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Articles

Book Reviews

Acquisition Planning in the United States Army Reserve

Lieutenant Colonel John Gohl[*]

Introduction

Managers in the United States Army Reserve (USAR) must exercise skill in acquisition planning as they support the global war on terrorism while they simultaneously restructure in function and relocate command elements.[1] Increasing operational tempo,[2] end strength caps,[3] and public policy requirements[4] act in concert to assure an unprecedented level of reliance on government contractors by the USAR. By way of example, the primary contracting organization supporting the USAR, the USAR Contracting Center (ARCC), Fort Dix, New Jersey, reports an increase in the dollar amount of contracting actions in the USAR from $399.8 million in fiscal year 2004, to $688 million in fiscal year 2007.[5]

> In spite of the large increase in workload, the increased complexity of contacts, and the increased tempo required, there has been a dramatic reduction in the capability of the Army to meet this challenge . . . . This combination represents a 'perfect storm' in Army contracting.[6]

The Army's Judge Advocate General (TJAG) has identified contract law capability as a Judge Advocate core legal discipline.[7] However, the Gansler Commission observations strike a chord with even a casual observer of the state of the current USAR contract law Judge Advocate capability. While contract law capability exists in the USAR, dedicated uniformed USAR contact law positions are rare.[8] To accomplish necessary legal reviews of contracting actions, USAR contracting at the Regional Readiness Commands must rely on part-time legal support from government civilian attorneys at the USAR organizations it supports.[9] This approach does little to assure that USAR develops and maintains a core capability of trained and deployable contract law Judge Advocate assets.

Dedicated contract law positions that support real-world USAR contract functions would foster the development of USAR contract law expertise in the Judge Advocate General's Corps. The USAR force structure is not there yet. The responsibility for the development of the contract law core discipline currently rests squarely on the shoulders of every USAR Judge Advocate senior leader.[10] Accordingly, it is of vital importance to the mission of the USAR that USAR Judge Advocate leaders understand the function and best practices of acquisition planning for USAR procurements.

The purpose of this article is twofold. First, the article acts as a primer and ready reference for Judge Advocates, senior leaders, and USAR lawyers advising requiring activities at USAR Command (USARC) staff directorates, subordinate commands, and functional organizations. Second, the article identifies and presents resolutions for common legal issues encountered by attorneys, organizational clients and contracting officers supporting acquisition functions in the USAR.

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[1] *See* Press Release, U.S. Army, Army Reserve Chief Predicts Large Changes in Future (Feb. 15, 2005).

[2] *See* JOINT CHIEFS OF STAFF, RESERVE COMPONENT EMPLOYMENT STUDY 2005 annex G (1999) (providing analysis of issues related to increased operational tempo in the Reserve components).

[3] P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 211 (2003).

[4] *See* U.S. OFFICE OF MGMT. & BUDGET, CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter OMB CIR. A-76] (requiring increased privatization of government functions).

[5] E-mail from Pamela Lutz, ARCC Deputy Director, to the author, subject: Input for Your Advanced Acquisition Planning Article (5 May 2006, 16:09:00 EST) (on file with author); e-mail from Pamela Lutz, ARCC Deputy Director, to the author, subject: Army Lawyer Article (21 Mar. 2008, 09:50:00 EST) (on file with author).

[6] JACQUES S. GANSLER ET AL., URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING, REPORT OF THE "COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS" (2007).

[7] Memorandum, The Judge Advocate General, to Judge Advocate Senior Leaders, subject: Training Guidance (29 Oct. 2007) [hereinafter OTJAG Memo];

[8] E-mail from Lieutenant Colonel John Gohl, to Colonel Kathryn Stone, Army OTJAG, subject: Contract Law Billets Data Call (8 Feb. 2008, 15:57:00 EST) (on file with author).

[9] *Id.*

[10] OTJAG Memo, *supra* note 7.

Active component contract law attorneys will benefit from learning the unique organizational acquisition planning model successfully employed in the USAR, and can duplicate this success by carrying elements of the USAR model to their active component organizations.

The Requirement for Acquisition Planning

Anyone who clips a coupon from the Sunday newspaper, or shops for the best prices by visiting several department stores, conducts acquisition planning. Some military managers have no more expertise in government acquisitions than the average Sunday newspaper reader, but must plan for the acquisition of goods and services valued from hundreds of thousands up to millions of dollars.

Acquisition planning is required by statute. The statutory requirement to "use advance procurement planning and market research,"[11] is implemented by Federal Acquisition Regulation (FAR) Part 7, *Acquisition Planning*.[12] The minimum level of formality for acquisition planning within the Department of Defense (DOD) is further spelled out in Defense Federal Acquisition Regulation Supplement (DFARS) Part 207. The DFARS requires formal, written acquisition plans only for acquisitions in the multi-million dollar range.[13] Further, DFARS Part 207, *Acquisition Planning*, recently increased the dollar thresholds for required preparation of written acquisition plans.[14]

At the same time, the Secretary of the Army has called for increased acquisition planning for thousands of low-level acquisitions by imposing a requirement that the major commander (usually a lieutenant general) approve all service contracts, whether new acquisition or exercise of option periods.[15]

The USARC headquarters has more stringent planning requirements for its acquisitions than most active Army activities require for acquisition actions. Before an acquisition action is sent to the supporting contracting office, the Chief of Staff must approve a written acquisition plan, also called a "requirements packet."[16] The dollar threshold for written acquisition planning at the USARC headquarters is only $2500.[17] The planning documents required for low-dollar acquisitions are a simplified version of the FAR requirements for larger acquisitions. An Army contracting officer would likely observe that the approved requirements packet resembles a "purchase request on steroids."

Acquisition Planning at the USARC Headquarters

Acquisition planning in the USARC Headquarters is accomplished through the use of a consultative process with Army Acquisition Corps Contracting Officers at the USAR Contract Administration Support Office (CASO). The USARC CASO is a first-of-its-kind organization in the United States military. The CASO contract analysts are certified Acquisition Corps officers; most are fully (level II) certified. Their role at the USARC does not include making purchases on behalf of the government. The CASO contract analysts are consultants for the requiring activities of the USAR, including action officers at the Office of the Chief, Army Reserve (OCAR) and USARC Headquarters.

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[11] 41 U.S.C. § 253a(a)(1)(B) (2000), 10 U.S.C. §2305(a)(1)(A)(ii).

[12] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 7.105(a), (b) (July 1, 2007) [hereinafter FAR] (providing a detailed list of acquisition planning considerations).

[13] U.S. DEP'T OF DEFENSE, FEDERAL ACQUISITION REG. SUPP. subpt. 207.103 (May 19, 2006) [hereinafter DFARS] (requiring written acquisition plans for: (a) development acquisitions valued at $5 million or more; (b) production or services acquisitions valued at $30 million or more for all years or $15 million or more for any fiscal year; and (c) any other acquisition considered appropriate by the agency).

[14] 48 C.F.R. § 207 (Sept. 2006); *see also* worksheet, *infra* App. C.

[15] Memorandum, Secretary of the Army, U.S. Army, to HQDA Principles, MACOM Commanders and the Superintendent, USMA, subject: Army Policy for Civilian Hiring and Initiation/Continuation of Contracts for Service Personnel (23 Feb. 2006) [hereinafter Sec'y of the Army Memo] (establishing new requirements for approval of service contracts).

[16] Contract Administrative Support Office Standing Operating Procedures, *available at* https://usarcintra/caso/SOP/CASO%20SOP.htm.

[17] Memorandum, Chief of Staff, U.S. Army Reserve Command, to Directors, Chiefs, Coordinating and Personal Staff Agencies, subject: Contract Funding Vehicles (5 Dec. 2005) [hereinafter Contract Funding Vehicles Memo].

The CASO review process assures that the requiring activities structure their requirements to provide for maximum competition and economically efficient product or service packages. For example, the process saved the USARC millions of dollars in administrative fees by enforcing Army contract offloading policies that resulted in contracts awarded through the Army Contracting Agency.[18] As another example, the review process identified and resolved a fiscal law issue which eliminated a cost to the government of $1 million each time the contract expired.[19]

A well-drafted USARC Headquarters acquisition plan provides a 90% solution for the Army Contracting Agency supporting contracting office. The plan also serves as an audit trail for acquisition decisions and facts supporting the decisions. On completion of the acquisition plan by the requiring activity, the CASO contract analyst obtains a legal review from the USARC Office of the Staff Judge Advocate (OSJA), ensures OSJA recommendations are carried out by the requiring activity, staffs the action to coordinate for funding and approval by the USAR Chief of Staff, and submits the acquisition plan to the appropriate supporting contracting office.

The written acquisition plan consists of up to eight documents. The document requirements vary depending on the proposed level of competition and whether the acquisition is for a new requirement, a modification to an existing contract, or the exercise of a contract option.[20] The chart at Appendix A summarizes which documents are required. The following discussion addresses the acquisition planning documents which frequently contain issues of legal significance. The purpose of the discussion is to identify common, avoidable legal problems, and to suggest best practices to resolve those issues.

