 1 (Apr. 21, 1998) (on file with author) [hereinafter Collins Letter] (arguing that Congress meant for the agencies to be “primarily responsible for preventing discrimination in federal employment”).

52. See Civil Rights Act of 1964 §717, 42 U.S.C.A. § 2000e-16 (West 1999).

cess.⁵³ The resolution of this dispute would ultimately come from the Department of Justice⁵⁴ because the constitutional principle of the unitary executive prohibits federal agencies from suing one another.⁵⁵ Some background information is necessary, however, before the question of the EEOC's power to give AJs final decision authority can be addressed.

The EEOC and Private Sector Employment Discrimination

The EEOC was created by Title VII of the Civil Rights Act of 1964.⁵⁶ Congress intended that the EEOC "be the primary [f]ederal agency responsible for eliminating discriminatory employment practices in the United States."⁵⁷ Contrary to this strong mandate, the EEOC's original powers were actually quite weak. The 1964 Act limited the EEOC's enforcement authority to "informal methods of conference, conciliation, and persuasion."⁵⁸

The 1964 Act gave the EEOC authority to investigate charges of *private sector* employment discrimination, to determine whether there was probable cause to believe Title VII⁵⁹

had been violated, and to conciliate the claim.⁶⁰ It did not give the EEOC power to determine employer liability or to issue judicially enforceable orders.⁶¹ If the claim was not resolved,⁶² the EEOC issued a right to sue letter.⁶³ The employee was then entitled to pursue the claim in court.⁶⁴

Congress soon realized the EEOC needed more power. Despite the EEOC's "heroic" efforts in the fight against employment discrimination, the "machinery created by the Civil Rights Act of 1964" was simply inadequate.⁶⁵ The 1964 Act's scheme to eliminate private sector employment discrimination through voluntary compliance was "oversimplified"⁶⁶ and a "cruel joke" for those alleging discrimination.⁶⁷ Congress' failure to give the EEOC meaningful enforcement powers was a "major flaw," making Title VII "little more than a declaration of national policy."⁶⁸

Congress attempted to remedy this problem in the Equal Employment Opportunity Act of 1972.⁶⁹ Although both the Senate and House generally agreed that the EEOC's enforcement powers needed to be increased,⁷⁰ there was much debate over how to do so.⁷¹ Congress compromised by giving the

53. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8599 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

54. Telephone Interview with Nicholas Inzeo, EEOC Deputy Legal Counsel (Oct. 13, 1998) [hereinafter Inzeo Interview].

55. Executive power, created by Article II of the Constitution, is vested exclusively in the President. *See* U.S. CONST. art. II, § 1, cl. 1; *Myers v. United States*, 272 U.S. 52, 61-64 (1926). Federal agencies, including the EEOC, are part of the executive branch. If federal agencies were to sue one another, it would put the President in the "untenable position of speaking with two conflicting voices." 7 Op. Off. Legal Counsel 57, 64 (1983).

56. 42 U.S.C.A. § 2000e-4.

57. S. REP. NO. 92-415, at 4 (1972), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 413 (1972).

58. *Id.*

59. Title VII refers to the portion of the 1964 Act pertaining to employment discrimination. *See* 42 U.S.C.A. §§ 701-718.

60. *See* 42 U.S.C.A. § 2000e-5.

61. *See* H.R. REP. NO. 92-238, at 2 (1972), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 62 (1972).

62. The EEOC achieved conciliation in less than half of the cases in which reasonable cause to believe Title VII had been violated was found. *Id.* at 4.

63. *See* 42 U.S.C.A. § 2000e-5(f).

64. *See id.*

65. H.R. REP. NO. 92-238, at 3.

66. *Id.* at 8.

67. S. REP. NO. 92-415, at 8 (1972), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 413 (1972).

68. *Id.* at 4.

69. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending the Civil Rights Act of 1964).

70. *See* H.R. REP. NO. 92-238, at 3; S. REP. NO. 92-415, at 4.

71. The Labor Committees of both the Senate and House forwarded bills that would give cease and desist powers to the EEOC, but those proposals were ultimately rejected out of fear of creating an "overzealous" agency acting as "investigator, prosecutor, and judge." Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 64-66.

EEOC prosecutorial power, which is the ability to file suit against private employers once conciliation efforts fail.⁷² Even though the EEOC's powers were increased by the 1972 Act, the courts retained the role of ultimate fact-finder and adjudicator of private sector cases.⁷³

The Evolution of Federal Sector Equal Employment Opportunity

The Civil Rights Act of 1964 was meant to eliminate discrimination in employment; however, it did not originally apply to federal employees.⁷⁴ The first attempt to eliminate discrimination in federal employment came in an Executive Order of President Roosevelt in 1940.⁷⁵ Subsequent Presidents espoused similar policies against federal sector discrimination, which the Civil Service Commission (CSC)⁷⁶ was responsible for implementing.⁷⁷

By 1972, Congress had "significant evidence" that the policies against discrimination in federal employment were ineffective.⁷⁸ Specifically, women and minorities were denied access to federal jobs, the CSC's EEO process was "unduly weighted in favor of [f]ederal agencies," and remedies were inadequate

to deter discrimination.⁷⁹ Congress responded with a statute prohibiting discrimination in the federal sector, the Equal Employment Opportunity Act of 1972.⁸⁰

In addition to strengthening the EEOC's private sector enforcement power, the 1972 Act amended the Civil Rights Act of 1964 to make it applicable in the federal sector.⁸¹ The 1972 Act gave the CSC, rather than the EEOC, the job of coordinating and enforcing "all aspects of equal employment opportunity in the Federal workplace."⁸² The EEOC's role remained in the private sector. This changed in 1979 when the CSC was abolished and responsibility for federal sector EEO transferred to the EEOC.⁸³ For the first time, the EEOC was responsible for enforcing both private sector and federal sector equal employment opportunity.⁸⁴

When it took over the federal sector task from the CSC, the EEOC did not create a new system for EEO complaints processing. Instead, it merely adopted the procedures formerly used by the CSC.⁸⁵ Although the EEOC has made some revisions to its federal sector regulations since that time,⁸⁶ those regulations have kept final decision authority with the agencies.⁸⁷

72. *Id.*

73. See Equal Employment Opportunity Act of 1972 § 4 (amending § 706 of the Civil Rights Act of 1964). Congressional Republicans preferred a larger role for the courts because they were concerned about the EEOC's "image as an advocate for civil rights." White, *supra* note 71, at 64.

74. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

75. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 42 U.S.C.A. § 2000e-4, at 413 (West 1999), *and in* 92 Stat. 3781 (1978).

76. The CSC was the federal government's "master personnel agency," responsible for all aspects of federal personnel management. Stimson, *supra* note 8, at 205. In 1979, its functions were transferred to the EEOC and the newly created Merit Systems Protection Board, the Office of Personnel Management, and the Office of Special Counsel. See *id.* (citing Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978)).

77. H.R. REP. NO. 92-238, at 2 (1972), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 82 (1972). Congress also expressed a policy against federal employment discrimination. See Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 523 (1966). ("[It is] the policy of the United States to insure equal employment opportunities for [f]ederal employees without discrimination because of race, color, sex, or national origin.")

78. H.R. REP. NO. 103-599, pt. 1, at 23 (1994) (citing *Hearings on H.R. 1746: Equal Employment Opportunity Enforcement Procedures Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92nd Cong. (1971)).

79. *Id.*

80. *Id.*

81. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C.A. § 2000e-16 (West 1999)).

82. H.R. REP. NO. 103-599, pt. 1, at 23. The 1972 Act also gave federal employees the right to file a civil action in federal district court for a de novo review of discrimination claims. See 42 U.S.C.A. § 2000e-16(c).

83. See Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 42 U.S.C.A. § 2000e-4, at 413 (West 1999), *and in* 92 Stat. 3781 (1978).

84. The EEOC's roles in the private and public sector are very different and should not be confused. Although this article's sole focus is federal sector equal employment opportunity, a brief description of the EEOC's private sector role is necessary to examine the powers Congress gave to the EEOC in the 1964 and 1972 Acts. See *supra* text accompanying notes 58-64, 72-73 (describing EEOC's private sector role); *supra* text accompanying notes 16-22 (describing EEOC's federal sector role).

85. See Equal Employment Opportunity in the Federal Government, 43 Fed. Reg. 60,900 (1978) (codified at 29 C.F.R. pt. 1613 (1979)); see also COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 2 (1987) (explaining that the EEOC continued the CSC procedure of having agencies investigate and decide their own cases).

The EEOC's Statutory Authority

The legislation making Title VII applicable to federal employees, the 1972 Equal Employment Opportunity Act, should answer whether the EEOC has the power to make AJ decisions final.⁸⁸ A brief history of the 1972 Act is necessary in order to address this question of statutory interpretation.

The 1972 Equal Employment Opportunity Act—The 1972 Equal Employment Opportunity Act initially arose as the “Hawkins Bill” in the House of Representatives.⁸⁹ That bill gave the EEOC, rather than the CSC, the authority to enforce equal employment opportunity in federal employment.⁹⁰ The House Labor Committee emphasized that the EEOC was right for the job because of its expertise and because of the CSC’s conflict of interest in sitting “in judgment over its own practices and procedures.”⁹¹

During what was largely a debate over whether to give the EEOC cease and desist power for use in its private sector cases, the Hawkins Bill was amended by the “Erlenborn substitute.”⁹² The substitute gave the EEOC prosecutorial power in private

sector cases in lieu of cease and desist authority.⁹³ It did not address federal sector equal employment opportunity.⁹⁴ Title VII coverage for federal employees was essentially lost in the debate over how to strengthen the EEOC’s private sector enforcement power.⁹⁵ The Erlenborn substitute passed the House by a narrow margin.⁹⁶

Unlike the House bill, the Senate’s version of the bill expanded Title VII coverage to include the federal sector.⁹⁷ The bill gave the CSC expanded authority to enforce federal sector equal employment opportunity—a task already assigned to it by Executive Order.⁹⁸ In its report, the Senate Labor Committee acknowledged the CSC’s “built-in conflict of interest.”⁹⁹ The Committee was persuaded, however, that the CSC was “sincere” in its dedication to equal employment opportunity principles and that it had the “will and desire to overcome” the conflict.¹⁰⁰ The Committee strongly urged the CSC to seek out the EEOC’s experience and knowledge and to work closely with the EEOC in developing federal sector equal employment opportunity programs.¹⁰¹

The Senate ultimately prevailed,¹⁰² and the 1972 Equal Employment Opportunity Act included Title VII coverage for the federal sector.¹⁰³ The Act assigned the CSC the task of

86. See Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1998). For a historical overview of the EEOC’s difficulties and delays in developing federal sector regulations, see H.R. REP. NO. 100-456, at 13.

87. See 29 C.F.R. § 1614.110.

88. The Supreme Court has recently granted *certiorari* to consider the question of the EEOC’s power in another context: whether the EEOC has statutory authority to order federal agencies to pay compensatory damages during the administrative process. See *Gibson v. Brown*, 137 F.3d 992, 993 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 863 (Jan. 15, 1999) (No. 98-238). The circuits are split on the issue. The United States Courts of Appeals for the Seventh and Eleventh Circuits have held that Congress did not give the EEOC such authority when it made federal agencies subject to liability for compensatory damages in the Civil Rights Act of 1991. *Id.* at 996; *Crawford v. Babbitt*, 148 F.3d 1318, 1326 (11th Cir. 1998); see 42 U.S.C.A. § 1981(a) (West 1999). The Fifth Circuit, however, has found that the EEOC has such authority. *Fitzgerald v. Dep’t of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997). The EEOC’s power to order agencies to pay compensatory damages is a different question than that of its power to give AJs final decision authority. The former requires interpreting Congress’ intent in § 1981a of the Civil Rights Act of 1991, while the latter requires interpreting § 717 of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972).

89. See H.R. 1746, 92d Cong. (1971); 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1685 (1972).

90. See H.R. REP. NO. 92-238, at 22 (1972).

91. *Id.* at 24.

92. See 92 CONG. REC. 31,979-81 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 247-48 (1972).

93. See 92 CONG. REC. 4929 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1744 (1972).

94. See S. CONF. REP. NO. 92-681, at 21 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1819 (1972).

95. See 92 CONG. REC. 32,094 (1971).

96. See 92 CONG. REC. 4929 (1972).

97. See S. 2515, 92d Cong. (1971); see also S. REP. NO. 92-415, at 2 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 411 (1972) (explaining the provisions of Senate Bill 2515).

98. See *id.*

99. *Id.* at 15.

100. *Id.*

101. *Id.* at 16.

enforcing federal equal employment opportunity¹⁰⁴—a task eventually reassigned to the EEOC.¹⁰⁵ Thus, any present-day authority of the EEOC to make AJ decisions final stems from the powers given to its predecessor, the CSC, in the 1972 Act.

Interpreting the 1972 Act—The starting point in interpreting the 1972 Act is the language of the statute itself. Unless there is “clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”¹⁰⁶ If the statute’s words are unambiguous, the inquiry ends, and the plain meaning of the text must be enforced.¹⁰⁷

The CSC’s federal sector enforcement powers are found in Section 11 of the Act.¹⁰⁸ That Section amended Title VII of the Civil Rights Act of 1964 by adding new Section 717, “Nondiscrimination in Federal Government Employment.”¹⁰⁹ Section 717(a) provides that federal personnel actions shall be made free from discrimination.¹¹⁰ Section 717(b) gives the CSC the “authority to enforce the provisions of subsection (a) through appropriate remedies . . . as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.”¹¹¹ It further directs federal agencies and departments to “comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder.”¹¹²

Taken alone, Section 717(b)’s plain meaning is clear. The statute authorizes the EEOC (as CSC’s successor) to issue rules and regulations governing federal sector equal employment opportunity and directs the other federal agencies to obey. This

broad authority would undoubtedly empower the EEOC to make its AJ decisions final, rather than recommended.

Section 717(c) complicates the plain meaning analysis. That section provides federal EEO complainants the right to file civil actions if they are dissatisfied with the administrative disposition of their complaints.¹¹³ In somewhat confusing language, it provides that

within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the [CSC] upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination . . . , or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the [CSC] on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment . . . may file a civil action as provided in [S]ection 706.¹¹⁴

Reading this language alone and giving the words their “ordinary, contemporary, common meaning,”¹¹⁵ a conclusion could be reached that Congress authorized only the federal agencies to issue final decisions on EEO complaints (absent an appeal to the CSC). Of course, neither Section 717(b) nor 717(c) can be interpreted standing alone, as “each statutory provision should be read by reference to the whole act.”¹¹⁶

102. See S. CONF. REP. NO. 92-681, at 21 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1819 (1972).

103. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1831 (1972).

104. *Id.*

105. See *supra* note 83 and accompanying text (federal sector EEO responsibility transferred to the EEOC under Reorganization Plan No. 1 of 1978).

106. *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

107. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989).

108. Equal Employment Opportunity Act of 1972 § 11.

109. *Id.*

110. See *id.*

111. *Id.*

112. *Id.*

113. See *id.*

114. *Id.*

115. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

When read together, the two sections conflict in their meaning. By using the phrase “*final action taken by a department, agency, or unit*” in Section 717(c), did Congress intend to foreclose the CSC (and the EEOC as successor) from having final decision authority on EEO complaints? The EEOC thinks not. It interprets Section 717(b)’s “broad language” to give it complete authority to make such a change in federal EEO complaints procedure.¹¹⁷ The EEOC’s interpretation is entitled to deference unless it is contrary to the statute’s plain meaning or is unreasonable.¹¹⁸

Ambiguities in a statute’s language may also be resolved by considering legislative history.¹¹⁹ The 1972 Act’s legislative history contains some discussion of the EEO complaints procedures established by the CSC (by authority of Executive Order) and used in the federal government up until that time. Under those procedures, the “accused” federal agency was responsible for investigating and judging itself, meaning that the agency head made the final determination as to whether discrimination occurred within the agency.¹²⁰

Both Labor Committees reporting on the bills were highly critical of this arrangement and recognized it as a conflict of interest.¹²¹ House Report 238 described the CSC’s complaints process as “[a] critical defect of the [f]ederal equal employment program.”¹²² It also specifically noted that the legislation would

allow the EEOC¹²³ to “establish appropriate procedures for an impartial adjudication” of EEO complaints.¹²⁴

The Senate Labor Committee reporting on the bill likewise criticized the CSC’s complaints processing procedure and said it deserved “special scrutiny” by the CSC.¹²⁵ It noted that each agency was “still responsible for investigating and judging itself,” with the agency head making the “final agency determination” on the case.¹²⁶ The Committee felt this procedure “may have denied employees adequate opportunity for impartial investigation and resolution of complaints.”¹²⁷ Most significantly, it noted that the “new authority given to the [CSC] in the bill is intended to enable the [CSC] to reconsider its entire complaint structure and the relationships between the employee, agency and [CSC] in these cases.”¹²⁸

This legislative history shows that Congress was dissatisfied with the complaints processing procedures in existence when the 1972 Act became law, particularly the inherent conflict of interest resulting from agencies issuing final decisions on their own cases. Further, Congress fully expected and intended that the CSC use the authority provided to it in the 1972 Act to revise its complaints procedures to eliminate this conflict of interest. The CSC never did so, nor did the EEOC after acquiring federal sector responsibility from the CSC.¹²⁹ The basic scheme criticized by Congress in 1971 is the same one¹³⁰ the

116. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 324 (1994) (listing the canons of statutory construction used or developed by the Rehnquist Court).

117. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598-99 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

118. See ESKRIDGE, *supra* note 116, at 324; *Hudson v. Reno*, 130 F.3d 1193, 1201 (6th Cir. 1997) (“[D]eference is only appropriate with respect to ambiguous language; the EEOC’s interpretation is entitled to no deference when its position is at odds with the plain language of the statute.”) (citation omitted); *accord Gibson v. Brown*, 137 F.3d 992, 996 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 863 (Jan. 15, 1999) (No. 98-238) (“We have no difficulty affording the EEOC a measure of deference—even when interpreting its own powers under a statutory scheme—so long as the interpretation is consistent with the plain language of the statute.”); *Fitzgerald v. Department of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997) (“We afford considerable weight and deference to an agency’s interpretation of a statute it administers if Congress has not spoken directly to the precise question at issue.”).

119. See ESKRIDGE, *supra* note 116, at 325.

120. See H.R. REP. NO. 92-238, at 24 (1971).

121. See *id.* at 24-25; S. REP. NO. 92-415, at 15 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 423 (1972). According to “The Rehnquist Court’s Canons,” committee reports are “authoritative legislative history but cannot trump a textual plain meaning.” ESKRIDGE, *supra* note 116, at 325.

122. H.R. REP. NO. 92-238, at 23.

123. House Report 238 refers to the EEOC because the version of the bill on which it was reporting gave federal sector EEO responsibility to the EEOC rather than the CSC. The Minority View in House Report 238 does not discuss federal sector EEO, except to note that it generally opposed expanding EEOC’s “jurisdiction” when it was “struggling to control a burgeoning backlog” of private sector cases. *Id.* at 67. The bill that eventually became law gave federal sector responsibility to the CSC. See *supra* text accompanying notes 98-104.

124. H.R. REP. NO. 92-238, at 26.

125. S. REP. NO. 92-415, at 14.

126. *Id.*

127. *Id.*

128. *Id.*

EEOC recently attempted to fix with its proposal to make AJ decisions final.¹³¹

In light of this expression of congressional intent, the use of the phrase “*final action taken by a department, agency, or unit*” in Section 717(c) is best interpreted as simply a delineation of when a complainant can take his case to court.¹³² To find that Congress meant Section 717(c) to mandate final decisions by agencies rather than the EEOC would be an interpretation inconsistent with the policy of Section 717(b).¹³³ A more reasonable interpretation is that Congress used the language of Section 717(c) merely to lay out the complainant’s right to sue the federal government based on the complaints procedures existing at that time.¹³⁴

The legislative history supports this interpretation of Section 717(c). Senate Report 415 discusses the provision not as the right of the agency head to issue final decisions, but as federal employees’ “private right of action in the courts.”¹³⁵ It also notes the requirement for employees to exhaust their administrative remedies before going to court and the employees’ need for “certainty as to the steps required to exhaust such remedies.”¹³⁶ Under the administrative procedures existing when Section 717(c) was enacted, the last step in the administrative process came when the agency took final action on the case (or when the CSC did so by deciding the appeal).¹³⁷ Congress’ use of this exact language in Section 717(c) can be explained as simply putting federal employees on notice of when their

administrative remedies were exhausted and when their right to go to court was triggered.

It is illogical to interpret Section 717(c) as prohibiting the EEOC from making AJ decisions final. This interpretation would require a finding that Congress codified just one small part of the EEO complaints procedure in Section 717(c)¹³⁸ and at the same time gave the EEOC’s predecessor free rein over the rest of the complaints processing procedures in Section 717(b). Further, a finding that Congress meant to codify final decision procedure clashes with a legislative history clearly showing Congress’ unhappiness with the conflict of interest created by then-existing CSC procedures.

Interpreting Section 717(c) to prohibit AJ final decisions is also illogical because EEOC decisions ultimately bind federal agencies. It is well established that when a complainant appeals a final agency decision to the EEOC, the EEOC’s appeal decision is binding on the federal agency.¹³⁹ Unlike complainants, federal agencies are not permitted to challenge an adverse EEOC decision in federal district court.¹⁴⁰ Congress established this “one-way appealability rule” in the 1972 Act and codified it in Section 717(c).¹⁴¹ In other words, Congress chose to give the EEOC the “final say” over agencies in the form of binding EEOC appeal decisions. Giving AJs the authority to issue final rather than recommended decisions does not change who gets the “final say” on complaints. Like complainants, agencies would have the ability to appeal adverse AJ decisions to the EEOC for a final (and binding) appeal decision.¹⁴²

129. See *supra* text accompanying notes 85-87.

130. See Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1998).

131. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

132. The phrase “*final action taken by a department, agency, or unit*” apparently arose in the Senate’s bill. See S. 2515, 92d Cong. (1971). The original bill introduced in the House (and rejected by the Erlenborn substitute) used the more general term “*final disposition*.” See H.R. 1746, 92d Cong. (1971).

133. See ESKRIDGE, *supra* note , at 324 (identifying one of the canons of statutory construction as “[a]void interpreting a provision in a way that is inconsistent with the policy of another provision”).

134. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8599 (adopting the same interpretation of Section 717(c)).

135. S. REP. NO. 92-415, at 16 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 423 (1972).

136. *Id.*

137. See *id.* at 14.

138. Cf. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8599 (arguing nothing in the language of Section 717 indicates Congress intended to codify any parts of the existing administrative procedures).

139. See *Morris v. Rice*, 985 F.2d 143, 145 (4th Cir. 1993); *accord* *Gibson v. Brown*, 137 F.3d 992, 993 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 863 (U.S. Jan. 15, 1999) (No. 98-238); *Moore v. Devine*, 780 F.2d 1559, 1562-63 (11th Cir. 1986); see also Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.502(a) (1998) (“Relief ordered in a final decision on appeal to the EEOC is mandatory and binding on the agency.”).

140. See 42 U.S.C.A. § 2000e-16(c) (West 1999); Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.504(a) (1998).

141. *Crawford v. Babbitt*, 148 F.3d 1318, 1325 (11th Cir. 1998).

142. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598, 8605.

The 1978 Reorganization Plan—In 1978, President Carter submitted a Reorganization Plan to Congress in an attempt to consolidate in the EEOC a wide range of federal equal employment opportunity activities.¹⁴³ Among other things, the Plan would transfer responsibility for federal sector EEO from the CSC to the EEOC.¹⁴⁴ Under the Reorganization Act of 1977, the plan would become effective unless the House or Senate passed a resolution of disapproval.¹⁴⁵ Neither did so, and the task of coordinating and enforcing federal sector EEO transferred to the EEOC in 1979.¹⁴⁶

In forwarding the Reorganization Plan to Congress, the President noted a variety of deficiencies in the federal sector EEO program as administered by the CSC.¹⁴⁷ One of his main concerns was the existence of “conflicts within agencies between their program responsibilities and their responsibility to enforce the civil rights laws.”¹⁴⁸ The President believed this conflict could be resolved by transferring federal sector EEO functions to the EEOC, an agency with “considerable expertise” in the field.¹⁴⁹

Congress did not disagree with the President. If it was concerned about giving the EEOC the ability to adjudicate federal sector EEO complaints and to impose binding decisions on federal agencies, this was its chance to speak up by disapproving the Reorganization Plan. Some members of Congress did express concern over transferring adjudicatory powers from the CSC to the EEOC, arguing that the EEOC was conflicted by its

role of advocate in private sector cases.¹⁵⁰ Those views did not prevail, however, as both the House and Senate committees studying the Reorganization Plan recommended it favorably to their respective Houses.¹⁵¹

The legislative histories of both the 1972 Equal Employment Opportunity Act and Reorganization Plan Number 1 show that the EEOC does have the authority to change its regulations to make AJ decisions final.¹⁵² New legislation such as the FEFA is not required before the EEOC could implement such a change. Is AJ Final Decision Authority Good Policy?

Making AJ decisions final is not just a question of the EEOC’s statutory authority. It is also a policy question: is AJ final decision authority wise? Not surprisingly, federal agencies overwhelmingly answer the question in the negative.¹⁵³ Equally unsurprising is the view of EEO complainants, private attorneys, and federal employee unions, who overwhelmingly support taking away the agencies’ power to issue final decisions.¹⁵⁴ There are good arguments on both sides.

Taking Away Final Decision Authority from Federal Agencies is Unwise

Agency Final Decisions Serve as a “Safety Net”—Some believe that agency final decisions serve as a “safety net,” allowing agencies to overcome bad decisions by AJs.¹⁵⁵ Army statistics from 1993-1997 illustrate the argument. Administra-

143. See Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), reprinted in 42 U.S.C.A. § 2000e-4, at 413 (West 1999), and in 92 Stat. 3781 (1978).

144. See *id.*

145. Reorganization Act of 1977, Pub.L.No. 95-717, 91 Stat. 29. To overcome constitutional concerns created by the Reorganization Act’s scheme for a one-house legislative veto, Congress subsequently ratified all prior reorganizations and then amended the Act to require a joint resolution in support of any reorganization plan. See Stimson, *supra* note , at 165 n.4.

146. See Reorg. Plan No. 1 of 1978. The House rejected a resolution of disapproval. H.R. Res. 1049, 95th Cong. (1978). A resolution of disapproval was not brought to a vote in the Senate, but the Committee on Governmental Affairs unanimously recommended against passage of a resolution of disapproval. S. Res. 404, 95th Cong. (1978); S. REP. No. 95-750, at 6 (1978).

147. See Message of the President, in Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), reprinted in 42 U.S.C.A. § 2000e-4, at 415 (West 1999).

148. *Id.*

149. *Id.*

150. See 95 CONG. REC. 11,331 (1978).

151. See S. REP. No. 95-750, at 6; H.R. REP. No. 95-1069, at 3 (1978).

152. In an Executive Order implementing Reorganization Plan Number 1, President Carter reiterated the language of Section 717(b). See Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978), reprinted in 42 U.S.C.A. § 2000e-4, at 419 (West 1999) (“The [EEOC] . . . shall issue such rules, regulations, orders, and instructions . . . as it deems necessary and appropriate to carry out this Order.”).

153. See Letter from Earl Payne, Director, Department of Defense Civilian Personnel Management Service, to Frances Hart, Executive Secretariat, Equal Employment Opportunity Commission 3 (Apr. 21, 1998) (on file with author) [hereinafter Payne Letter]; Proposed Final Rule, *supra* note 40, at 20.

154. See Letter from Alma Riojas Esparza, Executive Director, Federally Employed Women, to Frances Hart, Executive Secretariat, Equal Employment Opportunity Commission 5 (Apr. 20, 1998) (on file with author); Proposed Final Rule, *supra* note 40, at 20.