Legal Issues in the Acquisition Strategy Memorandum (ASM)

The ASM is the cornerstone document of the acquisition plan.[21] The ASM is less formal than the written "acquisition strategy" required by DFARS Subpart 207.103 for some high-dollar acquisitions. The ASM provides a summary of the key points of the acquisition to the approving authority, contracting analyst and contracting officer. The key points include: a description of the project, identification of key contact persons within the command, funding resources, proposed methods of competition, and any issues or concerns peculiar to the acquisition. The importance of the ASM is underscored by the requirements for written review by a CASO contract analyst and legal review by the USARC OSJA contract law attorney.[22]

Exercise of Contract Options

In cases involving the exercise of a contract option, the FAR requires contracting officer determinations as a condition precedent to exercising the option.[23] Accordingly, the USAR ASM must provide adequate support for the required contracting officer determinations. The organizational acquisition planner uses the ASM to support the contracting officer's exercise of sole discretion to determine that the exercise of the option is the "most advantageous method of filling the government's need, price and other factors considered."[24] For example, the drafter of the ASM may use the "other considerations" paragraph of the ASM for a discussion of the government's need for continuity of operations and potential costs of disrupting operations. These are significant factors in supporting the contracting officer's determination.[25]

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[18] Memorandum, OCAR, to Subordinate Commanders and USAR Staff Directorates, subject: Proper Use of Non-DOD Contracts (31 May 2005) [hereinafter OCAR Memo] (requiring determination and finding (D&F) certifying proposed offload is in the "best interest of the government" including handwritten note from Lieutenant General (LTG) Helmly, stating "use in house contracting resources.") (on file with author).

[19] Memorandum, USARC OSJA, to CASO, subject: Review of Acquisition Planning Materials for Regional Training Site–Medical (RTS-MED) Acquisition (13 Mar. 2006) (on file with author).

[20] Contract Funding Vehicles Memo, *supra* note 17.

[21] *See infra* App. B for a sample ASM.

[22] *See* Contract Funding Vehicles Memo, *supra* note 17.

[23] *See* FAR, *supra* note 12, at 17.207(c)–(f).

[24] *Id.* at 17.207; *see also* C.G. Ashe Enters., B-188043, 56 Comp. Gen. 397, Mar. 7, 1977 (stating that where options are exercisable at the sole discretion of the government, board will not consider a bid protest by incumbent asserting agency should have exercised option provisions).

[25] *See* FAR, *supra* note 12, at 17.207(e).

Period of Performance Issues

The period of performance (POP) defines the length of the contract as well as the start and end dates for contract performance. These dates appear in the ASM and in the performance work statement (PWS). Acquisition plans developed over a period of time may contain differing POPs in the various acquisition planning documents which is problematic because it does not clearly communicate the agency's requirements to the supporting contracting office. The POP dates must be consistent in all documents of the acquisition plan.

The period of performance for a new acquisition typically includes a base year plus up to four option years.[26] This set-up is the traditional method for contacts which use single-year funds, such as Operations and Maintenance USAR (O&M) funding, which are also referred to as category "2080" funds. Multi-year contracts[27] are relatively uncommon at the USAR Headquarters because most of its contract acquisitions require the use of single-year O&M funds.[28]

Requiring Activity Advocacy For-or-Against Small Business Set-Aside Decisions

The USAR requiring activity may use the ASM to communicate information that informs and advocates for the requiring activity position concerning the contracting officer's evaluation of whether to set aside certain acquisitions for small businesses. In the "competition" or "other considerations" paragraphs of the ASM, the requiring activity may discuss the reasons why the requiring activity believes a small dollar-value acquisition is, or is not, appropriate for a small business set-aside.

The requiring activity discussions must have a basis in the FAR requirements for small business set aside recommendations. For example, the FAR requires a total small business set-aside for most contracts not exceeding $100,000.[29] The total contract price is determined by adding the value of the base year plus all option years.[30] Thus, the requiring activity may point out whether the small business set-aside is or is not required and validate whether the value of the base year plus all option years exceed $100,000.[31]

As another example, if the acquisition qualifies for the total small business set-aside, then each business solicited by the contracting officer must qualify as a "small business" within the meaning of the FAR, "unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery."[32] The contracting officer is not required to use any particular method of assessing the availability of small businesses.[33] Thus, prior procurement history, market surveys, and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set-aside an acquisition for small business. [34] However, the assessment must be based on sufficient facts to establish its reasonableness.[35] Input from the USAR requiring activity in the ASM assists the contracting officer in reaching the required determination.

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[26] *See id.* at 17.204(e).

[27] Contracts with a base period of two or more years.

[28] Exceptions include information technology acquisitions, which may require the use of multiple-year procurement funds, and contracts under the GSA multi-year contract authority (codified at 40 U.S.C. § 322 (2000)), which feature lengthy base periods as an exception to the requirements of FAR 17.204.

[29] FAR, *supra* note 12, at 19.502-2. *But see id.* at 8.404(a), 16.5 (exempting Federal Supply Schedule orders and orders under Indefinite Delivery Indefinite Quantity contracts).

[30] *Id.* at 1.108.

[31] Analysis of option years for purpose of determining total contract price under FAR 1.108 differs from the analysis of option years to determine obligation of funds, which treats the exercise of an option as a separate contract under FAR 2.101 and DEFENSE FIN. & ACCOUNT. SERV. -INDIANA MANUAL 37-1, ch. 8, para. 080603(B) (Mar 2004) [hereinafter DFAS-IN 37-1].

[32] FAR, *supra* note 12, at 19.502-2; *see also* NJCT Corp., Comp. Gen. B-219455, July 22, 1985, 85-2 CPD ¶ 170 (holding that the actual number of offers received does not establish that the expectation of receiving more offers was not reasonable).

[33] Mktg. & Mgmt. Info., Inc., B-283399.2, B-283399.3, 1999 U.S. Comp. Gen. LEXIS 223 (Nov. 30, 1999).

[34] *Id.*

[35] *Id.*

If the requiring activity feels the purchase is not appropriate for the use of the small business set-aside, he can support the required contracting officer's determination by using the ASM to communicate the reasons to exempt the acquisition from the required set-aside. For example, if the acquisition is for a commercial item or service which is not available from a small business, the requiring activity uses the "other considerations" paragraph of the ASM to discuss why the need could not be filled using a small business. The requiring activity should never use the ASM to communicate a mere statement of preference, such as "we have had trouble with small business contracts in the past and we prefer a large business for this requirement."

The requiring activity can also use the ASM to recommend a small business set-aside if the value of the acquisition does not mandate the set-aside. In some cases a set-aside may be desirable to avoid potential litigation based on an organizational conflict of interest (OCI)[36] or perceived anti-competitive behavior. The three most common causes of OCI are "unequal access to information," "impaired objectivity," and "biased ground rules."[37]

In cases where the USAR requiring activity anticipates the performance of the contract would give a contractor access to non-public information, which could give the contractor a competitive advantage in other acquisitions, the requiring activity avoids the resulting "unequal access to information" problem[38] by recommending award of the contract to a small business that is unlikely to compete for the other acquisitions.

Similarly, a USAR requiring activity recommendation to award to a small business avoids potential protests by large businesses in cases that otherwise may require exclusion of some, but not all, large businesses as sources, because of an "impaired objectivity" problem. Impaired objectivity occurs when an incumbent contractor is likely to compete for a new requirement, even though the award of the new contract would likely result in conflicting obligations under the incumbent contract and the new contract.[39] In these cases the requiring activity may use the ASM to recommend the contracting officer award to a small business that does not have other contacts with the Command.

The USAR acquisition planner avoids a "biased ground rules" problem—in which the new acquisition could allow the new contractor to write a statement of work or otherwise set the ground rules for another government contract[40]—by recommending that the contracting officer award the new contract to a small business that is unlikely to compete for the contract that would be impacted by the work of the new contractor.

Contract Bundling

The ASM is an appropriate document to communicate to the contracting officer how the organization has satisfied the rules related to contract bundling. As the government strives for greater efficiencies in contract acquisitions, requiring activities frequently identify similar types of small contracts within their organizations which can be consolidated into smaller numbers of larger contracts.

Contract bundling occurs when two or more functions previously performed under separate smaller contracts are consolidated into a solicitation for a single contract that is likely to be unsuitable for small business, due to the specialized nature of the elements of the consolidated acquisition, geographic dispersion of the new requirement, or the aggregate dollar value of the resulting contract.[41] For example, contract bundling occurs if two contracts, which previously qualified for a mandatory small business set-aside, a discretionary small business set aside, or could have been performed by small businesses individually, are consolidated into a new single acquisition which, due to its dollar value, does not qualify for the mandatory set-aside.[42]

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[36] *See* FAR, *supra* note 12, at 9.5.

[37] *See, e.g.*, Axiom Res. Mgmt. Inc. v. United States, 78 Fed. Cl. 576 (2007).

[38] *See, e.g.*, *id.*

[39] *See, e.g.*, *id.*

[40] *See, e.g.*, *id.*; *see also e.g.*, J&E Assoc. Inc., B-278771, 1998 U.S. Comp. Gen. LEXIS 64 (Mar. 12, 1998) (holding that the agency required to address organizational conflicts where university was contracted to provide education counselors and the counselors could recommend Soldiers enroll in classes offered by the university)

[41] FAR, *supra* note 12, at 2.101.

[42] *Id.* at.19.502-2; *see also id.* at 2.101; Sigmatech, Inc., B-296401, 2005 U.S. Comp. Gen. LEXIS 140 (Aug. 10, 2005); *see also* U.S. DEP'T OF DEFENSE, OFFICE OF SMALL BUSINESS PROGRAMS, BENEFIT ANALYSIS GUIDEBOOK fig.1-1 (2007).

Attorneys reviewing acquisition planning products must ensure that their agencies avoid unnecessary and unjustified bundling of contract requirements that preclude competition by small businesses.[43] However, bundling is permissible if the agency documentation shows that the agency adhered to the rules in the FAR related to contract bundling.[44] The contracting officer uses the information contained in the USAR acquisition plan to reach the required contracting officer determinations with regard to the proposed bundling.