155. See *id.* at 21 (“Agencies also questioned the quality and consistency of [AJ] decisions in opposing the change.”).

tive judges recommended findings of discrimination in 145 Army cases during that period.¹⁵⁶ The Army issued final agency decisions rejecting ninety-four of those recommended findings, or nearly sixty-five percent of AJ decisions against it.¹⁵⁷ On appeal to the EEOC's Office of Federal Operations, the Army was reversed only six times.¹⁵⁸ This means that of cases appealed, the EEOC sustained the Army's rejection of AJ decisions nearly ninety-four percent of the time.¹⁵⁹

Given these statistics, it would seem that agencies need final decision authority as a means to overcome incorrect AJ decisions. The need for this agency "safety net" may not be as great as it initially appears, however. First, AJ recommended findings of discrimination are relatively few: only about nine percent of cases heard.¹⁶⁰ Second, agencies would have the right to appeal adverse AJ final decisions to the EEOC.¹⁶¹ The EEOC appeal would serve as the new agency "safety net" against bad AJ decisions. The Army's appeals data show that this "safety net" can be highly effective, as the EEOC sustains the agency in the great majority of cases appealed.¹⁶²

Distrust and Lack of Confidence in the EEOC—A prime source of agency opposition to the finality of AJ decisions may be a historical distrust and lack of confidence in the EEOC. "Historically, the EEOC has been viewed as 'toothless,' a 'poor, enfeebled thing' as compared to other federal agencies."¹⁶³

Federal agencies do not seem to be alone in their lack of confidence in the EEOC. For example, the courts may have reserved a greater lawmaking role in the employment discrimination area by suggesting "a lesser role for the EEOC on questions of statutory interpretation than is enjoyed by most independent agencies."¹⁶⁴ Congress has also noted widespread complaints about the EEOC's competence and efficiency in both its private and federal sector programs.¹⁶⁵ This shows agency fears that AJ final decision authority should not be discounted. Instead, the EEOC must do a better job to build the confidence of its "clients," which include agencies as well as complainants.

Increasing AJ training and classification/pay grade levels may be one way of accomplishing this. Equal Employment

156. Payne Letter, *supra* note 153, at 4.

157. *Id.*

158. *Id.* Government-wide data is not available. On an annual basis, the EEOC publishes an extensive compilation of data concerning federal sector EEO complaints. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FEDERAL SECTOR REPORT ON EEO COMPLAINTS PROCESSING AND APPEALS (1996) [hereinafter EEOC 1996 REPORT]. The most recent published report is from fiscal year 1997. Data for 1998 are not yet available. Inzeo Interview, *supra* note 48. Although EEOC annual reports contain statistics on the number of AJ recommended decisions rejected or modified by final agency decisions, they do not report how many final agency decisions are sustained by the EEOC's Office of Federal Operations on appeal by complainants. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

159. Air Force final agency decisions were upheld by the EEOC Office of Federal Operations over 93% of the time for the years 1995-1998. See Collins Letter, *supra* note 51. In arriving at this figure, the Air Force did not distinguish final agency decisions issued after an AJ hearing from final agency decisions issued in cases where the complainant elected *not* to have an AJ hearing. Telephone Interview with Sophie Clark, Director, Air Force Civilian Appellate Review Office (Feb. 25, 1999).

160. See EEOC 1997 REPORT, *supra* note 9, at T-39 (reporting findings of discrimination in 8.8% of cases). In 1996, AJs recommended findings of discrimination in 9.2% of cases. See EEOC 1996 REPORT, *supra* note 158, at T-36. In 1997, only 35% of the requests for AJ hearings resulted in an AJ decision. See U.S. GOV'T ACCT. OFF., RISING TRENDS IN EEO COMPLAINT CASELOADS IN THE FEDERAL SECTOR 45 n.13 (Jul. 1998) [hereinafter GAO REPORT] (noting that at the hearing stage, a case can be settled by the parties, withdrawn by the complainant, remanded to the agency for further action, or decided by the AJ).

161. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598, 8601 (proposing that both complainants and agencies be allowed to appeal final AJ decisions to the EEOC). Under the current regulations, only complainants (and class agents in class complaints) have the right to appeal to the EEOC. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.401 (1998).

162. See *supra* notes 158-159 and accompanying text. If an agency loses on appeal, it can request reconsideration by the full EEOC. See 29 C.F.R. § 1614.107; see *supra* note 22. An EEOC proposal would severely limit the reconsideration of EEOC appeal decisions. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8601; Proposed Final Rule, *supra* note 40, at 40. Under the proposed rule, the EEOC will only grant requests for reconsideration when the requester demonstrates that the EEOC appeal decision involved a "clearly erroneous interpretation of material fact or law or when the appeal decision will have a "substantial impact on the policies, practices, or operations of the agency." *Id.* The EEOC has proposed this change because it believes the current "broad availability of reconsideration has not significantly enhanced the overall decision-making process." Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8601. The EEOC believes that reforming the reconsideration process will allow it to redirect resources to improve the timeliness and quality of appeal decisions by its Office of Federal Operations. See *id.*

163. White, *supra* note 71, at 51 (addressing why the Supreme Court might be reluctant to find a congressional delegation of statutory interpretive authority to the EEOC). The Merit Systems Protection Board, on the other hand, is traditionally viewed as an efficient, effective adjudicator and protector of the merit principles of federal employment. See Stimson, *supra* note 8, at 216.

164. White, *supra* note 71, at 51.

165. See COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 12 (1987).

Opportunity Commission AJs are largely at a grade level lower than similar officials in other agencies.¹⁶⁶ The EEOC frequently loses quality AJs to other agencies such as the Merit Systems Protection Board.¹⁶⁷ One reason for EEOC AJs' lower pay grade is their limited authority to issue recommended and not final decisions.¹⁶⁸ An increase in pay should, therefore, go hand-in-hand with AJ final decision authority.¹⁶⁹

EEOC Conflict of Interest—Some believe the EEOC has a conflict of interest because it is designed to be a protector of employees who suffer workplace discrimination. Thus, EEOC AJs can never be truly “neutral” and disinterested decision-makers.

To appreciate this argument fully, the EEOC's private and federal sector roles must be distinguished. While wearing its federal sector “hat,” the EEOC is an adjudicator and decision-maker.¹⁷⁰ Its private sector responsibilities are quite different. In private sector cases, the EEOC may only act as investigator, conciliator, and if that fails, as prosecutor.¹⁷¹ While the EEOC may pursue a claim in court on behalf of a private sector party, the court has the role of adjudicator.¹⁷²

The EEOC's private sector enforcement power was limited in this manner because

congressional Republicans were concerned with conferring fact-finding responsibilities on the EEOC. The agency had “attained an image as an advocate for civil rights,” and thus there was a reluctance to make a “mis-

sion” agency the finder of facts. The opposition to increasing the EEOC's enforcement authority centered on the fear that an overzealous agency would be acting as investigator, prosecutor, and judge.¹⁷³

Because of its historical role as “protector” and private sector advocate against discrimination, the EEOC has been viewed by some as lacking objectivity and tending to be claimant-oriented.¹⁷⁴ Whether real or perceived, this bias undoubtedly causes some federal agencies to feel that AJ final decisions cannot be fair.

An example of this conflict is found in recent EEOC proposals to “strengthen” the federal sector class complaints' process.¹⁷⁵ The EEOC wants to change its regulations so that more class complaints are filed and certified at the administrative level.¹⁷⁶ It believes that “[c]lass actions play a particularly vital role in the enforcement of the equal employment laws. They are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims.”¹⁷⁷

This language emphasizes a potential conflict of interest. On one hand, the EEOC must promote policies and procedures designed to eradicate the broad patterns of workplace discrimination that are typically found in class actions. On the other hand, its own AJs (and its appellate staff) will be the adjudicators of the class complaints that arise as a result of the EEOC's improved efforts. These dual roles create at least a perceived conflict of interest.¹⁷⁸

166. *Id.* at 6.

167. Inzeo Interview, *supra* note 54.

168. *See* H.R. REP. NO. 100-456, at 6.

169. In the past, Congress has also recommended that the EEOC “move promptly” to increase AJs' support personnel and make more equipment available to them. *Id.*

170. *See* Civil Rights Act of 1964 § 717, 42 U.S.C.A. § 2000e-16 (West 1999); Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1998).

171. *See* 42 U.S.C.A. § 705.

172. *See id.*

173. White, *supra* note 71, at 65 (citations omitted). One historian has described the role of the EEOC as “murky,” a “kind of bastard compromise between a quasi-judicial regulatory commission, an administrative agency, and an educational and conciliation bureau.” *Id.* at 60 n.70.

174. *See id.* at 64-65 (describing this view as being held by Chief Justice William Rehnquist when he was the head of the U.S. Attorney General's Office of Legal Counsel).

175. *See* Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8600 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

176. *Id.* at 8599.

177. *Id.*

178. The EEOC has three major divisions performing federal sector EEO duties. The Hearing Program Division administers federal sector complaints processing and provides “technical guidance and assistance” to federal agencies and employees concerning complaints processing. It also provides guidance and sets standards for EEOC AJs. The Affirmative Employment Program Division develops and implements policies regarding the hiring, placement, and advancement of minorities, women, and handicapped persons. The Office of Federal Operations administers the EEOC's appellate responsibilities. *See* HADLEY, *supra* note 22, at 10.

Assuming, *arguendo*, that the EEOC does have a conflict of interest, is the problem so big that AJs should not be empowered with final decision authority? Probably not, as AJs recommend relatively few findings of discrimination.¹⁷⁹

The EEOC has always had an adjudicative role in the federal sector EEO process. Complainants have always appealed final agency decisions to the EEOC. When an agency's final decision is reversed on appeal (meaning the EEOC has found discrimination) the agency is bound by that "final Commission decision."¹⁸⁰ Thus, from a practical standpoint, giving AJs final decision authority would not alter an already-existing conflict of interest in the current regulations.

Further, if appeal is likely anyway, the system becomes more efficient by getting the appeals process over sooner, rather than later.¹⁸¹ Making AJ decisions final would eliminate the time-consuming and costly step of sending AJ recommendations back to the agency for final decision.¹⁸²

EEOC Backlogs and Increased Delays—AJ final decision authority may increase EEOC backlogs and delays in complaints processing.

In many cases, complainants elect an "immediate final decision" from the agency rather than an AJ hearing.¹⁸³ These final agency decisions without hearings occur in a significant number of cases, about sixty-four percent from 1995 to 1997.¹⁸⁴ Even with AJ final decision authority, agencies would continue to decide cases in which the complainant elects against a hearing.¹⁸⁵

More complainants may opt for hearings if AJs had final decision authority.¹⁸⁶ This may lead to even more delay in the system, as final decisions with hearings generally take longer to issue than those without hearings.¹⁸⁷ An increase in hearings may also result from an overall increase in EEO complaints.¹⁸⁸ It is questionable whether the EEOC has the necessary budget or staff to handle a sharp increase in hearings volume. Some members of Congress, for example, feel the EEOC is "already struggling with its burgeoning caseload" and may not have the capability to take on additional responsibilities.¹⁸⁹

Increased hearings volume as a result of AJ final decision authority is speculative at this point.¹⁹⁰ Administrative judge final decision authority may cause more complainants to elect a hearing because they see AJs as more likely to decide in their favor.¹⁹¹

179. See *supra* note 160 and accompanying text (AJs find discrimination in about 9% of cases). This statistic is consistent with reports that the EEO complaints process is burdened with a large number of frivolous cases. See GAO REPORT, *supra* note 160, at 2. Some employees use the EEO process to get "a third party's assistance in resolving workplace disputes unrelated to discrimination." *Id.* The EEOC reports that a "sizable number" of cases stem from "basic communications problems in the workplace" rather than discrimination. *Id.* (citing U.S. EQUAL OPPORTUNITY COMM'N, ADR STUDY (Oct. 1996)). The claim that AJs are biased in favor of complainants is also defeated somewhat by the relatively low rate at which they find discrimination.

180. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.502(a) (1998); see also *Moore v. Devine*, 780 F.2d 1559, 1562-63 (11th Cir. 1986) (holding that final EEOC decisions are binding on the agency).

181. Although precise data are not available, statistics show that appeal is highly likely in most cases. Complainants appealed final agency decisions to the EEOC in about 81% of cases in 1997. See EEOC 1997 REPORT, *supra* note 9, at 61, T-36. In 1996, about 89% of final agency decisions were appealed to the EEOC. See EEOC 1996 REPORT, *supra* note 158, at 67, T-27. These percentages are approximate because data are not available to account for the overlap of fiscal years. For example, final agency decisions issued at the very end of fiscal year 1997 would be appealed at the beginning of fiscal year 1998. (Complainants have 30 days from receipt of the final agency decision to appeal to EEOC. See 29 C.F.R. § 1614.402). Thus, they would not be counted as appealed cases until 1998. A large number of EEOC appeals, about 25%, come from Department of Defense complainants. See EEOC 1997 REPORT, *supra* note 9, at 62.

182. The EEOC does not report data on the amount of time used by agencies to issue final decisions after the receipt of AJ recommended decisions. See EEOC 1996 Report, *supra* note 158 (reporting no such data); GAO REPORT, *supra* note 160, at 46 (noting that EEOC reports the average time taken by agencies to process a complaint by type of closure rather than by each stage of the complaint process). Agencies are supposed to issue the final decision within 60 days of receiving the AJ recommended decision. See 29 C.F.R. § 1614.110.

183. See 29 C.F.R. § 1614.108(f), § 1614.110. "Immediate final decisions" by agencies are also called agency decisions without hearings.

184. See EEOC 1997 REPORT, *supra* note 9, at T-30 (reporting 5393 agency decisions without hearings); EEOC 1996 REPORT, *supra* note 158, at T-30 (reporting 4686 agency decisions without hearings); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FEDERAL SECTOR REPORT ON EEO COMPLAINTS PROCESSING AND APPEALS T-30 (1995) [hereinafter EEOC 1995 REPORT] (reporting 4996 agency decisions without hearings).

185. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

186. See, e.g., Payne Letter, *supra* note 153, at 4 (stating that Department of Defense agencies would have more complaints "going directly to EEOC for a hearing" if AJ decisions became final).

187. See GAO REPORT, *supra* note 160, at 47 (reporting for fiscal year 1996 that agencies took an average of 558 days to issue a final agency decision without a hearing and 613 days to issue a final agency decision in cases in which an AJ issued a recommended decision). Of course, AJ final decision authority might equalize these figures, as AJ decisions would no longer have to go back to the agency for final action.

188. See H.R. REP. NO. 103-599 pt. 1, at 97 (1994) (suggesting that the volume of complaints filed with the EEOC would increase if the FEFA became law).

189. *Id.*

If decisions became even more delayed with AJ final decision authority, however, complainants may opt for an agency decision without a hearing in order to get their cases to court faster.¹⁹² A more optimistic view is that more cases will settle once agency alternative dispute resolution (ADR) programs are in place, thereby decreasing the number of complainants who elect AJ hearings.¹⁹³

Nonetheless, the potential for increased backlog is a serious concern that should be addressed by the EEOC before AJ final decision authority is granted. The EEOC might be able to avoid this potential problem by reducing AJ processing time.¹⁹⁴ It is doubtful the EEOC could achieve this without hiring more AJs.¹⁹⁵

Giving AJs Final Decision Authority Is Wise

The federal sector complaints processing system has been universally criticized.¹⁹⁶ The most common criticisms are that it is an overly complex system, agencies are delegated the

responsibility for investigating and deciding their own employees' complaints, there are long delays in getting final agency decisions, and there is a lack of sanctions against agencies for inadequate investigations and delays.¹⁹⁷

This is not mere complaining by dissatisfied complainants and their attorneys. Congress and the General Accounting Office have repeatedly voiced these complaints, and Congress is particularly troubled with agencies deciding their own cases.¹⁹⁸ In short, the federal sector complaints processing system "is an embarrassment to the [f]ederal [g]overnment" and something "Rube Goldberg would have been proud of."¹⁹⁹

Agency Conflict of Interest—The most persuasive and frequently heard argument is that agencies should not issue final decisions because they have a conflict of interest. When a federal employee files an EEO complaint, the agency becomes the "accused," the investigator, and then the decision-maker. "Think for a moment of the public outrage if the government permitted IBM or General Motors . . . to investigate and take final action on complaints that violated . . . the Civil Rights Act."²⁰⁰

190. For example, one might speculate that the number of hearing requests would increase as the number of complaints increased. However, data show that requests for hearing do not necessarily correspond with the number of complaints filed. In 1994, the number of complaints filed increased 10%, and the number of requests for AJ hearing increased 21%. See EEOC 1996 Report, *supra* note 158, at 20, 52. In 1995, the number of complaints filed increased 12%, but requests for hearing decreased about 2%. See *id.* In 1996, the number of complaints filed decreased 4%, but requests for AJ hearing increased about 2%. See *id.* In 1997, the number of complaints filed increased almost 10%, and requests for AJ hearing increased almost 5%. See EEOC 1997 REPORT, *supra* note 9, at 20, 51. Increases in the number of complaints filed since 1994 were largely driven by postal workers' complaints. See GAO REPORT, *supra* note 160, at 39. Postal workers also had a "disproportionately high" and "increasing share" of hearing requests and EEOC appeals. *Id.* at 37.

191. This view holds that giving new EEO "rights" causes employees to file more EEO complaints. *Cf. id.* (attributing increases in federal sector EEO complaints in part to the Civil Rights Act of 1991, which allows awards of up to \$300,000 in compensatory damages).

192. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.408 (1998) (allowing complainants to file a civil action if a final decision has not been issued after 180 days from the date the complaint was filed).

193. The EEOC's proposed final rule requires agencies to establish ADR programs; however, agencies are free to develop whatever program best suits their needs. See Proposed Final Rule, *supra* note 40, at 5. Agencies must make ADR available during both the pre-complaint (counseling) and formal complaint process, but agencies have discretion to decide whether it is appropriate to offer ADR on a case-by-case basis. *Id.*

194. AJ case processing time is on the increase. In 1994, it took an average of 154 days for an AJ to hear a case and issue a recommended decision. EEOC 1997 REPORT, *supra* note 9, at 51. That processing time went up to 187 days in 1995, 234 days in 1996, and 277 days in 1997. *Id.* AJs are supposed to issue recommended decisions within 180 days. See 29 C.F.R. § 1614.109(g).

195. The pending case inventory of AJs nearly doubled between 1994 and 1997. At the close of fiscal year 1994, AJs had 5177 cases pending. EEOC 1997 REPORT, *supra* note 9, at 51. At the end of fiscal year 1997, there were 10,016 cases pending. *Id.* Although the number of AJs available for hearings has increased (from 53 in 1991 to 75 in 1996), the influx of hearing requests outpaced the increase in AJs. See GAO REPORT, *supra* note 160, at 52-53. The EEOC has requested additional funding to hire more AJs. *Id.* at 54.

196. See H.R. REP. NO. 103-599 pt. 2, at 34 (1994).

197. See *id.* Agencies are required to complete investigations within 180 days from the date the complaint was filed. See 29 C.F.R. § 1614.108(e). In 1997, only 24% of agency investigations were completed within that time. EEOC 1997 REPORT, *supra* note 9, at T-24 (listing investigation completion times for all federal agencies).

198. See COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 2 (1987); U.S. GOV'T ACCT. OFF., FEDERAL EMPLOYEE REDRESS: A SYSTEM IN NEED OF REFORM (Apr. 1996) (stating that the EEO complaint process is inefficient, time consuming, and costly).

199. H.R. REP. NO. 100-456, at 13. Rube Goldberg was a Pulitzer prize winning cartoonist, sculptor, and author who believed there are two ways to do things, the simple and the hard way, and that a surprising number of people preferred doing things the hard way. His cartoons of "absurdly-connected machines" that accomplished by "extremely complex, roundabout means what seemingly could be done simply" have associated the name "Rube Goldberg" with any convoluted solution to a simple task. Alex Wolfe, *The Official Rube Goldberg Web Site* (visited Feb. 12, 1999) <<http://www.rube-goldberg.com/bio.htm>>.

The argument may be somewhat overstated. The agency does not have the final say in all cases, such as those when the dissatisfied complainant appeals the agency's decision to the EEOC or files a civil suit in federal district court.²⁰¹

There is an additional argument for agency conflict of interest in the investigatory stage, also controlled by the agency.²⁰² Investigators who are biased in favor of agency management theoretically have the ability to create a record favorable to the agency early on in the process.²⁰³ Equal Employment Opportunity counselors (who are agency employees) could do so as well because they are the first information-gatherers in the complaints process.²⁰⁴ This conflict of interest problem is not resolved by giving AJs final decision authority, as agencies would retain their pre-hearing investigatory responsibilities.²⁰⁵ It may become less of a problem however, as the majority of federal agencies now contract out their investigations rather than do them in-house.²⁰⁶

Nonetheless, the current regulations create at least a perception of unfairness towards EEO complainants, which has been recognized as a very serious problem in the complaints processing system.²⁰⁷ Agencies reject or modify the majority of AJ findings of discrimination but accept nearly all AJ findings of no discrimination.²⁰⁸ Of course, if agency decisions are more likely than AJ decisions to reach correct factual and legal results, this perception of unfairness might be considered a necessary, although unfortunate cost of doing business.²⁰⁹ In the end, however, agency final decisions are not necessary for correct results in EEO cases. If AJs had final decision authority, agencies would gain the right to appeal adverse decisions to the EEOC's Office of Federal Operations.²¹⁰ Agencies, like complainants, would ultimately rely on the Office of Federal Operations to reach the correct result on review.²¹¹

Consistency—Administrative judge final decisions should lead to more consistent results in federal sector cases. Decision-making in discrimination cases would be centralized in

200. H.R. REP. NO. 103-599 pt. 1, at 37 (1994) (quoting former EEOC Chairwoman Eleanor Holmes Norton).

201. See 29 C.F.R. § 1614.401(a), § 1614.408. Complainants appeal the majority of agency decisions to the EEOC. See *supra* note 181 and accompanying text. The EEOC does not report statistics on how many EEO complaints end up in federal district court. See EEOC 1996 REPORT, *supra* note 158.

202. 29 C.F.R. § 1614.108(a) provides that “[t]he investigation of complaints shall be conducted by the agency against which the complaint has been filed.”

203. Under EEOC directives, agencies have discretion to use a number of fact-finding methods during the investigation and are responsible for maintaining the personnel and resources necessary to investigate complaints. See EEOC 1997 REPORT, *supra* note 9, at 29.

204. Complainants are required to consult with agency EEO Counselors prior to filing a formal complaint. See 29 C.F.R. § 1614.105. During this stage of the complaints process, which is called “pre-complaint processing,” counselors gather information and conduct “counseling activities” in accordance with EEOC directives. *Id.* In one study conducted by the Washington Council of Lawyers, some EEO counselors reported “great scrutiny” during this process and subtle pressure not to find discrimination. H.R. REP. NO. 103-599 pt. 1, at 25-26 (citing *Processing EEO Complaints in the Federal Sector: Problems and Solutions Before the Subcomm. On Employment and Housing of the Comm. On Gov't Operations*, 100th Cong. (1987)).

205. See Proposed Final Rule, *supra* note 40.

206. See EEOC 1997 REPORT, *supra* note 9, at 2. About 60% of federal agencies contracted out all or part of their investigations in 1997. See *id.* Agencies reported spending over \$10 million on contract investigations in 1997, at an average cost of \$2128 per investigation. See *id.* at T-21. Agencies spent over \$18 million in 1997 on in-house investigations, at an average cost of \$1823 per investigation. See *id.* The quality of both in-house and contract investigations is questionable. The written material is often voluminous, yet “too superficial” and unhelpful to the finder of fact. H.R. REP. NO. 103-599 pt. 1, at 28, 42. While EEOC Chairman, Justice Clarence Thomas argued that the EEOC's lack of centralized quality control violated the “obligation to the American citizenry to operate a system that does not waste tax dollars.” *Id.* pt. 2, at 33.

207. See COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 4 (1987).

The decentralized system under which agencies investigate and act on discrimination charges against themselves in a clear conflict of interest. With ‘the fox in charge of the henhouse,’ the system lacks credibility with employees. Fundamental fairness—and importantly, the perception of fairness—require that an independent third party be the adjudicator of discrimination complaints.

Id.

208. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998). In 1997, agencies rejected or modified AJ recommended findings of discrimination 67% of the time. See EEOC 1997 REPORT, *supra* note 9, at 52. Agencies accepted AJ recommended findings of no discrimination nearly 98% of the time. See *id.*

209. There are currently no government-wide data to test whether agency final decisions are more accurate than AJ recommended decisions. See *supra* note 158 (EEOC reports do not contain data showing how often agency decisions that reject AJ findings of discrimination are sustained by the EEOC on appeal).

210. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598.

211. There is reason to believe that agencies can have faith that the correct results will be reached. Although government-wide data are unavailable, the EEOC Office of Federal Operations sustains Army and Air Force final decisions on appeal well over 90% of the time. See *supra* notes 156-159 and accompanying text.

one agency, the EEOC, rather than in ninety-seven different federal agencies.²¹² This would eliminate many differing interpretations and applications of the discrimination laws.²¹³

AJ final decisions should also lead to an improved appellate process. The Office of Federal Operations would no longer review after-the-fact final decisions written by agency personnel removed from the hearings process. Instead, it would review decisions written by AJs, who conduct the hearings and hear the evidence first-hand.²¹⁴

Improved Efficiency and Complaints Processing Times— Having agencies “reconsider” and issue decisions on cases already heard by AJs not only looks bad, but is also duplicative, inefficient, and costly. Eliminating final agency decisions after AJ hearings would remove a step from complaints processing and may lead to some improvement in the “inordinate delay” that plagues the current system.²¹⁵ Whether they have a valid case or not, in complainants’ eyes “justice delayed is justice denied.”²¹⁶ Delay encourages complainants to “initiate litigation in [f]ederal district court at the earliest possible moment in lieu of using the administrative process through to completion.”²¹⁷ This “perverse consequence” is something to be seriously avoided, given that the stakes and costs of civil litigation are extremely high.²¹⁸

AJ final decisions are wise from a policy perspective. Most agency concerns about losing final decision authority are legit-

imate, but they do not override the need for a fairer and more effective federal sector complaints processing system.

Conclusion

The universal criticism of the federal sector complaints processing regulations should not be solely attributed to mismanagement by the EEOC and federal agencies. Instead, the problems with the current regulations are deeply rooted in their “Rube Goldberg” design. Congress intended that the “critical defect” of agencies judging themselves be eliminated from the system. Having adopted the CSC’s procedures of agency self-investigation and decision-making, the EEOC has not effectuated Congress’ intent.

Although AJ final decision authority will not cure all the problems of the current system, getting the “fox out of the chicken coop” is a necessary step in the right direction. The EEOC already has the statutory authority to make this change. The EEOC’s recent retreat from its proposal to make AJ decisions final, however, shows that legislation, such as the FEFA, will be required before this controversial change can be accomplished.

212. See EEOC 1997 REPORT, *supra* note 9, at 14-17.

213. One example of how differently agencies interpret the facts and law may be found in the rates at which they accept AJ findings of discrimination. For example, in the last three reporting years the Department of Veterans Affairs accepted AJ findings of discrimination in only 21% of cases. See *id.* at T-38; EEOC 1996 REPORT, *supra* note 158, at T-36; EEOC 1995 REPORT, *supra* note 184, at T-36. Department of Defense agencies accepted AJ findings of discrimination at a significantly higher rate, in 52% of cases. See *id.* at T-34; EEOC 1997 REPORT, *supra* note 9, at T-37; EEOC 1996 REPORT, *supra* note 158, at T-34.

214. When it originally proposed AJ final decision authority, the EEOC also proposed a substantial evidence standard of review for appeal of AJ decisions. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8601. Agency decisions without hearings would be subjected to a *de novo* standard of review. See *id.* The EEOC believes that “applying the *de novo* standard of review to the factual findings in [AJ] final decisions after hearings would be an inefficient use of EEOC’s limited resources.” *Id.*

215. H.R. REP. NO. 103-599 pt. 1, at 29 (1994). See *supra* note 187 (reporting an average of 613 days for a final agency decision to be issued in cases that went to hearing).