Contract bundling is necessary and justified for most acquisitions if the command will realize a 10% or greater cost savings as a result of the bundling.[45] The ASM is an appropriate document to communicate the efforts of the command in meeting the following special requirements to justify contract bundling under the FAR.

First, the head of the agency must conduct market research to determine whether bundling is necessary and justified—i.e., that a cost savings of at least 10% will be realized.[46] Market research, which is already a requirement for all acquisitions, including USAR acquisition plans, is used by the agency head in making the determination. Thus, a statement in the ASM referring to the cost savings shown in the market research assists in meeting this requirement.

Second, the contracting officer must make a statement as to why bundling is justified.[47] If the requiring activity adequately states his case in the ASM and provides supporting documentation in the acquisition plan, the contracting officer need do little more than refer to the acquisition planning documents to support the required finding.

Management Decision Document (MDD) Requirement Is Suspended

If the proposed solicitation is for the acquisition of services which support or improve agency policy development, decision making, management or administration,[48] then the acquisition is for Contracted Advisory and Assistance Services (CAAS). The regulatory requirement for an MDD for CAAS contracts is temporarily suspended,[49] but this will not significantly reduce the level of acquisition planning at the USARC headquarters. An ASM will still be required at the USARC headquarters in the place of an MDD. The key differences between the ASM and the MDD are that the MDD contains more detail than the ASM in the areas of quality control and contract administration planning,[50] and the MDD has differing levels of approval in some cases.[51]

Legal Issues in the PWS

The PWS is important to the acquisition both during contract formation and during contract administration. A well-written PWS supports a solicitation which provides the largest possible number of potential contractors with opportunity to compete. At contract award, the PWS is incorporated into the contract. Mistakes in the PWS during the acquisition planning phase surface to cause problems post-award during contract administration.

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[43] 15 U.S.C. §631(j)(3) (2000).

[44] FAR, *supra* note 12, at 7.107; *see, e.g.*, B.H. Aircraft Co. Inc., Comp. Gen. B-295399.2, July 25, 2005, 2005 CPD ¶ 138 (affirming agency bundling of 2454 individual requirements under a single contract, where the provisions of FAR 7.107 were adequately carried out by the agency).

[45] FAR, *supra* note 12, at 7.107(b) (requiring a cost savings of at least 10% to justify bundling a contract valued at $75 million or less, including all option years).

[46] *Id.* at 7.107.

[47] *Id.* at 19.202-1.

[48] U.S. DEP'T OF THE ARMY, REG. 5-14, MANAGEMENT OF CONTRACTED ADVISORY AND ASSISTANCE SERVICES para. 1-4 (15 Jan. 1993) [hereinafter AR 5-14].

[49] Memorandum, Deputy Under Secretary of the Army, to HQDA Principal Officials, Subordinate Commanders and Directors, subject: Suspension of Requirement to Prepare a Management Decision Document (22 May 2006).

[50] AR 5-14, *supra* note 48.

[51] *See* U.S. ARMY FORCES COMMAND SUPP. 1 TO AR 5-14 (1 Dec. 1994) [hereinafter FORSCOM SUPP. 1 to AR 5-14] (providing delegation of authority to the Major Subordinate Commander to approve CAAS for studies, analysis, and evaluation in the amount of $250,000, and for management support services or engineering and technical services in the amount of $500,000).

The intent of this section is not to provide instruction on how to complete a PWS. The DOD provides a handbook to guide the preparation of PWSs.[52] Neither does this section provide an exhaustive analysis of all possible PWS issues leading to legal problems. The following discussion highlights examples of PWS issues encountered when reviewing acquisition planning products prepared by USAR requiring activities and suggests appropriate preventative measures.

Avoid Ambiguities in Duty Descriptions or Deliverables Descriptions

The requiring activity must specifically state in the PWS exactly the requirements that exist and cannot leave "wiggle room" to imagine that the contract will also cover functions he may have 'forgotten' in the planning process. If some of the requirements for the contract are anticipated for a later time, but are not needed immediately, or are not yet fully developed, the requiring activity is in a unique position to build-out the scope of the contract to accommodate the later requirement. The requiring activity must state in the PWS that the contracting officer may later modify the contract to include the additional subject matter. Since the PWS is an essential element of the solicitation and becomes part of the contract, the statement of intent in the PWS to later modify the contract for the new subject matter is also part of the solicitation and contract. In this way, the acquisition planner builds the scope of the acquisition in a broad enough manner to include the anticipated but presently excluded subject matter.[53]

When drafting duty descriptions and descriptions of deliverables in the PWS, agencies must "rely on the use of measurable performance standards."[54] Ambiguous language in duty descriptions or deliverables descriptions leads to potential costly legal problems involving contract interpretation during contract performance.[55] The following are common examples of ambiguous descriptions PWSs in USAR acquisitions.

Descriptions which use the phrases "including but not limited to. . . ." or "additional duties as assigned by (insert title of military person)" result in costly and time-consuming *scope of contract* and *unauthorized commitment* issues, as well as the potential for an illegal *personal services contract*.[56] For example, the contractor may demand additional funding for work which the government directed under the "including but not limited to" language when the work was not adequately described in the PWS.[57] Such a contract is also subject to litigation by the vendor's competitors for assigning the vendor work that is outside the scope of the contract.[58] The potential result is an acquisition which was not properly competed.[59]

Use of the word "should" or the phrase "should be able to" to describe personnel qualifications or deliverables results in ambiguous contract terms that lead to difficulty in enforcing performance standards. The word "should" does not provide a "measurable performance requirement."[60] Qualifications and performance criteria are either mandatory or discretionary. For example, a requirement that contractor personnel *should* possess Master's degrees does not amount to a requirement under the contract. If a requirement is subject to waiver, the contracting officer is the only approval authority. The PWS must state any departure from this rule, for example, contracting officer representative authority to make recommendations to the contracting officer for waivers, other procedures or unusual circumstances related to waivers of contract requirements.

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[52] U.S. DEP'T OF DEFENSE, HANDBOOK FOR PREPARATION OF PERFORMANCE WORK STATEMENT (PWS), MIL-HDBK-245D (3 Apr. 1996).

[53] *See, e.g.*, CWT/Alexander Travel, Ltd. v. United States, 78 Fed. Cl.486 (2007) (ruling in favor of Government where contract contained provisions indicating changes of the type involved in the case were expected during the performance of the contract).

[54] FAR, *supra* note 12, at 37.602(b)(3).

[55] *See, e.g.*, Philco – Ford Corp., ASBCA No. 16198, 73-1 BCA ¶ 9,860.

[56] *See* FAR, *supra* note 12, at 37.104.

[57] *Id.* (stating that PWS required engineering calculations "including but not limited to" those specified in contract. Contractor entitled to equitable adjustment when government required additional calculations to add margin of product safety not specified in contract.).

[58] *See, e.g.*, Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000) (holding that a prospective bidder may use the Tucker Act, 28 U.S.C. § 1491(b) to protest a contract modification, if the modification violates a statute); *see also CWT/Alexander Travel, Ltd.*, 78 Fed. Cl. 486 (out-of-scope changes violate the Competition in Contracting Act); HG Props. A, LP, B-290416, B-290416.2, 2002 U.S. Comp. Gen. LEXIS 106 (July 25, 2002) (providing that the Comptroller General will review a protest by a third party alleging that a contract modification is outside the scope of the vendor's contract and therefore should have been a new procurement);

[59] *See CWT/Alexander Travel, Ltd.*, 78 Fed. Cl. 486.

[60] FAR, *supra* note 12, at 37.602(b)(3).

Quantity, Time, and Place of Delivery

The guidance in the FAR for descriptions of deliverables in the PWS is general in nature: requiring description of work in terms of the required results, or assessment of work performance against measurable performance standards. In acquisitions for CAAS services, Army Regulation 5-14 imposes more specific requirements; the listing of deliverables by "quantity and place and time of delivery and schedule of delivery."[61] Whether or not the acquisition is for CAAS services, it is difficult to produce a "measurable performance requirement" in the absence of listing deliverables in the PWS by quantity and time and place of delivery. For example, if the deliverable is the production of reports, list daily reports as "daily," and list flash reports as "immediately." Clear identification of contract deliverables in the acquisition planning stage will save money by avoiding contract performance problems in the contract management stage of the acquisition.

"Brand Name or Equal" Descriptions

In some acquisitions, such as information technology purchases, the description of a certain brand and model of product in the PWS is the best solution to meet the needs of the government—but not the only solution available. The use of "brand name" descriptions in acquisitions is closely managed[62] because contract specifications which are not vendor-neutral do not provide for full and open competition, regardless of the number of sources solicited.[63] "Brand name" descriptions require justification and approval documents, no matter how small the purchase.[64]

Full and open competition is satisfied if the PWS includes a "brand name or equal" purchase description[65] to describe the product to be acquired. Under the "brand name or equal" purchase description, the PWS includes the brand name and model followed by the phrase "or equal" and a general description of those "salient physical, functional, or performance characteristics" of the brand name item that an "equal" item must meet to be acceptable for award.[66] When using a "brand name or equal" purchase description, the agency must evaluate the proposals, including product literature submitted by the competitors to determine compliance with the requirements of the solicitation.[67]

The reviewing attorney must assure that the requiring activity does not merely cut-and-paste from the product literature to develop the PWS. The PWS may only describe deliverables in the broadest possible terms to meet the minimum needs of the government.[68] For example, in a hypothetical information technology acquisition of a computer network switching device, the command may recommend the use of an ACME brand Coyote 2006 model device, or equivalent.