216. *Id.*

217. *Id.*

218. *Id.*

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

Wills and Professional Responsibility Notes

New Jersey Law Firm Can Reveal Client Information to Wife

A common occurrence in legal assistance offices is preparing wills for both the husband and wife. It is important for legal assistance attorneys to recognize the potential for conflicts of interest that arises in this situation. Clients do not think anything about it; indeed, most go to considerable lengths to arrange an appointment that both spouses can attend. How can there be a conflict, it is just a will and we agree on how to distribute our estate? The lawyer must take a very different view. It is not "our" estate. Each party to the marriage has a separate estate even when the assets are owned jointly. It is not unusual for their interests to differ. A recent case from New Jersey illustrates the Pandora's box that can be opened when estate planning, family law, and professional responsibility collide.

An attorney in the estate-planning department of the law firm Hill Wallack prepared wills in October 1997 for a husband and wife.¹ The firm's policy required that the clients read and sign a dual representation agreement. The distribution of the interests supported Hill Wallack's desire to inform her. The

estate was typical for a married couple—all to the spouse and then to issue.²

In January 1998, before the husband and wife executed the wills, a woman coincidentally retained Hill Wallack's family law department in a paternity action against the husband.³ The husband's surname was inadvertently misspelled when entered in the firm's client database; therefore, a conflict check did not identify the conflict.⁴ The husband retained different counsel for the paternity action.⁵ The conflict finally came to light when the family law attorney for Hill Wallack requested financial information from the husband for purposes of determining child support.⁶ The husband's paternity case attorney responded that Hill Wallack already had all that information. Hill Wallack immediately withdrew from the paternity action once they discovered the conflict.⁷

The real issue began, however, when Hill Wallack sent a letter to the husband notifying him that the lawfirm had a professional obligation to inform his wife of the existence of his illegitimate child.⁸ The husband joined Hill Wallack as a third party to the paternity action and obtained a restraining order preventing the disclosure to his wife.⁹ Hill Wallack faced the classic tension between the obligation of confidentiality and the conflict of interest. The New Jersey Supreme Court, after a lengthy analysis, concluded that Hill Wallack could inform the wife of the existence of the illegitimate child.¹⁰

The Supreme Court of New Jersey agreed with Hill Wallack that the information about the existence of an illegitimate child could affect the distribution of the wife's estate, if she predeceased her husband. Additionally, the husband's obligation to pay support to the child could deplete that part of his estate that otherwise would pass to his wife, if he predeceased her. Therefore, the wife's interests and the lawyer's duty to protect those court had to consider the issue of confidentiality.

1. A. v. B. v. Hill Wallack, Attorneys at Law, 726 A.2d 924 (N.J. 1999).

2. *Id.* at 925.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 926.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

New Jersey's exceptions to the confidentiality rule are broader than the ABA Model rule.¹¹ The New Jersey rule mandates disclosure of confidential information if such disclosure is necessary to prevent the client from "committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another . . ."¹² The court refused to mandate disclosure under this rule.¹³ The New Jersey rule, however, also permits the disclosure of a confidential communication to the extent the lawyer reasonably believes necessary to "rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used."¹⁴ The husband's deliberate omission of the existence of his illegitimate child was enough to constitute a fraud on his wife.¹⁵

In addition to the analysis on the New Jersey confidentiality rule, the court also considered that the couple signed a dual representation agreement. The dual representation agreement signed by the husband and wife did not include an express waiver of confidentiality; however, it indicated that information provided by one client could become available to the other.¹⁶ While an explicit waiver would have made disclosure easier, the court found that the spirit of the agreement supported Hill Wallack's decision to inform the wife.¹⁷ The court also pointed out that the information was not really a confidence obtained from the husband. In fact, the husband concealed the existence of the illegitimate child from the estate planning attorney as well as the wife.¹⁸

This case illustrates the potential for a seemingly simple will interview to explode into a significant professional responsibility and legal assistance problem. Legal assistance attorneys should recognize the potential for conflict in preparing wills for both the husband and wife. They should counsel those clients and have the clients read and sign a dual representation agreement. In addition, that dual representation agreement should be explicit about waiving confidentiality between spouses. Major Fenton.

Help With Preparing Wills for Louisiana Domiciliaries

Have you ever conducted an interview with a soldier or family member whose home of record was Louisiana? You do the interview and try to prepare the will using the LAAWS or Patriot Wills Program. Then you find out that Louisiana wills *are not* available on either. In the past the only options were to try to create a document using the All States Wills Guide, coordinate with the Legal Assistance Office at Fort Polk, or tell the client you could not assist him.

Now you can pull the Louisiana will questionnaire off of legal assistance database on JAGCNet, have your client complete the document, e-mail the questionnaire to Fort Polk at <shermanl@polk-emh2.army.mil>, <lenzp@polk-emh2.army.mil>, or <AFZX-JA@polk.emh2.army.mil>. The legal assistance staff will prepare the will in accordance with Louisiana law and *Army Regulation 27-3*¹⁹ and e-mail you a document ready for execution.

This initiative has been in place since late February 1999 after coordination with the Legal Assistance Policy Division, OTJAG. Fort Polk reports that the initial requests have been coming in worldwide and the turnaround time has been less than three workdays on average. Do not let those Louisiana concepts of usufruct or forced heirship scare you away from providing clients Louisiana wills. Take Fort Polk up on its offer to provide will services for all Louisiana soldiers and their family members regardless of where they are stationed. Major Fenton.

Consumer Law Note

The Internet: A New Medium for Scam Artists

The Internet has been a boon to many people. Information on news, travel, health, and myriad other topics is available at any time of the day or night in the privacy of your own home. This twenty-four-hour per day convenience has also attracted a booming Internet business community. The United States Department of Commerce estimates that by 2001, businesses

11. *Id.* at 927.

12. *Id.* (citing RPC 1.6(b)(1)).

13. *Id.*

14. *Id.* (citing RPC 1.6(c)).

15. *Id.*

16. *Id.* at 928.

17. *Id.*

18. *Id.* at 932.

19. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (10 Sept. 1995).

will conduct \$300 billion dollars in commerce via the Internet.²⁰ It should come as no surprise, then, that those seeking to take advantage of consumers would use this tool as well. The Federal Trade Commission (FTC) recently dealt with the perpetrators of two typical scams—credit repair and e-mail fraud.

The first group of actions reflects a joint effort between the FTC and state and local law enforcement. The focus of these forty actions was file segregation credit repair scams.²¹ According to the FTC, the schemes work like this: fraudulent actors place ads in newspapers, magazines or, increasingly, on the Internet, selling a service they say can help consumers create a new credit identity. Using claims like,

“Anyone can have a New Credit File virtually overnight . . .”;

“WIPE OUT ALL OF THE OLD BAD CREDIT ON YOUR OLD FILE. . . .”; and

“Credit Start Over. There’s a way to obtain a new Social Security N[umber] . . .”

[T]hey offer to sell a “kit” or “package” for prices ranging from \$21.95 to \$129.95. The “kit” advises consumers to apply for a new identification number from the I.R.S., Social Security Administration or credit reporting agencies and to use that number in place of their Social Security number when applying for credit. Consumers are frequently given advice about how to develop whole new credit profiles by doing such things as getting new driver’s licenses using the new I.D. number and advised about places that will give consumers “starter credit” using the new number.²²

Of course, the problem is that consumers violate federal law when they attempt to use any of these identification numbers as their social security number.²³ The message, according to FTC’s Bureau of Consumer Protection Director Jodie Bernstein, is that

[t]hese credit repair con games are spreading like wildfire on the Internet and in unsolicited junk e-mail, They target credit-impaired consumers,

anxious to repair their credit profiles. But we want consumers to get the message that using a false Social Security number—such as a taxpayer I.D. number—to apply for credit violates federal law and will only compound their problems.²⁴

Like other consumers, soldiers want credit, and the things that credit enables them to purchase. As young people with moderate incomes, however, these soldiers often have credit problems that they want or need to fix. Legal assistance attorneys must be vigilant in their preventive law programs to educate young soldiers about scams like the credit repair scam detailed above. Soldiers do not need to exacerbate their credit problems with violations of federal law.

Education is the best way to combat this problem since the solicitation for these types of services comes over e-mail and the internet—a medium that people normally view privately in their own home. Legal assistance attorneys will often be unaware of the problem until it is too late. The bottom line—without active preventive education in the Internet/e-mail arena, we will not be able to help soldiers avoid problems. Instead, we will only be able to help them pick up the pieces after they have already felt the problem’s bite.

A second type of problem that comes over e-mail is simply fraud. It is an Internet/e-mail twist on the telephone billing scams that have become popular over the last several years.²⁵ In this technological twist on the scam, however,

[c]onsumers receive an e-mail informing them that their order has been received and processed and their credit card will be billed for charges ranging from \$250 to \$899. In fact, the consumers hadn’t ordered anything. The e-mail advises consumers that if they have questions about their “order” or want to speak to a “representative” they should call a telephone number in area code 767. Most consumers don’t know the area code is in a foreign country, Dominica, West Indies, because no country code is required to make the calls. Consumers who call expecting to speak to a “representative” about the errone-

20. The Better Business Bureau, *Online Shoppers Do Have Recourse*, (visited 1 June 1999) <<http://www.bbb.org/alerts/19990201.html>>. The Better Business Bureau (BBB) also highlights their online complaint system in this article. More than 20,000 consumers per month access this system. *Id.* The BBB also certifies member businesses. Consumers can look for the “BBBOnLine” seal on businesses that are members of the BBB and agree to conduct their business in accord with its standards. *Id.*

21. Federal Trade Commission, *Law Enforcement Crackdown Targets Credit Repair Con Artists* (visited June 1, 1999) <<http://www.ftc.gov/opa/1999/9905/id21a4.htm>>.

22. *Id.*

23. *Id.*

24. *Id.*

25. See Federal Trade Commission, *Cramming: Mystery Phone Charges* (visited 1 June 1999) <<http://www.ftc.gov/bcp/conline/pubs/services/cramming.htm>>.

ous “order” are connected to an adult entertainment audiotext service with sexual content. Later, consumers receive telephone charges for the international, long-distance call to Roseau, Dominica.²⁶

The company conducting the scam makes money because “under international agreements, U.S. telephone carriers would ordinarily bill consumers for their pay-per-call charges and forward the funds to the Dominica telephone company which in turn distributes portions of the revenue to the providers of the audiotext service.”²⁷ Fortunately, the FTC has obtained injunctions against the individuals conducting this particular scam and is working to get consumers their money back.²⁸

The message from this scam is clear—consumers must be cautious about *any* message they get via e-mail. Consumers understandably worry when someone indicates that a business is about to place a significant charge on the consumer’s credit card. There is enormous temptation to call immediately. But, as with other e-mail/Internet scams,²⁹ the time necessary to verify the company and the problem is time well-spent.

Again education is the key. Legal assistance attorneys cannot monitor soldiers’ e-mail to protect them from unscrupulous people. They can, however, use all means at their disposal to get soldiers the word on these types of problems. Some innovative ideas that judge advocates have used include posting information pages linked to the installation web site;³⁰ periodic e-mail information papers or e-mail alerts to commanders; and use of television or radio public access to provide classes and information. While informed consumers are not always going to make the best choices, they are bound to make better choices than if they had no information. As electronic commerce becomes increasingly popular, the value of preventive law will only increase. It is the best way that we can help consumers avoid people who use “low-down tactics and high-tech tools to rob consumers in their own homes.”³¹ Major Lescault.

Criminal Law Note

Changes to Federal Rules Become Effective in the Military

Pursuant to Military Rule of Evidence (MRE) 1102,³² MRE 407, 801, 803, 804, and 807 are amended to reflect corresponding changes in the federal rules. The changes to the federal rules became effective on 1 December 1997. The changes to the military rules became effective 1 June 1999. The changes are set forth below with the new language underlined. Major Hansen.

MRE 407. Subsequent remedial measures

When, after an injury or harm allegedly caused by an event, measures are taken ~~which that~~; if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Note: There is a typo in the last sentence of MRE 407 of the MCM 98 Edition (“or feasibility or precautionary measures” should be “or feasibility of precautionary measures”).

MRE 801(d)(2) now reads as follows:

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party’s own statement in either the party’s individual or representative capacity, or (B) a statement of which the party has manifested the party’s adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment of the agency or

26. Federal Trade Commission, *E-mail Duped Consumers into Making Costly International Calls* (visited 1 June 1999) <<http://www.ftc.gov/opa/1999/9905/audiot10.htm>>.

27. *Id.*

28. *Id.*

29. See Federal Trade Commission, *FTC Consumer Alert! FTC Names Its Dirty Dozen: 12 Scams Most Likely to Arrive Via Bulk E-mail* (visited June 1, 1999) <<http://www.ftc.org/bcp/online/pubs/alerts/doznalrt.htm>>.

30. See, e.g., Fort Benning Legal Assistance Office Web Page (visited June 1, 1999) <<http://www.jag.benning.army.mil/la/>> (containing an excellent collection of information linked to the post home page).

31. Federal Trade Commission, *E-mail Duped Consumers into Making Costly International Calls* (visited 1 June 1999) <<http://www.ftc.gov/opa/1999/9905/audiot10.htm>> (quoting Jodie Bernstein, Director of the FTC’s Bureau of Consumer Protection).

32. Military Rule of Evidence 1102 states: “Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is take by the President.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (1998).

employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Note. This change responds to three issues raised in *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the Court's holding by expressly allowing the trial court to consider the contents of the co-conspirator's statement to determine if a conspiracy existed and the nature of the declarant's involvement. Second, it resolves the issue left unresolved in *Bourjaily* by stating that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the accused participated. Third, the amendment extends the rationale of *Bourjaily* to statements made under 801(d)(2)(C) and (D).

MRE 803(24) now reads as follows:

(24) [Transferred to Rule 807]

Note. The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

MRE 804(b)(5) and (6) now read as follows:

(5) [Transferred to Rule 807]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Note. 804(b)(6) states that a party forfeits the right to object to hearsay when that party's wrongdoing caused the declarant to be unavailable.

MRE 807 is new and reads as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Contract and Fiscal Law Note

Constructive Termination for Convenience Cannot be Invoked Retroactively in Requirements Contracts

Introduction

In *Carroll Automotive*,³³ the Armed Services Board of Contract Appeals (ASBCA) denied the Air Force's motion to dismiss the contractor's appeal based on the doctrine of constructive termination for convenience.³⁴ Instead, the board concluded that the Air Force breached its requirements contract³⁵ by failing to order all of its requirements from the same contractor. The board ruled that Carroll Automotive (Carroll), the requirements contractor, was entitled to lost profits. The ASBCA ruled that the Air Force may not retroactively argue that its actions (that is, purchasing the automotive parts accessories from another contractor) constituted partial constructive terminations for convenience.

Background

On 19 September 1990, the Air Force awarded a requirements contract to Carroll. The contract required Carroll to provide automotive parts and accessories for various vehicles and miscellaneous equipment at Luke Air Force Base, Arizona. The contract specified a base year plus four option years, effective on 1 November 1990.³⁶

33. ASBCA No. 50993, 98-2 BCA ¶ 29,864.

34. The constructive termination for convenience is a judge-made doctrine based on the concept that a contracting party who is sued for breach of contract may ordinarily defend on the ground that there existed at the time of the breach a legal excuse for non performance, although that party was then ignorant of the fact. See *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925); *Krygoski Construction Company, Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996).

35. A requirements contract is generally used for purchasing supplies or services when the government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated (in the contract) government agencies will need during the contract performance period. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 16.503(b) (June 1997) [hereinafter FAR].

In December 1995, Carroll learned that the Air Force had purchased vehicle parts and supplies from other contractors, contrary to the terms of its requirements contract, thus breaching the “requirements” clause³⁷ incorporated in the contract. When Carroll requested the Air Force’s complete purchase records for the total contract period, the Air Force only supplied records for 1995.³⁸ From the 1995 purchase records, Carroll estimated that it lost \$46,013.00 in profits for that year.

In June 1996, Carroll submitted a claim for lost profits totaling \$184,052.00. This amount covered four of the five years of the total contract period based on the 1995 purchase records provided by the Air Force. In June 1997, the contracting officer granted partial relief on the claim and paid Carroll \$15,318.94 in “lost anticipatory profits” for calendar year 1995. The contracting officer denied the remainder of Carroll’s claim because the contractor failed to substantiate its monetary entitlement for the prior four years.³⁹ On 4 September 1997, Carroll appealed the contracting officer’s final decision to the ASBCA.

The ASBCA Decision

On appeal, the Air Force moved for dismissal alleging that Carroll failed to state a claim upon which relief could be

granted. The Air Force argued that its actions of purchasing the required parts and accessories from other contractors constituted partial constructive terminations for convenience.⁴⁰ Based solely on this legal theory, the Air Force argued that the contract’s termination clause⁴¹ precluded Carroll from recovering profit on the terminated work.⁴² Furthermore, the Air Force asserted that Carroll did not allege bad faith, abuse of discretion, or arbitrary or capricious conduct by the agency.⁴³

The board disagreed. First, the board ruled⁴⁴ that “[p]roof of a constructive convenience termination is not an element of [Carroll’s] claim.”⁴⁵ Therefore, Carroll had no duty to allege bad faith, abuse of discretion, or arbitrary or capricious conduct by the Air Force. Furthermore, the board implied that even if Carroll had argued wrongful termination alleging bad faith, the Air Force could still assert the defense of constructive termination for convenience.⁴⁶

Second, the board concluded that the Air Force could not rely upon the constructive termination for convenience theory to retroactively breach a requirements contract and thus change its obligations under a completed contract.⁴⁷ In arriving at this conclusion, the board relied heavily on *Maxima Corp. v. United States*.⁴⁸ The *Maxima* court held that the government cannot use the constructive termination for convenience doctrine to

36. *Carroll*, 98-2 BCA ¶ at 147,779.

37. See FAR, *supra* note 35, 52.216-21(c) (Requirements). The Requirements Clause states, in part: “Except as this contract otherwise provides, the [g]overnment shall order from the [c]ontractor all the supplies or services specified in the [s]chedule that are required to be purchased by the [g]overnment activity or activities specified in the [s]chedule.” *Id.*

38. The contracting officer did not provide purchase records for the previous four years because the agency did not breach the requirements contracts for those years. Telephone Interview with Major David Frishberg, United States Air Force, Trial Attorney (Apr. 8, 1999) [hereinafter Frishberg Interview].

39. *Carroll*, 98-2 BCA ¶ 29,864 at 147,779. Ironically, the contracting officer denied the monetary claim for the previous four years when it was the Air Force that failed to provide Carroll with the purchasing records for those years.

40. *Id.* It is interesting to note that the contracting officer’s final decision failed to categorize the Air Force’s actions as partial terminations. This retroactive partial termination for convenience did not surface until the Air Force moved for dismissal of the appeal.

41. See FAR, *supra* note 35, 52.249-2 (Termination for Convenience of the Government). The termination clause provides, in part: “If the termination is partial, the [c]ontractor may file a proposal with the [c]ontracting [o]fficer for an equitable adjustment of the price(s) of the continued portion of the contract. The [c]ontracting [o]fficer shall make any equitable adjustment agreed upon.” *Id.*

42. The termination for convenience clause specifically limits recovery of profit to work completed by the contractor before the termination. In part, FAR 52.249-2(f) provides: “the [c]ontractor and the [c]ontracting [o]fficer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. . . .” *Id.* (emphasis add).

43. Generally, a contractor must allege and prove bad faith, abuse of discretion, or arbitrary or capricious government conduct in order to overcome the government’s convenience termination. See generally *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 543 F.2d 1298 (1976); *A-Transport Northwest Co. v. United States*, 36 F.3d 1576 (Fed. Cir. 1994).

44. *Carroll*, 98-2 BCA ¶ 29,865 at 147,780.

45. *Id.*

46. *Id.*

47. *Id.*

48. 847 F.2d 1549 (Fed. Cir. 1988). In *Maxima*, the EPA had a contract for typing, photocopying, editing, and related services. The EPA failed to order the contract’s guaranteed minimum quantity during the contract performance period. One year later, the EPA retroactively terminated the contract for the convenience of the government. *Id.* at 1550-1551.

retroactively terminate a fully performed contract to limit its liability for failing to order the contract's minimum amount of goods or services.⁴⁹ Although *Maxima* involved a partial convenience termination on an indefinite-delivery/indefinite-quantity contract versus a requirements contract in *Carroll*, the board concluded that *Maxima* applied to the *Carroll* case because the Air Force invoked the constructive termination for convenience doctrine after completing the requirements contract.

Third, the board held that bad faith, abuse of discretion, or arbitrary or capricious action by the Air Force are not the exclusive bases for recovering lost profit.⁵⁰ The board concluded that the termination for convenience clause required an equitable adjustment in the contract price in the event of a partial termination. In reaching this conclusion, the board relied upon the contracting officer's final decision that allowed Carroll to recover an additional \$15,318.94 including interest. Based on the contracting officer's determination, the board concluded that the partial terminations for convenience under the requirements contract did not prohibit Carroll from recovering lost profit.⁵¹

The termination for convenience doctrine puts an end to the government's massive procurement efforts that accompanied major wars without paying a contractor profits on unperformed work.⁵² Two factors, however, limit the government's broad right to terminate for convenience any government contract. First, the government may not terminate a contract unless it is in the government's interest.⁵³ Second, the contracting officer cannot in bad faith, abuse of discretion, or arbitrarily or capriciously terminate a contract for convenience.⁵⁴

In *John Reiner & Co. v. United States*,⁵⁵ the court stretched the doctrine of termination of convenience by creating the doctrine of constructive termination. By retroactively allowing the government to constructively terminate a contract for convenience, the doctrine prevents a contractor from recovering anticipated profits by nullifying a government breach. Courts and boards generally applied the *Reiner* rule unless a contractor alleges and proves bad faith, abuse of discretion, or arbitrary or capricious government conduct.⁵⁶ Courts and boards have generally treated the government's failure to perform its obligations under a requirements contract as a constructive change or a breach of contract; "If the [g]overnment action is considered

49. The *Maxima* court held:

The termination for convenience clause can appropriately be invoked only in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties. . . . The termination for convenience clause will not act as a constructive shield to protect defendant from the consequences of its decision to follow an option considered but rejected before contracting. . . .

No judicial authority has condoned use of the convenience clause to create a breach retroactively, where there was none, in order to change the government's obligations under a completed contract. *Id.* at 1553-1554.

50. *Carroll*, 98-2 BCA ¶ 29,865 at 147,780.

51. *Id.* After the board denied the Air Force's motion for dismissal, the Air Force and Carroll settled the appeal in the fall of 1998 for under \$5000. Frishberg Interview, *supra* note 38.

52. JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1073 (3d ed. 1995). The government termination of a contract before the implementation of the termination for convenience doctrine forced the government into a breach of contract. Under the common law breach damages, the contractor was entitled to "anticipatory profits" on unperformed work. *Id.* at 1074.

53. See FAR, *supra* note 35, 52.249-2(a) (Termination for Convenience). The termination clause states, in part: "The [g]overnment may terminate performance of work under this contract in whole or, from time to time, in part if the [c]ontracting [o]fficer determines that a termination is in the [g]overnment's interest." *Id.* Note that the termination does not require that it be in the government's "best" interest.

54. A contractor may prevail over the termination if it can prove there was a specific intent to injure the contractor. *Kelvar Corp. v. United States*, 543 F.2d 1298 at 1301-2 (1976).

55. 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964).

56. Proving that the government acted in bad faith, abused its discretion, or acted arbitrarily or capriciously is extremely difficult. See *Krygoski Construction Company, Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996). In *Krygoski*, the Air Force awarded the plaintiff a contract to demolish an abandoned missile site in Michigan. During a pre-demolition survey, the plaintiff identified additional areas not included in the original government estimate that required asbestos removal. Due to the substantial cost increase related to additional asbestos removal, the contracting officer decided to terminate the contract for convenience and to reprocure the requirement. The plaintiff sued in the Court of Federal Claims alleging breach of contract. Relying on *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), the trial court found the government improperly terminated *Krygoski's* contract. The court also found that the government abused its discretion in terminating the contract under the standard found in *Kalvar*. See *supra* note 55 and accompanying text. The Court of Appeals for the Federal Circuit reversed and remanded, holding that the Court of Federal Claims incorrectly relied upon *dicta* in the plurality opinion in *Torncello* (*Torncello* stands for the proposition that when the government enters into a contract knowing that it will not nor the contract, it cannot avoid a breach claim by using the termination for convenience clause.). Specifically, the court concluded that the trial court improperly found the change of circumstances insufficient to justify termination for convenience. Although arguably the government's circumstances had changed to meet even the *Torncello* plurality standard, the court declined to reach that issue, because *Torncello* only applies when the government enters a contract with no intention of fulfilling its promises.

a breach, the *Reiner* rule (constructive termination for convenience) has been applied to limit recovery on the theory that a convenience termination was possible and could have been used by the contracting officer.⁵⁷ In *Carroll*, the Air Force apparently relied on the *Reiner* rule and claimed its actions constituted constructive terminations for convenience. Therefore, the Air Force could avoid paying the contractor anticipatory profits (breach cost). Unfortunately, the board never addressed the applicability of the *Reiner* rule in its decision and instead

relied on *Maxima*, which dealt with an indefinite-delivery-indefinite-quantity contract.⁵⁸

Will this issue be raised again? Perhaps not, but it is interesting to note that the board could have at least considered the decisions involving a requirements contract that were constructively terminated for convenience.⁵⁹ Major Hong.

57. CIBINIC & NASH, *supra* note 52, at 1088.

58. An IDIQ is a variable quantity contract that is commonly used when the government has some minimum need for supplies and services, but do not know the full extent of the need or when that need may arise. Unlike a requirements contract, the government must purchase a guaranteed minimum quantity under an IDIQ contract. Under an IDIQ contract, however, there is no prohibition from purchasing the same supplies or services from a competing contractor that is found in a requirements contract. See FAR, *supra* note 35, 16.503, 16.504, 52.216-21 (Requirements), 52.216-22 (Indefinite Quantity).

59. See, e.g., S&W Tire Servs., Inc., GSBGA No. 6376, 82-2 BCA ¶ 16,048.

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

Making and Responding to Objections

During a court-martial, trial or defense counsel hears his opposing counsel's question of a witness, and realizes it is time to object. Whether the objection is as to the form of the question, or to the response sought by the question, counsel knows he wants to keep this information from the panel. A number of questions arise as counsel braces to object: Does the need to keep this information from the court justify the risk of aggravating the court with a legal objection? Are the court members even paying close enough attention that they understand the significance of the question? Will an objection heighten their curiosity about this issue? What exactly will the witness say in response to counsel's question if there is no objection? What evidentiary rule is it that precludes the witness from answering the question? Will the members think there is something to hide? How should one make the objection? When should the objection be made? What if the objection is not sustained?

These are just some of the questions that might go through counsel's mind when deciding whether to object. The true advocacy challenge is that an advocate has only a fraction of a second in which to resolve these issues and make the objection. Too often, the critical analysis required inclines counsel either to forego an objection altogether, or to follow the witness's damaging response with a meek objection. The "what, when, how, and why" of making objections reflects the art of trial advocacy; that is, there is no precise formula to guide counsel in what information to object to, or just how to state the objection.¹ The military judge and the Rules of Professional Conduct² will put some limits on excessive forms of objections. Ultimately, however, the lawyer trying the case must decide, in the interests of his client, whether the question at hand demands an objection. If an objection is warranted, counsel must step forth confidently and professionally and stop the proceedings.

In all aspects of trial advocacy, the key to making good decisions is preparation and anticipation. In making and responding to objections, "how" counsel presents his or her position can be the most important part of making or responding to an objection. Following are some guides to assist counsel in "how" to make objections at courts-martial.