The PWS must list the characteristics that make the ACME Coyote 2006 device meet the needs of the government, for example: 100% compatibility with all identified hardware and software already in use within the system; numerical statement of historical reliability; numerical expression of processing speed; number of ports or expansion slots; compatibility with existing expansion modules; physical dimensions to fit existing electronics racks; electricity-saving features; heat output; operating noise; etc. The PWS must not describe characteristics of the Coyote 2006 that are not necessary to meet the needs of the government for the computer network switching device, for example: standard features of the Coyote 2006 that will be unused in the needed application; the color of the keyboard; or the level of operating noise, if the device will be installed in a location where noise is not a factor. When using a "brand name or equal" purchase description, only describe the attributes needed to satisfy the requirement for the acquisition.

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[61] AR 5-14, *supra* note 43, at fig.4-1.

[62] *See* Memorandum, Office of Management and Budget, to Chief Acquisition Officers, Chief Information Officers, Senior Procurement Executives, subject: Use of Brand Name Specifications (11 Apr. 2005); *see also* Memorandum, Office of Management and Budget, to Chief Acquisition Officers, Senior Procurement Executives, subject: Publication of Brand Name Justifications (17 Apr. 2006); FAR, *supra* note 12, at 11.105.

[63] FAR, *supra* note 12, at 6.302-1(c).

[64] *See id.* at 5.102(a)(6); *see also id.* at 6.302-1(c), (d).

[65] *Id.* at 6.302-1(c), 11.104.

[66] *Id.* at 11.104.

[67] *See, e.g.*, Elementar Americas, Inc., Comp. Gen. B-289115, Jan. 11, 2002, 2002 CPD ¶ 20 (holding the protest sustained where agency did not correctly apply information in literature of competitor to evaluation for simplified acquisition using brand name or equal product description).

[68] *See, e.g.*, Mossberg Corp., Comp. Gen. B-274059, Nov. 18, 1996, 96-2 CPD ¶ 189 (requirement for steel receiver on shotguns is not necessary to meet minimum needs, when aluminum receivers provide the same desired characteristics).

After 20 January 2008, a PWS for the purchase of office computer equipment meets the requirements of the Energy Policy Act of 2005[69] if it includes the following statement: "*All products must be registered with the Electronic Product Environmental Assessment Tool (EPEAT)*."

The Energy Policy Act of 2005 requires that acquisition planning documents for energy consuming products contain "Energy Star" or "Federal Energy Management Program" (FEMP) criteria for energy efficiency.[70] The statutory requirement to include energy savings in acquisition plans also applies to product specifications and evaluation criteria, and requires the actual purchase of "Energy Star" or FEMP products.[71]

By including the above-recommended statement in PWS, requiring activities also satisfy the requirements of the presidential mandate that electronic products purchased by federal agencies must be EPEAT-registered.[72] After January 2008, all EPAT-registered products will also be "Energy Star 4.0" certified.[73] Accordingly, the use of the above recommended statement avoids potential contract delivery problems resulting from the receipt of obsolete "Energy Star 3.0" technology when ordering generic "Energy Star compliant" devices.[74]

The DOD instruction implementing the statutory requirement to purchase energy efficient devices also directs contracting personnel to consolidated contract instruments for purchases of approved products.[75] In the USAR, the Army Small Computer Program is the service contract for the acquisition of approved energy-efficient user-level computer products.

Market Research Documentation

Requiring activities conduct market research when they obtain information concerning prices and products available from competing vendors. Broadly speaking, the USAR uses market research to collect information in three areas: technical, pricing, and terms and conditions.[76] The degree of market research required depends on the circumstance of the procurement.[77] In some cases, market research leads to a clear indication of the best solution. In other cases, market research leads to the reevaluation of agency needs to accommodate the use of less costly commercial items. An USAR written acquisition plan which includes a document trail showing market research efforts by the requiring activity could mean the difference between success and failure in litigation.[78]

When preparing a commercial item acquisition, Army Contracting Agency (ACA) contracting personnel need the input, guidance, and support of their USAR customers to identify possible commercial components and technologies.[79] Market

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[69] Pub. L. No. 109-58, 119 Stat. 594.

[70] § 104(a).

[71] *Id.*

[72] *See* Exec. Order 13,423, 3 C.F.R. 3919 (2007).

[73] *See Answers to Frequent Questions:* ENERGY STAR® 4.0 and EPEATTM, http://www.energystar.gov/ia/partners/fedagencies/estar40.pdf (last visited Mar. 24, 2008).

[74] *Id.*

[75] U.S. DEP'T OF DEFENSE, INSTR. 4170.11, INSTALLATION ENERGY MANAGEMENT para. 5.2.2.2 (22 Nov. 2005).

[76] U.S. DEP'T OF DEFENSE, COMMERCIAL ITEM HANDBOOK version 1.0, at 6 (Nov. 2001), *available at* http://www.acq.osd.mil/dpagp/Docs/cihandbooks.pdf [hereinafter DOD HANDBOOK].

[77] *See, e.g.*, SHABA Contracting, Comp. Gen. B-287430, June 18, 2001, 2001 CPD ¶ 105 (holding that informal market research supported agency position during litigation).

[78] *See, e.g.*, Encompass Group LLC, B-296602, B-296617, U.S. Comp. Gen. LEXIS 142 (Aug. 10, 2005) (denying protest where agency market research supported government position).

[79] DOD HANDBOOK, *supra* note 76, at 6.

research documentation conducted by the requiring activity also becomes a time-saver to assist the contracting officer in meeting documentation requirements for commercial item procurements.[80]

Supporting Contracting Organizations

The USAR Contracting Center—ACA Assets Aligned with USAR Units

The ACA is the contracting authority for the USARC.[81] The USARC commander has designated ACA Fort Dix as the USAR Center of Excellence for Contracting.[82] The Assistant Secretary of the Army for Acquisition, Logistics and Technology has given the Director, ARCC, Fort Dix, full authority to carry out the contracting mission in the USAR, as well as operational control over contracting assets needed to accomplish the mission.[83]

Over the course of more than a decade, USAR contracting has transformed from a decentralized model, with little command and control over individual acquisition actions, to an increasingly centralized model with clear lines of authority and high levels of approval for individual contract actions. The three charts at Appendix D show the transformation of the USAR contracting model.[84]

The ARCC provides geographically localized, or otherwise specialized, contracting support for USAR organizations. The ARCC has recently realigned to provide pre-positioned corresponding support as shown at Appendix D, Illustration 3, so that the Army Reserve will not experience an interruption in support as it transforms to its post-Base Realignment and Closure (BRAC) Regional Support Command (RSC) structure. The Human Resources Command, St. Louis, Missouri, and the USAR Medical Command, Tampa, Florida, will continue to receive direct support from the contracting branch at ARCC, Fort Dix.[85]

The role of the ARCC in USAR contracting is monumental and still growing. During fiscal years 2005 through 2007, 127 ARCC employees processed 11,376 actions, 13,865 actions, and 13,196 USAR acquisition actions, respectively. The total combined dollar value for these acquisitions increased each year, from $443.4 million, to $519 million, to $688 million, respectively.[86] However, these figures do not present a complete picture of the enormity of the acquisition function in the USAR. The USAR organizations also receive support from ACA assets outside the ARCC, as discussed below.

ACA Support to the USAR from Outside the ARCC

Although USAR contracting is undergoing an ongoing process of centralization, a number of exceptions result in pockets of decentralized contracting support to the USAR. For example, the Headquarters, USARC, Fort McPherson, Georgia, and the Office of the Chief of the USAR, Alexandria, Virginia, receive direct support from the contracting branch at ARCC, Fort Dix, and from other ACA organizations outside the ARCC.[87] Contract support from ACA organizations not specifically aligned with the USAR organizations may be based on geography or specialization of pre-competed contract subject matter.

ACA Assets Located Near USAR Organizations

The convenience of colocation may determine the support relationship between an organization of the ACA outside the ARCC and the supported USAR organization. For example, the Headquarters, USARC receives contracting support from the

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[80] *See* FAR, *supra* note 12, at 13.501.

[81] Headquarters, Dep't of Army, Gen. Order No. 6 para. 8 (26 Sept. 2003); Headquarters, Dep't of Army, Gen. Order No. 6, para. 8 (24 Aug. 2002).

[82] Memorandum, USARC Commander, U.S. Army, to Subordinate Commanders, subject: Contracting Center of Excellence Centralization in the United States Army Reserve (22 Dec. 1999).

[83] Memorandum, ASA (AL&T), to Mr. Kastberg, subject: Designation as the Director, Army Reserve Contracting Center (1 Oct. 2002).

[84] *See infra* App. D (containing charts from: e-mail from Pamela Lutz, ARCC Deputy Director, to the author, subject: FW: ARCA Brief Feb 07.ppt (19 Mar. 2008, 12:05:00 EST) (on file with author)).

[85] *Id.*

[86] *See id*.

[87] *Id.*

ACA Southern Region Contracting Center-East. The organizations are collocated at Fort McPherson, Georgia. Likewise, the Office of the Chief of the Army Reserve receives contracting support from the Center for Contracting Excellence, D.C. The organizations are colocated near Washington D.C. Similarly, the United States Army Civil Affairs and Psychological Operations Command (USACAPOC), located at Fort Bragg, North Carolina, receives contracting support from the Fort Bragg Directorate of Contracting. The use of colocated contracting assets results in less centralized acquisition management in the pre-award stage, but more efficient contract management in the post-award stage of an acquisition.

Specialized Pre-Competed Contracts

The availability of pre-competed contracts may also determine the support relationship between an organization of the ACA outside the ARCC, and the supported USAR organization. For example, information technology products or services may be available through: the ACA Information, Technology, E-Commerce and Commercial Contracting Center (ITEC4) program, administered by ACA, Alexandria, Virginia and Directorate of Contracting, Fort Huachuca, Arizona; the U.S. Army Forces Command (FORSCOM) Operations, Planning, Training and Resource Support Services (OPTARSS) contract, administered by the ACA Southern Region Contracting Center-East, Fort McPherson, Georgia; and the Army Small Computers Program, Fort Monmouth, Virginia. The use of ACA pre-competed contracts administered by a distant ACA contracting office satisfies competition requirements and leverages the efficiencies of the Army's pre-competed contract instruments.

Cryptographic Systems Acquisition Support

The Army has consolidated the acquisition of cryptographic systems under the Communications Electronics Command (CECOM)-Communications Security Logistics Agency (CSLA). The CECOM-CSLA maintains pre-competed blanket purchase agreements (BPAs) for the purchase of approved cryptographic devices. The use of a CECOM-CLSA BPA is mandatory for the acquisition of Army cryptographic systems.[88] If a USAR organization places an order under a CECOM BPA, the requiring organization coordinates directly with the CLSA in placing the order.[89] The CECOM does not charge an administrative fee for use of their BPAs.

Contract Offloading—Use of Non-DOD Contracts

Contract offloading in the USAR occurs when an USAR organization fills a requirement using contracting support provided by an organization outside the DOD. The DOD,[90] Department of the Army,[91] and the Chief of the USAR[92] have each published policies officially discouraging the practice.

Contract offloading in the USAR is discouraged for four important reasons: First, offloading costs the USAR significant amounts of money in administrative fees charged by the non-DOD organization which administers the contract. Second, the practice is viewed as anti-competitive.[93] Third, quality control, contract supervision and management processes inherent in non-DoD contracts may be well-suited to the agency which possesses the contract, but may be ill-suited for use across agency

[88] U.S. DEP'T OF ARMY, REG. 25-2, INFORMATION ASSURANCE ch. 6-1a(4) (14 Nov. 2003).

[89] Telephone Interview with Julia Lucero, CSLA Logistics Management Specialist (6 Jan. 2006). Ms. Lucero stated that she is the Army point of contact for Information Assurance logistics. *Id.* She further stated purchase orders under a CECOM-CLSA pre-competed BPA may only be issued by the CECOM contracting office. *Id.* Ms. Lucero stated that USAR transactions under a CECOM-CLSA BPA should be conducted directly with her, and she will coordinate the order with the CECOM contracting officer. *Id.*

[90] Memorandum, OSD (AT&L), to Secretaries of the Military Departments, subject: Proper Use of Non-DoD Contracts (29 Oct. 2004) (requiring procedures for non-DOD contract vehicles on or after 1 January 2005); Memorandum, OSD (AT&L), to Secretaries of the Military Departments, subject: Proper Use of Non-DoD Contracts (20 July 2005).

[91] Memorandum, DA (ASA-AL&T), to Secretaries of the Military Departments, subject: Proper Use of Non-Department of Defense (Non-DoD) Contracts (12 July 2005).

[92] OCAR Memo, *supra* note 18 (under revision at date of this publication to more closely align USAR specific requirements with Army-wide requirements) (on file with author).

[93] *See, e.g.*, *An Oversight Hearing on Iraq Contracting Abuses: Hearing Before the S. Dem. Policy Comm.*, 108th Cong. (2004) [hereinafter *Policy Committee*] (testimony of Professor Steve Schooner describing interagency fee-for-service programs allowing program managers to avoid competition requirements and contract administration responsibilities), *available at* http://democrats.senate.gov/dpc/hearings/hearing17/transcript.pdf.

lines.[94] Fourth, contract offloading short-circuits agency-required acquisition planning processes which are intended to address agency-specific issues, rules and challenges.[95] Thus, the end result of contract offloading is often a contract which is more expensive, as well as unwieldy from a quality management and contract administration perspective.

For some purchases, an "offload" acquisition is the most desirable, or only, method available. For example, General Services Administration (GSA) has been designated by the Office of Management and Budget[96] as the executive agent for government-wide acquisitions for fifteen government-wide information technology programs.[97] Some of these programs are routinely used in the USAR.

Contract offloading is not prohibited in the USAR, but the USARC Commander closely manages the practice. In addition to Army-wide requirements[98], the Chief of the USAR guidance[99] requires that a determination and finding (D&F)[100] be prepared by the requesting agency and certified by the Chief of Staff, USAR. The D&F must certify consideration of five broad categories of acquisition planning, present documentation of contract data, and include a statement by a warranted contracting officer of the ACA indicating concurrence or non-concurrence.[101] Thus, the procedures are designed to assure the offload is in the best interest of the government, not merely for the convenience of the requiring activity.

Economy Act Orders

Some USAR acquisitions involve the delivery of products or services by other governmental organizations, inside or outside the DOD. The Economy Act[102] authorizes the head of a major organizational unit within the USAR to place an order with another major organizational unit within the government.

Centralized approval authority for funding, and review by an Army contracting officer, effectively manages the use of Economy Act transactions. These measures also assure that Economy Act transactions are not used to avoid sound acquisition planning measures, or short-cut full and open competition, to fill requirements. Centralized approval authority for funding, and contracting officer review, are the model for Economy Act transactions at the USARC headquarters.[103] Economy Act transactions are managed within the USARC headquarters by the use of a D&F.[104] The ACA retains involvement in the analysis of whether to execute an Economy Act transaction, because the D&F requires the signature of a contacting officer of the ACA before the USARC Chief of Staff will approve funding for the transaction.[105]

Federal Acquisition Regulation Part 17.5 governs the exercise of intra-agency Economy Act authority by simply stating that intra-agency transactions are addressed within agency regulations. Economy Act transactions are governed within the DOD by DOD Instruction[106] and Army regulations.

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[94] *See id.*; *see also Some U.S. Prison Contractors May Avoid Charges*, BALTIMORE SUN, May 24, 2004, *available at* http://www.baltimoresun.com/news/ (commentator P.W. Singer describing the use of an interior Department contract to fill need for interrogators in Iraq by exclaiming "You're placing a military interrogation task under Smokey the Bear . . . You can't have good oversight.").

[95] *See Policy Committee*, *supra* note 93.

[96] *See* Clinger-Cohen Act of 1996, 40 U.S.C. § 11302(e) (2000).

[97] Letter from Office of Management and Budget, to Administrator, General Services Administration (9 Aug. 2006) (designating GSA as executive agent for government-wide acquisitions for the following programs: Access Certificate for E-Services (ACES), Alliant, Allaint Small Business, Applications and Support for Widely-diverse End User Requirements (ANSWER), Disaster Recovery Services for Federal Computer Systems and Networks, STARS, FAST, HUBZone, Information Technology Omnibus Procurement II, Millennia, Millennia Lite, Seat Management Services, Smart Card, Veterans Technology Services and Virtual Data Center).

[98] Memorandum, DA (ASA-AL&T), to Administrative Assistant to the Secretary of the Army et al., subject: Proper Use of Non-Department of Defense (Non-DoD) Contracts (12 July 2005).

[99] OCAR Memo, *supra* note 18.

[100] *See* FAR, *supra* note 12, at 1.7 (providing D&F format).

[101] *Id.*

[102] 31 U.S.C. § 1535 (2000).

[103] *Supra* note 18.

[104] *Id.*

[105] *Id.*

[106] U.S. DEP'T OF DEFENSE, INSTR. 4000.19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT (9 Aug. 1995).

One example of an intra-agency Economy Act transaction that is sanctioned by Army regulation involves USAR medical organizations that carry Army radiation authorizations for radiation-producing equipment. Army Regulation 40-5, *Preventive Medicine*, states that the *Army Installation and Occupational Health Program*, via the U.S. Army Medical Command, surveys Army radiation authorization holders.[107] Thus, the regulation establishes an intra-service support mechanism, with cost reimbursement carried out under the Economy Act.

Legal Issues Common to USAR Acquisitions

Each written acquisition plan at the USARC headquarters requires a legal review by the OSJA prior to approval of funding for the acquisition.[108] Contract law attorneys who review acquisition planning materials for the USAR must exercise broad issue-spotting skills. A one-page review worksheet, such as the example provided at Appendix C, provides a useful start-point for legal analysis of a written acquisition plan. However, no worksheet can take the place of careful issue spotting and thorough analysis by a contract law attorney. The following discussion highlights some of the more common legal issues which are addressed in the legal review of USAR acquisition plans.

Special Rules for Service Contracts

On 23 February 2006, the Secretary of the Army published new requirements calling for the approval of the major commander—normally a three-star general—before initiating the acquisition or exercising option periods for service contracts.[109] The USARC Commander has delegated approval authority to the Chief of Staff, USAR to approve service contracts.[110] The requirement for approval of service contracts applies to every service contract in the USAR.[111] A completed USAR acquisition planning packet for a service contract is not legally sufficient if it does not include the required approval.

The point of contact for the request for approval for service contracts is the USARC CASO. The requesting organization completes a request for approval which contains a summary of the information the organization will later place in the ASM as part of the USAR acquisition plan.[112] The organization sends the request for approval via email to usarcsccconapproval@usar.army.mil. The CASO consolidates the requests for the USAR and presents the requests to the USARC Commander for approval.

Commercial Items—FAR Subpart 13.5 Simplified Acquisitions

The confluence of public policy, calling for the government acquisitions of commercial items,[113] and the needs of the USAR, results in many USARC acquisitions which involve the purchase of commercial items.[114] Some common examples of commercial item purchases in the USAR include hotel conference facilities, office equipment, computer network equipment, certain vehicle leases, and "extended warranty" agreements for certain commercial items. Each commercial item mentioned in this paragraph is discussed further in this article.