Stop the Examination with an Objection

The reason counsel object is to stop the flow of information to the court. Accomplish this goal by quickly rising and, as you

stand, announcing to the court, "Objection, your honor." There is no need to shout, but neither should counsel be timid in making an objection. Demonstrate confidence and good military bearing to the court members by rising with a purpose.

State the Objection

When making an objection do not present an argument or discourse on the law, but give the military judge a legal basis for your objection, for example, "hearsay," "irrelevant," "MRE 609(a)," and the like. Note, too, that sometimes counsel may make "speaking objections,"³ designed simply to state your legal position in layman's terms. For example, in objecting based on relevance, counsel might state, "That matter is not an issue before this court-martial today." The speaking objection may also help out a counsel who knows that what is being said is objectionable, but cannot articulate the technical, legal prohibition or cite to a specific rule.

Make the Objection and Response to the Military Judge

The military judge decides whether to sustain or to deny an objection. The judge also determines how much argument or explanation he requires to make that decision. Thus, counsel should offer a legal basis for an objection and then avoid further argument or discussion until asked by the military judge. Similarly, counsel opposing the objection should avoid responding until asked to do so by the military judge. It is not altogether rare for a judge, about to deny an objection, to change his mind when the counsel opposing the objection unnecessarily speaks up and reveals an improper basis in his question. Such unnecessary argument invites the judge to note, "Oh, well, if that's your basis, counsel, then the objection is sustained." In responding to objections, a good adage to remember is to speak only when spoken to.

Don't Argue with the Military Judge

If the military judge, by his ruling on an objection, has closed an avenue, devote your energy to an alternative approach instead of complaining and arguing with the military judge. Not only will such unnecessary arguing irritate the military judge, but it surely will appear unprofessional to the panel members. While members expect to see counsel make objec-

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 103(a)(1) (1998).

2. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 3.5 (1 May 1992). Rule 3.5 provides: "A lawyer shall not: . . . (c) engage in conduct intended to disrupt a tribunal."

3. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 329 (1994).

tions to advocate for a client and to enforce the rules in a court-martial, so also do the members expect judge advocates to comport themselves as officers by accepting a decision once made and moving to the next point. If, however, you truly feel the military judge made a wrong decision or failed to consider your argument, then ask for a recess or wait until the next Article 39(a) hearing to state your position, and point out precisely why the military judge's ruling was not legally correct.

Do Not Thank the Military Judge

While civility is an admirable quality, and especially so among trial advocates, the military judge is only doing his job in ruling on objections. It appears obsequious to thank the military judge for a favorable ruling. The best course of action,

whether the military judge has ruled for or against you, is simply to move on as if what just happened is what you fully intended or expected. A professional, deliberate response conveys to the court members a sense of confidence in your position.

There is a broad range of permissible objections counsel may make during a court-martial,⁴ and counsel should prepare for any of these objections that may arise in a given case. But trial advocates should learn and adopt a technique for making any such objections in a proper, legal, and professional manner, thus enhancing their overall likelihood of success. Major Allen.

4. See generally THOMAS A. MAUET, TRIAL TECHNIQUES 426 (1996).

USALSA Report

United States Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service.

Regulatory Fees . . . or Taxes? Sorting Out the Difference

In recent months, several installation environmental law specialists (ELSSs) have contacted ELD concerning potential payment of various fees imposed by states for environmental services. The fees vary in name and type to include "hazardous waste management fees," "water pollution protection fees," and "fees for environmental services." This article re-examines the familiar issue of federal liability for state imposed regulatory fees and taxes. The first section provides a review and update of the law of fee/tax liability. The second section outlines the steps to obtain Headquarters, Department of the Army approval to refuse payment of state imposed fees after an ELS has concluded that a state or local regulator has imposed an unlawful tax.

Fee/Tax Liability

General

In general, the federal government is immune from state requirements including fees and taxes. This immunity is constitutionally established through the Supremacy Clause,¹ and

the Plenary Powers Clause.² In addition, the Supreme Court established very early that "the Constitution and the laws made in pursuance thereof are supreme . . . and control the laws of the respective states, and cannot be controlled by them."³

Regarding taxes, the federal government cannot be made to pay a tax without a clear "congressional mandate."⁴ Likewise, the federal government is not subject to state requirements unless it has clearly consented to such in an unequivocal waiver of sovereign immunity.⁵ These waivers cannot be implied,⁶ and must be strictly construed in favor of the United States.⁷

Statutory Scheme

Among the major environmental laws, there are four waivers of sovereign immunity concerning the issue of fees.

Clean Water Act (CWA): Congress waived immunity for "all [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent as any non-governmental entity including the payment of reasonable service charges."⁸

Resource Conservation and Recovery Act (RCRA): Federal facilities' solid and hazardous waste programs must comply with "all [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges."⁹ Unlike the CWA, the RCRA further defines these "reasonable service charges" to include:

" . . . fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed"¹⁰

1. U.S. CONST. art. VI, cl. 2.

2. U.S. CONST. art. I, § 8, cl. 17.

3. *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819).

4. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954).

5. *Hancock v. Train*, 426 U.S. 167, 198 (1976).

6. *Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554 (1920).

7. *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992).

8. 33 U.S.C.A. § 1323(a) (West 1999).

9. 42 U.S.C.A. § 6961(a) (West 1999).

10. *Id.*

Safe Drinking Water Act (SDWA): The 1996 amendments to the SDWA added a waiver as to regulatory fees that is virtually identical to the RCRA waiver.¹¹

Clean Air Act (CAA): The CAA waiver may be broader than those found in the CWA, RCRA, or SDWA, because it omits the word “reasonable” from its waiver that requires compliance with:

[A]ll [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent as any non-governmental entity. The preceding sentence shall apply . . . to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program¹²

Fees v. Taxes

All of the above waivers of sovereign immunity only concern fees assessed by states against the federal government. Fees are charges for services rendered by state or local governments in administering their environmental programs. As one court put it, the “classic regulatory fee” is a levy “imposed by an agency upon those subject to its regulation” and used to raise money that is then placed into “a special fund to defray the agency’s regulation-related expenses.”¹³ Besides such indirect regulatory purposes as targeted revenue raising, fees may also accomplish a direct regulatory purpose such as encouraging or discouraging certain behavior (for example, waste reduction). By contrast, taxes are enforced contributions to provide for the

general support of the entire community. The environmental waivers quoted above do not waive sovereign immunity for state taxation.

Drawing the distinction between a fee and a tax is legally important, but is often difficult to accomplish. In 1978 the Supreme Court in *Massachusetts v. United States*¹⁴ established a test for analyzing all government-imposed fees for services. Under the *Massachusetts* test, if a fee satisfies all of the following three prongs it may be paid as a reasonable service charge:

- (1) Is the assessment non-discriminatory?
- (2) Is it a fair approximation of the cost of the benefits received?
- (3) Is it structured to produce revenues that will not exceed the regulator’s total cost of providing the benefits?

The Department of Defense (DOD) issued a guidance document in June 1984 stating that all environmental service charges levied by a state should be evaluated against the three *Massachusetts* criteria.¹⁵ In 1996, a DOD instruction¹⁶ incorporated these criteria with others in guidance on when environmental fees are payable. Although the waivers of sovereign immunity noted above were passed after *Massachusetts*, they are consistent with it and may reflect an attempt by Congress to codify at least part of the test.¹⁷ Moreover, the Department of Justice (DOJ) has adopted the *Massachusetts* standard as the method for analyzing fee/tax issues. For example, in litigation involving state hazardous waste fees in New York, the DOJ argued that the test was applicable to bar the state from imposing the fees.¹⁸

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11. *Id.* § 300j6(a).

12. *Id.* § 7418(a).

13. *Maine v. Department of the Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992).

14. 435 U.S. 444 (1978). *Massachusetts* involved state immunity from federal taxation. The Court recognized that the states have a qualified immunity from federal taxation and established a three-pronged test to determine whether the immunity applies. By analogy the same principle may be applied in the context of state taxes on federal facilities. The use of the analogy was adopted by the First Circuit in *Maine v. Department of the Navy*. It should be noted, however, the test was not adopted by the Eighth Circuit in *United States v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990).

15. Memorandum, Assistant Secretary of Defense for Installations to Service Secretaries, subject: State Environmental Taxes (4 June 1984). Although this memorandum does not specifically mention the *Massachusetts* case, it details the *Massachusetts* criteria as the basis for determining whether fees from a state are reasonable service charges or taxes.

16. U.S. DEP’T OF DEFENSE, INSTR. 4715.6, ENVIRONMENTAL COMPLIANCE (24 Apr. 1996). This states that it is DOD policy to:

- 4.7. Pay reasonable fees or service charges to State and local governments for compliance costs or activities except where such fees are:
 - 4.7.1. Discriminatory in either application or effect;
 - 4.7.2. Used for a service denied to a Federal Agency;
 - 4.7.3. Assessed under a statute in which the Federal sovereign immunity has not been unambiguously waived;
 - 4.7.4. Disproportionate to the intended service or use; or
 - 4.7.5. Determined to be a State or local tax. (The legality of all fees shall be evaluated by appropriate legal counsel).

17. For example, the fee waivers in RCRA and SDWA define reasonable service charges to include “nondiscriminatory charges,” an apparent codification of the first prong of the *Massachusetts* test. These statutes also enumerate several types of fees that are payable, which may reflect a conclusion as to the benefits that such fees would provide to regulatory programs (i.e., addressing the second and third prongs of the test).

Analysis under Massachusetts

Each of the prongs of the *Massachusetts* test has been further illuminated by litigation concerning environmental fees.

Discrimination Prong: Under *Massachusetts* the federal government must not be treated any differently in the enforcement of the fee requirement than other regulated entities. For example, in a case involving the imposition of RCRA hazardous waste fees, a federal district court summarily found that a state, which exempted itself from imposition of the fees, violates the nondiscrimination prong of the *Massachusetts* test.¹⁹ Although analysis of this prong under the CAA may lead to a contrary result,²⁰ installations should nevertheless be alert to discriminatory air program fees.

The practice of states exempting their own programs is not uncommon. A recent ELD review of a Kansas statute revealed exactly this discrimination.²¹ Analysis under the discrimination prong is generally the easiest aspect of fee/tax review because a problem may be plain from statutory text. An ELS reviewing a state statute should be careful to look for any provisions of state law which exempt out any particular entity: government or private. If the entity is in the same legal position as the federal government (that is, a user of regulated substances, generator of regulated pollutants, or an applicant for environmental permits) it must be subject to the same fees.²²

Benefits Prong: The fee charged must be a fair approximation of the benefits received to be considered “reasonable.” In announcing the three-part test in *Massachusetts*, the Supreme Court stressed that “[a] governmental body has an obvious interest in making those who *specifically benefit* from its services pay the cost”²³ Indeed, courts have determined that the “benefits to be examined in applying the test are those on whom the charges are imposed, not merely benefits to the public at large.”²⁴ Over the years, however, a strict application of the benefits prong has eroded. Litigation in New York illustrates this point, where a federal district court found that hazardous waste generator and transporter fees were permissible even though federal facilities did not receive specific service.²⁵ According to the court “the second prong of the *Massachusetts* test does not require an exact correlation, . . . between the costs of the overall services provided and the fees assessed for such services.”²⁶ The court noted that whether a federal entity actually uses any state services is irrelevant, because they constitute a “benefit” as long as the United States *could* use the state’s services in the future, if needed. Likewise, a simple showing that the dollar value of specific services rendered by the state was less than charges for those services was not enough to establish a lack of benefit. Such a showing does not take into account “overall” benefits that facilities receive as a result of program availability.²⁷ According to the court, the state need only show “a rational relationship between the method used to calculate the fees and the benefits available to those who pay them.”²⁸ The First Circuit pursued similar reasoning in a RCRA fee case.²⁹

18. New York State Dep’t of Env’tl. Conservation v. United States Dep’t of Energy, 850 F. Supp. 132, 135 (N.D. N.Y. 1994). The case involved fees imposed prior to a 1992 amendment to RCRA that created the waiver quoted above. The court was construing a previous waiver that obligated the federal government to pay “reasonable service charges.” *Id.*

19. New York State Dep’t of Env’tl. Conservation v. United States Dep’t of Energy, 89-CV-194 to 197, 1997 U.S. Dist. LEXIS 20718, at *22 (N.D. N.Y. Dec. 24, 1997). Ironically, the court ordered the United States to pay the fees because the state had corrected the discriminatory practice by retroactively paying the fees during the litigation.

20. United States v. South Coast Air Quality Management Dist., 748 F. Supp. 732 (C.D. Cal. 1990). The court held that it was not discriminatory to exempt a state from air fees while the United States must pay. The court reasoned that the CAA waiver of sovereign immunity was “to the same extent as any non-governmental entity . . .” *Id.* Accordingly, under the CAA, a state may be treated differently as it is considered a “governmental entity.”

21. Memorandum, Environmental Law Division, subject: Kansas Solid Waste Tonnage Fee (2 Aug. 1999). Referring to Kansas statute (65-3415b(a), the memorandum notes that “[t]he State of Kansas has established a statutory scheme that allows for the collection of solid waste tonnage or ‘tipping’ fees of \$1.00 for each ton of solid waste disposed in any landfill in the state.” Referring to Kansas statute (65-3415b(c)(5), the statute provides, however, that these fees do not apply to “construction and demolition waste disposed of by the state of Kansas, or by any city or county in the state of Kansas, or by any person on behalf thereof.” The memorandum concludes that the fee is discriminatory and should not be paid.

22. The DOD success in encouraging the state of California to revamp its hazardous waste fees to remove discriminatory provisions is another example of this approach.

23. *Massachusetts v. United States*, 435 U.S. 444, 462 (1978) (emphasis added).

24. *United States v. Maine*, 524 F. Supp. 1056 (D. Me. 1981).

25. New York State Dept. of Env’tl. Conservation v. United States, 850 F. Supp. 132 (N.D. N.Y. 1994).

26. *Id.* at 142.

27. *Id.* at 136.

28. *Id.* at 143.