The value of most commercial item acquisitions at the USARC headquarters is within the dollar limits[115] for the use of the Commercial Item Test Program.[116] The Commercial Item Test Program provides contracting officers with procedural

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[107] U.S. DEP'T OF ARMY, REG. 40-5, PREVENTIVE MEDICINE ch. 1 (25 May 2007)

[108] *Supra* note 17.

[109] Sec'y of the Army Memo, *supra* note 15.

[110] Memorandum, Chief, Army Reserve, to Deputy Chief, Army Reserve, DCG, USARC, CoS, Army Reserve and CXO, Army Reserve, subject: Delegation of Authority—Army Policy for Civilian Hiring and Initiation/Continuation of Contracts for Service Personnel (1 July 2006).

[111] *See* Sec'y of the Army Memo, *supra* note 15.

[112] Form available at the USARC CASO.

[113] Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, tit. VIII, 108 Stat. 3243.

[114] FAR, *supra* note 12, at 2.101 (defining commercial items to include products and services).

[115] *See id.* at 13.500 ($5 million, including all option periods or $10 million for contingency operations or recovery from nuclear, biological, chemical or radiological attack against the United States).

discretion and flexibility to solicit, offer, evaluate, and award commercial item contracts using special simplified acquisition procedures.[117] The result for the USARC is maximum efficiency and economy, and minimal burden and administrative costs for both the government and industry.[118] Congress has extended the authority for contracting officers to use the special procedures of the Commercial Item Test Program through January 1, 2010.[119]

When the USARC acquisition plan is approved, CASO forwards the documentation to the ACA contracting officer to complete the acquisition. Acquisitions conducted under the simplified acquisition procedures of FAR Subpart 13.5 are exempt from the full-and-open competition requirements of FAR Part 6. However, the contracting officer must provide competition and meet the requirements of FAR Part 13.501 by documenting the following steps.

First, the contracting officer must draft a brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR Subpart 13.5 were used.[120] The procedures may include examination of the market research procedures used by the USARC for this acquisition, and use of the market research documentation provided in the acquisition plan.

Second, the contracting officer must record the number of offers received.[121] The market research provided in the USAR acquisition plan is a resource to assist the contracting officer in completing the required market research.

Third, the contracting officer must draft an explanation of the basis for the contract award decision.[122] Much of that basis will likely come from the considerations discussed by the requiring activity in the ASM.

The contracting officer is the approval authority for justifications and approvals for sole-source acquisitions under the Commercial Item Test Program up to $550,000.00.[123] Thus, the contracting officer may require the requiring activity to provide a draft justification and approval document, or other additional documentation from the USARC, if the contracting officer elects to pursue a sole-source acquisition.

Vehicle Leases

Some acquisition plans in the USAR include the requirement to lease specialized vehicles or to meet surge capacity needs, when the required vehicles are not available in the Army supply system. One such example is a homeland defense mission which requires the unit to haul a civilian 5th-wheel trailer, and no available Army vehicle has a 5th-wheel trailer hitch. Another example is the use of rental vehicles to meet surge capacity needs for non-tactical vehicles during exercises or operations, when an adequate supply of GSA fleet vehicles is not available.

Short Term Leases for Several Days or Weeks

The cost of a short term lease of a non-tactical vehicle to fill a mission requirement, for a period of days or weeks,[124] most often does not exceed the micro-purchase threshold of $3,000.00.[125] Thus, the use of the government purchase card is authorized[126] and the vehicle lease does not require a written acquisition plan.[127]

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[116] *Id.* at 13.5.

[117] *Id.* at 13.500.

[118] *Id.*

[119] Pub. L. No. 110-181, § 822(a), 122 Stat. 3 (2008).

[120] FAR, *supra* note 12, at 13.500.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] This discussion does not address the short term lease of a vehicle while on a temporary duty assignment.

[125] FAR, *supra* note 12, at 2.1 (defining "micropurchase threshold" as $3,000.00, with noted exceptions).

[126] *Id.* at 13.2.

[127] *Supra* note 12.

However, when the required number of vehicles or the length of time necessary for the leases, results in a cost which exceeds the micro-purchase threshold, the lease becomes a commercial item acquisition—which most often qualifies for simplified acquisition.[128] If the total cost of the lease exceeds $150,000.00 or the total number of vehicles exceeds twenty-five, the requiring activity must seek special approval from Headquarters, Department of the Army.[129]

Vehicle Leases in Excess of Twelve months, Twenty-five Vehicles or $150,000.00

Some vehicle leases in the USAR address recurring requirements which result in the need for vehicle leases in excess of twelve months, twenty-five vehicles or $150,000.00. However, fulfilling a large-scale or multi-year requirement for lease vehicles is limited by regulation.[130] The rules require the major command to secure prior approval from Department of the Army Logistics (DALO-TSP)[131] before executing a long-term lease when leasing requirements exceed twelve months.[132] Further, if an acquisition involves a lease of vehicles for a term of eighteen months or more, a D&F must be prepared by the head of the supporting contracting activity.[133]

Some long term vehicle lease requirements in excess of twelve months may be satisfied by using a GSA Federal Supply Schedule (FSS) contract. However, the use of a GSA FSS contract for a motor vehicle lease does not qualify the motor vehicle as part of the Interagency Fleet Management System (IFMS). Thus, the leased vehicle is not considered a GSA-owned vehicle[134] and the acquisition plan must include the required approval by DALO-TSP.[135] Further, the use of a GSA contract for a vehicle lease exceeding eighteen months requires two D&Fs be prepared: one is required by the Chief of the USAR for an "offload" contract[136] and the other is required by the DFARS.[137]

Intellectual Property Issues

The USAR is a large purchaser of computer software applications. In addition to commercial off the shelf applications, such as Microsoft Office or Delrina FormFlow, some organizations within the USAR contract for the development of customized computer software applications to support their data processing, time management, or logistics tracking functions.

When planning an acquisition for the development, operation, or maintenance of customized computer software application, the requiring activity must be aware of the respective rights of the government and the software developer. The acquisition plan must include documents to justify the departure from standard DOD practices with regard to rights in developmental software applications.

The DFARS contains standard contract clauses related to the management of intellectual property considerations in government contracts.[138] The following clauses address the most common intellectual property issues in developmental software contracts in the USAR.

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[128] FAR, *supra* note 12, at 13.5

[129] U.S. DEP'T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION AND USE OF MOTOR VEHICLES para. 3-11(b) (10 Aug. 2004) [hereinafter AR 58-1].

[130] *Id.*

[131] Telephone Interview with Mr. David J. Fuchs, Non-Tactical Vehicle Manager, DAIM-FDF (3 Aug. 2006) [hereinafter Fuchs Interview]. Mr. Fuchs stated that his office, DAIM-FDF, is the successor organization to DALO-TSP. *Id.* He further stated that streamlined processes at DAIM-FDF provide for fast turn-around on approvals required by AR 58-1. *Id.*; *see* AR 58-1, *supra* note 129, para. 3-11(b).

[132] AR 58-1, *supra* note 129 (requiring activity must seek the required approval by memorandum to HQDA (DALO-TSP), 500 Army Pentagon, Washington D.C. 20310-0500).

[133] *See* DFARS, *supra* note 13, at 207.470.

[134] AR 58-1, *supra* note 129, at 3-12(b).

[135] *Id.*

[136] *Supra* note 18.

[137] *See* DFARS, *supra* note 13, at 207.470.

[138] *See* OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY AND LOGISTICS, HANDBOOK 1.1, INTELLECTUAL PROPERTY: NAVIGATING THROUGH COMMERCIAL WATERS, ISSUES AND SOLUTIONS WHEN NEGOTIATING INTELLECTUAL PROPERTY WITH COMMERCIAL COMPANIES App. D (Oct. 15, 2001) (providing a summary of DFARS clauses related to intellectual property).

First, DFARS 252.227-7014 allows the government to take unlimited, nonexclusive rights in noncommercial software developed at government expense, which means the contractor has the right to resell computer scripts developed at government expense, on the commercial market.[139] If the requiring activity does not want the software developed under the contract to be resold on the commercial market, this requirement must be included in the acquisition plan. The acquisition plan must include documentation, such as a memorandum from the commander, directorate chief or organizational head, to support a request to the contracting officer to depart from this DOD standard practice.

Second, through DFARS 252.204-7000, the contractor may not release unclassified information pertaining to any program related to the contract absent prior written approval by the contracting officer, unless the information is otherwise in the public domain before the release.[140] The clause also requires the contractor to place a similar clause in any subcontracts.[141] This clause is especially important in light of DFARS 252.227-7014 because it prohibits the contractor from disclosing information concerning the internal business practices of the USAR organization, in the event the contractor elects to resell the computer software developed under the contract. The requiring activity performs a quality control function when he assures the contacting officer includes this standard clause in the developmental software contract.

Fiscal Law Issues—Purpose/Time/Amount

Every acquisition plan in the USAR involves fiscal law analysis to assure compliance with the three basic mechanisms of fiscal control imposed by Congress. The fiscal controls mechanisms are: (1) obligations and expenditures must be for a proper purpose; (2) obligations must occur within the time limits applicable to the appropriation (e.g., O&M funds are available for one fiscal year); and (3) obligations must be within the amounts authorized by Congress. One or more statutes implement each fiscal control mechanism. This section discusses issues related to some of the statutes of frequent applicability to USAR acquisitions.