The federal government has had little success in challenging environmental fees on the basis that they are excessive or do not approximate the costs of benefits received. The cases noted above demonstrate that federal courts may be expected to apply deferential standards when analyzing the “reasonableness” of environmental fees. An installation contesting a fee solely on the basis that there are little or no benefits should be alert to these broad standards. Given the current state of the law, the overwhelming majority of “benefits” analyses will lead to the conclusion that the state may levy the fee.

Fee Structure Prong: Is the fee structured to produce revenues that will not exceed the total cost to the state of the benefits supplied? If this prong is addressed strictly in terms of total program revenues as compared to expenditures, relief from payment of fees will be unlikely as long as there is a “rough relation between state regulatory costs and the fees charged.”³⁰ This analytical approach has not received much attention in practice probably because obtaining the fiscal information necessary to pursue it successfully would be difficult.

Problems associated with the third prong are more easily identified when a state fails to restrict the use of environmental fees to related environmental programs. For example, ELD concluded that installations in Georgia should not pay certain hazardous waste fees because these revenues are placed into a fund from which the state legislature may make general appropriations. Similarly, DOJ’s Office of Legal Counsel opined that a District of Columbia CAA program of charging monthly fees for parking spaces was essentially designed to create a subsidy for its mass transit system.³¹ Environmental law specialists should raise concerns whenever state statutes allow environmental fees to be used for broad purposes or to be co-mingled with unrelated state funds.

Procedures for Approval to Not Pay Unlawful Fees

In resolving environmental fee/tax issues, it is essential that all DOD facilities within a state act in unison. Inconsistent approaches among installations to a fee/tax issue are a recipe for long-term contentious relations between the non-paying installation and the regulatory agency. To maintain an installation’s credibility and to avoid acrimony that can spill over into all media programs, thorough coordination among all DOD (and, preferably, all federal) installations and with headquarters

is required before deciding to not pay fees. Moreover, the ability of the United States to successfully litigate fee/tax cases may be thwarted by installations that take inconsistent positions on issues that arise.

As noted at the outset, the four environmental statutes discussed above all contain waivers of immunity for the payment of regulatory fees. In practice, installations should be paying all environmental fees assessed by states under these programs unless ELD, in consultation with other DOD services, makes a written determination that they are unlawful taxes. In general, when a state agency requests the payment of a regulatory fee, the installation ELS should be the first to analyze the issue of liability using the chart contained in the previous section. The ELS should research the state law, make copies of relevant statutes, and examine prior versions of the statutes to determine if there has been a recent change. In addition, the ELS should determine whether the installation has paid the fee in the past, and note any other relevant background information.

If the ELS concludes that the fee should not be paid, the ELS should diplomatically ask the regulatory agency to delay enforcement of the fee until it has been reviewed by higher federal authorities. Often times the state agencies will not be familiar with the concept of sovereign immunity, or the *Massachusetts* test. The ELS should explain the laws and request cooperation. The ELS should stress that the installation has a duty and obligation to maintain compliance with all state laws and regulations, but that a sovereign immunity issue affects the installation’s authority to pay the fee, and must be addressed at higher levels.³²

The ELS should next forward the ELS’s legal opinion detailing the specific statutory sections and relevant facts to the servicing Army regional environmental coordinator (REC) and the major command. The Army REC should alert the ELD and all Army installations within the jurisdiction to the issue and find out whether each installation has been paying the fees in question. Based on input from other Army installations, the Army REC should augment the factual summary and legal opinion with additional information and legal analysis. The Army REC then coordinates the issue with the designated DOD REC,³³ who has responsibility for developing a DOD position on issues of common concern to all military installations and RECs.³⁴ The DOD REC should serve as the primary point of contact with the state on the issue, to ensure that all military installations speak with one voice.³⁵ Should differences arise among

29. *Maine v. Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992). See *New York State Dep’t of Env’tl. Conservation v. United States*, 772 F. Supp. 91 (N.D. N.Y. 1991) (discussing the second and third prongs of the *Massachusetts* test).

30. *Maine v. Navy*, 973 F.2d at 1013.

31. Whether the District of Columbia’s Clean Air Compliance Fee May Be Collected from the Federal Government, Op. Office of Legal Counsel, DOJ, 1996 OLC LEXIS 10 (23 Jan. 1996). This opinion, while it did not specifically track with the structure of the *Massachusetts* test, is an excellent discussion of the legal principles that support it.

32. William D. Benton & Byron D. Baur, *Applicability of Environmental “Fees” and “Taxes” To Federal Facilities*, 31 A.F.L. REV. 253, 261 (1989). This article includes many practical tips on resolving fee/tax issues.

DOD services as to whether a fee in question should be paid, the DOD REC will have the primary responsibility to resolve those differences.

As noted above, Army RECs should coordinate factual summaries and legal opinions with the ELD as well as the DOD REC. This will allow ELD to make coordination with the headquarters elements of the other DOD services, if needed.³⁶ In addition, for RCRA fee/tax questions, ELD effects any necessary policy coordination with the Army secretariat (the DOD-designated executive agent for RCRA issues)³⁷ through the Army General Counsel. The Environmental Law Division also consults with DOJ to determine if a particular position will be supported in case of litigation over RCRA-based fees.

The key to resolving fee/tax issues efficiently is the initial research and opinion by the ELS, followed by further development and active coordination of the issue by both the Army and DOD RECs. Following the procedures outlined above will allow the installation to resolve each fee/tax issue while minimizing damage to working relationships with regulators. That is, regulators should be instructed that fee/tax issues are significant legal and policy matters that are addressed by "higher headquarters," and that decisions to withhold payments for particular fees are not made at the installation level. Major Cotell and Lieutenant Colonel Jaynes.

33. Where the Army REC is also the DOD REC, that office would perform dual functions. See U.S. DEP'T OF DEFENSE, INSTR. 4715.2, DOD REGIONAL ENVIRONMENTAL COORDINATION para. 4.3.1 (3 May 1996). Under this Instruction, the Army REC also serves as the DOD REC for EPA Regions 4, 5, 7, and 8. Air Force RECs are also DOD RECs for Regions 2, 6, and 10. Navy RECs are also DOD RECs in Regions 1, 3, and 9. *Id.* para. 3.1.

34. *Id.* para. 5.4.1. Under this policy, the DOD REC for each region is responsible for monitoring and coordinating the consistent interpretation and application of DOD environmental policies on military installations.

35. *Id.* para. 5.2.1.

36. Coordinating fee/tax issues typically results in the ELD preparing legal opinions on whether a particular fee is payable. Sample analyses for fee issues in Georgia, California, and Kansas are available on request.

37. U.S. DEP'T OF DEFENSE, INSTR. 4715.6, ENVIRONMENTAL COMPLIANCE, enclosure 2 (24 Apr. 1996).

Fee/Tax Template

The following summarizes the foregoing discussion into a template for analyzing fee/tax issues:

A. *Closely examine the applicable waiver of sovereign immunity.*

That is, look at the waivers reviewed above for the CWA, RCRA, SDWA, or CAA to see if the fee in question is clearly within the general scope of the waiver.

B. *Does the levy pass each of the prongs in the Massachusetts v. United States test?*

The following three prongs reflect a lens for further examining waivers of sovereign immunity for regulatory fees based on judicial decisions. If the answers to all three of the primary questions are yes, then the fee is a payable service charge, not an unlawful tax.

1. Is the levy imposed in a nondiscriminatory fashion?

- Are there regulated entities within the state on whom the fee is not imposed?
- Are those entities similarly situated with the federal government (i.e., do they generate regulated substances and apply for environmental permits)?
- Is the state government required to pay its own fees?

2. Is the levy based on a fair approximation of the costs of the benefits (i.e., is it associated with a discernible benefit to the payor)?

-- Characteristics associated with benefits to the payor (i.e., "user" fees):

- payments are made in return for government-provided benefits
- duty to pay arises from voluntary use of services (e.g., receipt of a permit)
- failure to pay results in termination of services
- levy is imposed by an *agency* in capacity as vendor of goods and services
- payments are calculated to recoup actual costs of regulating the payor
- services, though not actually used by payor, are available to the payor
- payments, though not actually equal to direct services received, support overall general benefits of the regulatory program

-- Characteristics not associated with benefits to the payor (i.e., taxes):

- liability arises from status (e.g., assessments for property owners)
- failure to pay results in penalties
- duty to pay arises automatically, regardless of services provided
- levy is imposed by the *government* in capacity as a sovereign agent
- payments are fixed and charged the same to all users
- payments are used to provide benefits to the public at large
- services are not available to the payor

3. Is the levy structured to produce revenues that will not exceed the total cost to the state government of the benefits to be supplied to the payor?

- Does it demonstrably support only the cost to the state of administering the regulatory program?
- Does it produce net revenues to the state for potentially unrelated uses (i.e., non-regulatory government programs or the general public)?

Guard and Reserve Affairs Items

*Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army*

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....trometn@hqda.army.mil
Director

COL Keith Hamack,.....hamackh@hqda.army.mil
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Dr. Mark Foley,.....foleym@hqda.army.mil
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Mrs. Debra Parker,.....parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster,fostesl@hqda.army.mil
IMA Assistant

USAR/ARNG Applications for JAGC Appointment

Effective 14 June 1999, the Judge Advocate Recruiting Office (JARO) will process all application for USAR and ARNG appointments as commissioned and warrant officers in the JAGC. Inquiries and requests for applications, previously handled by GRA, will be directed to JARO.

Judge Advocate Recruiting Office
901 North Stuart Street, Suite 700
Arlington, Virginia 22203-837

(800) 336-3315

Applicants should also be directed to the JAGC recruiting web site at <www.jagcnet.army.mil/recruit.nsf>.

At this web site they can obtain a description of the JAGC and the application process. Individuals can also request an application through the web site. A future option will allow individuals to download application forms.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1999

July 1999

5-16 July 149th Basic Course (Phase I-Fort Lee) (5-27-C20).

12, 13 July 30th Methods of Instruction Course (5F-F70).

6-9 July Professional Recruiting Training Seminar

12-16 July 10th Legal Administrators Course (7A-550A1).

16 July-24 September 149th Basic Course (Phase II-TJAGSA) (5-27-C20).

August 1999

2-6 August 71st Law of War Workshop (5F-F42).

2-13 August 143rd Contract Attorneys Course (5F-F10).

9-13 August 17th Federal Litigation Course (5F-F29).

16-20 August 155th Senior Officers Legal Orientation Course (5F-F1).

16 August 1999-26 May 2000 48th Graduate Course (5-27-C22).

23-27 August 5th Military Justice Mangers Course (5F-F31).

23 August-3 September 32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September 1999 USAREUR Legal Assistance CLE (5F-F23E).

13-17 September 1999 USAREUR Administrative Law CLE (5F-F24E).

13-24 September 12th Criminal Law Advocacy Course (5F-F34).

29, 30 September 30th Methods of Instruction Course (5F-F70).

October 1999

4-8 October 1999 JAG Annual CLE Workshop (5F-JAG).

4-15 October 150th Basic Course (Phase I-Fort Lee) (5-27-C20).

15 October- 22 December	150th Basic Course (Phase II- TJAGSA) (5-27-C20).	26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
12-15 October	72nd Law of War Workshop (5F-F42).		
18-22 October	45th Legal Assistance Course (5F-F23).	28 January- 7 April	151st Basic Course (Phase II- TJAGSA) (5-27-C20).
25-29 October	55th Fiscal Law Course (5F-F12).	31 January- 4 February	158th Senior Officers Legal Orientation Course (5F-F1).
November 1999		February 2000	
1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).	7-11 February	73rd Law of War Workshop (5F-F42).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).	7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
15-19 November	53rd Federal Labor Relations Course (5F-F22).	14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).	28 February- 10 March	33rd Operational Law Seminar (5F-F47).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).	28 February- 10 March	144th Contract Attorneys Course (5F-F10).
December 1999		March 2000	
6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).	13-17 March	46th Legal Assistance Course (5F-F23).
6-10 December	1999 Government Contract Law Symposium (5F-F11).	20-24 March	3rd Contract Litigation Course (5F-F102).
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).	20-31 March	13th Criminal Law Advocacy Course (5F-F34).
	2000	27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).
January 2000		April 2000	
4-7 January	2000 USAREUR Tax CLE (5F-F28E).	10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).	10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
10-21 January	2000 JAOAC (Phase II) (5F-F55).	12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).	17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).
18-21 January	2000 PACOM Tax CLE (5F-F28P).		

May 2000		5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
1-5 May	56th Fiscal Law Course (5F-F12).		
1-19 May	43rd Military Judge Course (5F-F33).	12-16 June	4th Senior Legal NCO Course (512-71D-CLNCO).
8-12 May	57th Fiscal Law Course (5F-F12).	12-16 June	30th Staff Judge Advocate Course (5F-F52).
	June 2000	19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
5-9 June	3rd National Security Crime and Intelligence Law Workshop (5F-F401).	19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).	26-28 June	Professional Recruiting Training Seminar
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).		

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available through the DTIC, see the April 1999 issue of *The Army Lawyer*.

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer*.

3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1998 issue of *The Army Lawyer*.

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer*.

5. Articles

The following information may be useful to judge advocates:

Lawrence E. King, *Strate v. A-1 Contractors: A Perspective*, 75 N.D. L. REV. 1 (1999).

Ved P. Nanda, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT'L. & POL'Y 827 (Winter 1998).

6. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pen-tiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel

are available by e-mail at jagsch@hqda.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

US Army Corps of Engineers
215 North 17th Street
ATTN: Ms. Karen Stefero, Librarian
Omaha, NE 68102-4978
Commercial: (402) 221-3229
e-mail: karen.l.stefero@usace.army.mil

Comptroller General Decisions, Vols. 1-72
US Court of Claims Reports, Vols. 104-159
US Court of Claims Reports, Vols. 160-210
West's Federal Digest, Vols. 1-72
West's Federal Practice Digest, Vols. 1-92
Modern Federal Practice Digest, Vols. 1-60
Northeastern Reporter, Vols. 1-200
Northeastern Reporter Digest, Vols. 1-68
Pacific Reporter, 1st SE, Vols. 1-300
Pacific Digest, 1st SE, Vols. 2-15
Pacific Digest, Beginning 1-100, P 2D, 1-40
Southwestern Reporter, 2d, Vols. 265-554.