The Army uses an accounting system of "fund citations" (fund cites). Each acquisition plan is accompanied by a *Purchase Request and Commitment* form,[142] which contains a fund cite to indicate the source of funding. Knowledge of the source of funding is essential to the determination of whether an acquisition meets the requirements of purpose, time, and amount. Below are examples of the most common fund cites used for USARC Headquarters acquisitions:

CODE	PURPOSE	APPROPRIATION	TIME
21-2031 through 21-2035	Procurement	Procurement	3 Years
21-2080	O&M	USARs	1 Year

Violations of the fiscal control statutes are frequently also violations of the Antideficiency Act.[143] The Antideficiency Act provides penalties designed to deter government employees from making or authorizing an expenditure or obligation in excess of the amount contemplated and authorized by Congress.[144] Thus, avoiding violations of the fiscal controls of purpose, time, and amount during the acquisition planning phase may avoid mandatory reporting and investigation procedures, as well as potential penalties under the Antideficiency act in the contract administration phase.

Purpose

The purpose statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[145] One practical application of the purpose statute in an USAR acquisition is the investment/expense threshold for information technology systems.

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[139] DFARS, *supra* note 13, at 252.227-7014.

[140] *Id.* at 252.204-7000.

[141] *Id.*

[142] U.S. Dep't of Army, DA Form 3953, Purchase Request and Commitment (Mar. 1991).

[143] 31 U.S.C. §§ 1341, 1342, 1350, 1351, 1511–19 (2000).

[144] § 1341(a)(1)(A).

[145] § 1301(a).

Congress has delineated between a "system" purchased at a cost of greater than $250,000.00, called an "investment" and a "system" purchased at a cost of less than $250,000.00, called an "expense."[146] The investment/expense threshold determines the type of funding used for the acquisition. Expenses must be paid for using Operational funds, such as O&M funds.[147] These funds expire at the end of each fiscal year. Investments costing more than $250,000.00 must be paid for using procurement funds.[148] These funds typically remain available for three years or more.

It is essential to identify the estimated dollar values of the separate components and systems to be purchased under an acquisition plan so that the proper funds will be applied to the purchase. For example, a detailed analysis may be required for the life-cycle replacement of network-connected desktop computers, with a total combined value exceeding $250,000.00. The use of USAR computer networks to interconnect computer equipment complicates the analysis of whether the purchase of a compilation of equipment, for connection to the network, amounts to a "system" purchase with a unit cost exceeding the investment/expense threshold, or a series of small purchases not amounting to a "system."[149] Life-cycle replacement of equipment presents similar complexities.[150] When the computers connect to a common network; share e-mail, calendar, and print servers; and otherwise interact using the network, they may appear to operate as a "system."

The analysis of whether this acquisition consists of many small purchases or the replacement of a "system" relies upon the "primary function" analysis required by the Defense Finance and Accounting Service.[151] Using the "primary function" analysis, it is easy to conclude that desktop computers connected to the network are not a "system" if the "primary function" of each computer is to operate as an independent work station. Thus, the network enhances the value of the independent work stations but network operation is not the "primary purpose" of the computer work stations. Under those facts, the use of O&M funds does not violate the purpose statute.[152]

The OSJA will provide legal advice in helping to define whether a compilation of equipment, such as interconnected information management or video telecommunications devices, amounts to a "system" for purpose of the investment/expense threshold.

Time Limits and Crossing Fiscal Years

A majority of acquisitions at the USARC Headquarters are funded using single-year O&M funds. Thus, it is important to understand the rules for the use of single-year funds when planning an acquisition which is projected to fill a need over a period of more than one year. With limited exceptions, the use of current-year funds is prohibited to pay for future-year needs. This is called the *bona fide needs rule.*[153] The discussion below addresses two exceptions to the *bona fide needs rule* and addresses issues peculiar to extended warranty contracts as related to the *bona fide needs rule*.

Severable Service Contracts Crossing Fiscal Years and the Bona Fide Needs Rule

When a requirement for a severable service contract crosses fiscal years, the general rule is that severable service contracts are funded with appropriations for the year in which the services are performed.

A common example in the USAR involves janitorial contracts. If a twelve-month contract for building cleaning services runs from July 2006 through July 2007, it is a severable services contract which crosses fiscal years. The contract is for severable services because each instance of building cleaning amounts to a complete, separate delivery of services. The contract crosses fiscal years because part of the contract is before the end of fiscal year 2006, on 30 September 2006, and part

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[146] Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11 (2003).

[147] *See id.*

[148] *Id.*

[149] *Id.*

[150] *See, e.g.*, 10 U.S.C. § 2245a (2000) (prohibiting the use of operations and maintenance funds to purchase any item, including a replacement item, that has an investment item unit cost that is greater than $250,000.00).

[151] DEFENSE FIN. & ACCOUNT. SERV.-INDIANA, MANUAL37-100-06, ARMY MANAGEMENT STRUCTURE para. D.2.a [hereinafter DFAS-IN 37-100-06].

[152] 31 U.S.C. § 1301(a).

[153] § 1502(a).

of the contract is after the start of fiscal year 2007, on 1 October 2006. The services performed on or before 30 September 2006 would normally be paid with fiscal year 2006 funds, and the services performed after 1 October 2006 would normally be paid using fiscal year 2007 funds.

However, the command may also elect to fund a severable services contract entirely with funds from the current fiscal year if the contract does not exceed twelve months. FAR Part 32.703-3(b) implements 10 U.S.C. § 2410a, and provides the necessary authority to entirely fund a severable service contract that does not exceed twelve months, using current funds.

Option years are not counted in the determination of whether a contract exceeds twelve months for the purpose of the election to use current-year funds for a service contract that crosses fiscal years. An option year is treated as a new contract.[154] Thus, the command should focus on the current period of performance, even if additional option years are available.

Materials Contracts—Stock Level Exception to Bona Fide Needs Rule

Materials ordered near the end of the fiscal year may be paid for using current-year funds, even if the materials ordered will not be consumed until the next fiscal year, using the *stock level exception* to the *bona fide needs rule*.[155] However, the materials may only be ordered using the *stock level exception* for common-use items in sufficient amounts to maintain established stock levels.[156]

The requiring activity must include documents in the acquisition planning materials to establish the normal stock level and justify the use of the *stock level exception*. For example, the normal stock level for repair parts for equipment is frequently established in technical manuals. Thus, the ASM should refer to the paragraph in the technical manual which establishes the normal stock level and justifies the use of the *stock level exception*.

As another example, if the normal stock level for multi-purpose photocopier paper is a three-month supply, the use of FY 2006 funds during the last week of the fiscal year is authorized to purchase a supply of paper that will not be exhausted until the first quarter of FY 2007. However, the requiring activity should include an excerpt from the standing operating procedures for the organization, or a separate memorandum in the acquisition planning documents, which establishes the normal stock level and justifies the use of the *stock level exception*.

Extended Warranty Issues

Manufacturers' extended warranties usually involve an up-front payment for several years of warranty coverage. At first glance, the purchase of extended warranties appears to expose a disconnect between government procurement policy and fiscal law requirements. On the one hand, the government is required, to the maximum extent possible, to use manufacturer's extended warranties when it purchases commercial items.[157] On the other hand, neither the Code of Federal Regulations, nor the FAR provide an exception to the bona-fide needs rule, which is codified at 31 U.S.C. § 1502(a), and which prohibits the use of current year-funds to pay for future-year needs. However, the Defense Finance and Accounting Service has adopted the position that an extended warranty is considered to be a whole "product" and not a service covering a specific fiscal year need; thus there is no conflict with the bona-fide needs rule when purchasing this product in one fiscal year for a potential benefit which might accrue in a future year.[158]

Conclusion

Careful acquisition planning results in monetary and manpower gains for the USAR. When requiring activities structure purchases in an efficient and legally sufficient manner, the government gets the most appropriate products and services while

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[154] DFAS-IN 37-1, *supra* note 31, at ch. 8, para. 080603(B).

[155] U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG. vol. 3, ch. 8, para. 080303A (Mar. 2008) [hereinafter DOD-FMR].

[156] *See* Betty F. Leatherman, Dept. of Comm., B-156161, 44 Comp. Gen. 695 (1965).

[157] Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 264; *see also* FAR, *supra* note 12, at 12.404(b).

[158] DFAS-IN 37-100-06, *supra* note 151, at App. A, para. D.1.e.

it avoids legal pitfalls that have the potential to sap the administrative capacity of the organization and interfere with the performance of the contract. Judge Advocate senior leaders in the USAR should use this guidebook as they organize their approaches to their contract law core discipline development responsibilities.[159] Attorneys who support requiring activities in the USAR should use this guidebook has a handy reference to assist in structuring purchases and otherwise adding clarity to any unclear issues in the acquisition plan. Requiring activities, contracting consultants and reviewing attorneys should carefully consider information contained in the ASM, PWS, and other acquisition planning materials to assure the requirement and the proposed methods of meeting the requirement are clearly stated and legally supported. Keen attention to fiscal law rules, recurring legal issues in USAR acquisition planning materials, and USAR-specific procedures saves time and money, and becomes a multiplier for the accomplishment of the mission of the USAR.

[159] OTJAG Memo, *supra* note 151.

Appendix A

Chart of Required Acquisition Planning Documents

	New Requirement	Modification	Option
	Yes	Yes	Yes
Acquisition Strategy Memorandum (ASM); or Management Decision Document (MDD) if Contracted Assistance and Advisory Services	Yes	Yes	Yes
Chief of Staff Briefing Slides (for acquisitions exceeding $25,000.00.)	Yes	Yes	Yes
Request for Service Contract Approval (for service contracts over $2,500.00)	Yes	Yes	Yes
Performance Work Statement (PWS) or Statement of Objectives (SOO)	Yes	Yes	No
Market Research Documentation	Yes	No	No
Independent Government Cost Estimate (IGCE)	Yes	No	No
Copy of Current Contract or Task Order	Usually N/A	Yes	Yes
Draft Justification and Approval if Sole-Source Purchase	If applicable	If applicable	If applicable
DA Form 3953 Purchase Request and Commitment	Yes	Yes	Yes
DD Form 448 Military Interdepartmental Purchase Request (MIPR) (if applicable)	Yes	Yes	Yes

Appendix B

Sample Acquisition Strategy Memorandum

AFRC-JA

MEMORANDUM FOR Chief of Staff, USAR

SUBJECT: Acquisition Strategy Memorandum

1. Description of project:

2. Contracting Officer Representative (COR) or Task Monitor (TM):

3. Estimated total cost:

4. Delivery or performance date:

5. Competitive or non-competitive nature of the proposed procurement:

6. Type/source funding:

7. Special approvals:

8. Issues affecting procurement:

9. Date the contract office must receive the acquisition package:

10. Statement of why work cannot be done in-house or by another government agency:

11. Statement that the proposed procurement is not a duplication of effort:

12. Statement that contract off-loading procedures were followed when dealing with non-DOD activities:

13. State anticipated benefits:

14. Indicate method used to measure anticipated benefits:

15. Statement that the requiring office considers the deliverables to fully address the government's need for feedback from the contractor, if applicable:

SIGNATURE OF DIRECTOR
RANK, BRANCH
Name of Requiring Organization

Appendix C

Worksheet for Legal Review

Worksheet for Legal Review of Project: _____

FAR 7.102 - Policy - Agencies shall perform acquisition planning and conduct market research for all acquisitions in order to promote and provide for: (a) acquisition of commercial items; (b) full and open competition.

DFARS 207.103 - Written acquisition plans required for: (a) development acquisitions ≥$10mil; (b) production or services acquisitions ≥ $50 mil for all years or ≥ 25 mil for any FY; (c) any other acquisition considered appropriate by the agency.

USAR Command Chief of Staff Memorandum, SUBJECT: Contract Funding Vehicles, 5 Dec. 2005 (formerly USARC Administrative Memo number 4) - Requires written acquisition plans for any contract funding vehicle exceeding $2,500.00

FAR 7.105 contents of written acquisition plans

(a) Background and objectives
1. Statement of need
2. Conditions
3. Cost
4. Capability or performance
5. Delivery or performance period
6. Trade-offs
7. Risks
8. Acquisition streamlining

(b) Plan of Action
1. Sources
2. Competition
3. Source selection procedures
4. Acquisition considerations
5. Budgeting and funding
6. Product or service descriptions
7. Priorities, allocations, and allotments
8. Contractor v. govt. performance
9. Inherently governmental functions
10. Management info required - monitoring the contractor's efforts
11. Make or buy
12. Test and evaluation
13. Logistics considerations
14. Government furnished property
15. Government furnished information
16. Environmental and energy conservation objectives
17. Security considerations
18. Contract administration
19. Other statutory and program considerations
20. Milestones for the acquisition cycle

Cryptographic Systems (IT hardware/software): Use of Communications Electronics Command (CECOM) Communications Security Logistics Agency (CLSA) may be mandatory, under the provisions of AR 25-2, chapter 6-1, which requires the use of CSLA for the acquisition of cryptographic systems. The Army point of contact at CECOM-CLSA for Information Assurance Logistics is Logistics Management Specialist Julia Lucero ((520) 538-8259).

Software Intellectual Property Considerations: See summary of DFARS clauses in *Navigating Commercial Waters*, App D. Most common clauses in software system maintenance and development Ks are:

◦ DFARS 252.204-7000 - Disclosure of information
◦ DFARS 252.227-7014 - Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation
◦ DFARS 252.227-7025 - Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

Appendix D

ARCC Geographic Alignment

Illustration 1
"The Way it Was"
(prior to consolidation in 1996)

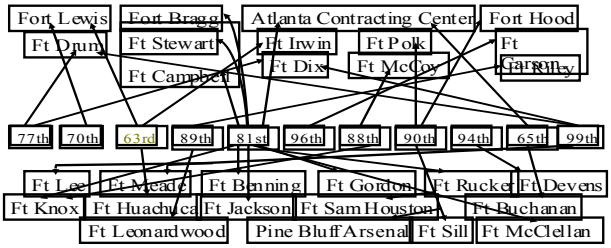
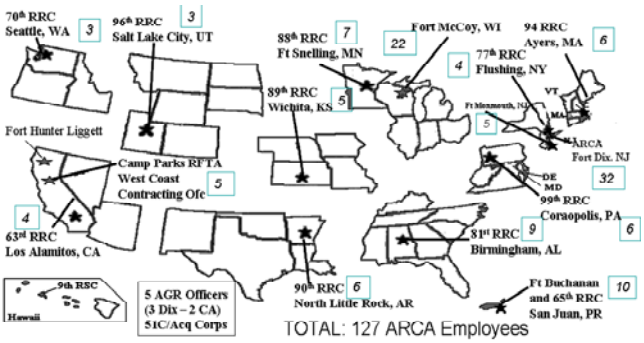
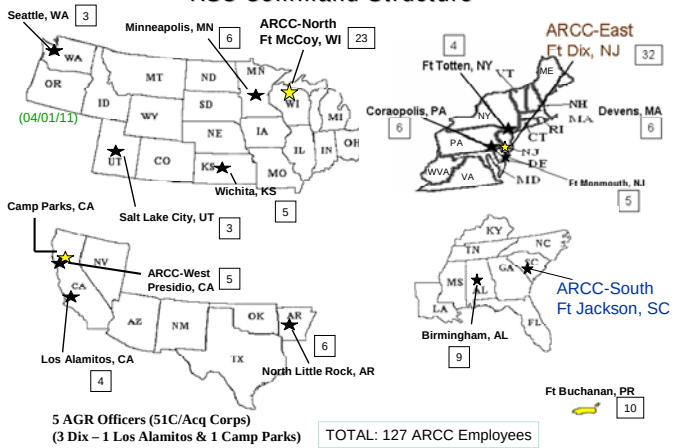


Illustration 2
ARCA
Recent Legacy Support based on USAR RRC
Command Structure



New ARCC Support Structure based on USAR Post-BRAC
RSC Command Structure



Affirmative Action or Passive Participation in Perpetuating Discrimination?
The Future of Race-Based Preferences in Government Contracting

Major (U.S. Army Retired) Patricia C. Bradley[*]

Affirmative action should not be regarded as nihilistic. We should not abandon all attempts to set standards, nor should we hire and promote unqualified individuals over qualified ones. But the inconsistencies cast doubt on how well opponents of affirmative action adhere to the principles of color blindness and meritocracy, hinting that the standards we choose may be arbitrary. They oblige us to ask how to offer expanded opportunities.[1]

I. Introduction

Affirmative action has been described as a "redistributive measure that enhances the standard of living and quality of life for the have-nots and have-too-littles."[2] It allows "equal access to America's prosperity" by advocating preferential policies that promote the sharing of wealth, which is a hotly debated topic in government policy.[3] The history of affirmative action dates back to the end of legal segregation, however, there is no well-defined or agreed upon meaning of the term.[4] For purposes of this paper, the term affirmative action means practices taken by employers, universities, and government agencies that actively improve the economic status of minorities and women with regard to employment, education and business opportunity.

Affirmative action has been used in government contracts for over forty years.[5] Set-asides, subcontracting opportunities, and price evaluation adjustments for minority owned businesses are all examples of affirmative action in government contracts. These practices, however, may be coming to an end as a result of a procurement process making many small disadvantaged businesses ineligible for government contracts.[6] A bill denying large businesses access to government small business set-aside programs and extending the socially and economically disadvantaged business programs through 30 September 2012, received unanimous Senate committee approval on 7 November 2008.[7] Yet this bill to revitalize small business contracting will not be enough for Small Disadvantaged Businesses (SDBs) if Section 1207 of the National Defense Authorization Act is not included.[8] While the Supreme Court has upheld the constitutionality of price evaluation

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[1] FRANK WU, RACE IN AMERICA BEYOND BLACK AND WHITE 162 (2002).

[2] CORNELL WEST, RACE MATTERS 63 (1993).

[3] *See id.*

[4] John Valery White, *From Brown to Grutter: Affirmative Action and Higher Education in the South: Article: What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2120 (2004). In his comment, White states: "There is no rigorous definition of affirmative action. Affirmative action can, of course, be defined historically, if not statutorily. Historically, affirmative action is the subject of policy debate about the extent of remedies for Jim Crow." *Id. See also* BLACKS'S LAW DICTIONARY 22 (2d ed.1996) (defining affirmative action as the positive steps designed to eliminate the existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination).

[5] *See* Danielle Conway-Jones & Christopher Jones, *Department of Defense Procurement Practices After* Adarand*: What Lies Ahead for the Largest Purchaser of Goods and Services and Its Base of Small Disadvantaged Business Contractors*, 39 HOW. L. J. 391, 392 (1995) (citing Holly Idelson, *A Thirty Year Experiment*, 53 CONG. Q. 1579 (1995)).

[6] The Federal Acquisition Streamlining Act (FASA) enacted into law in 1994, legalized contract bundling and allowed federal procurement personnel to take small pieces of business and throw them in with huge solicitations, thus putting them out of reach of small and minority businesses. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10, 15, and 41 U.S.C.) [hereinafter FASA].

[7] Small Business Contracting Revitalization Act, S. 2300, 110th Cong. (2007) [hereinafter SBCRA].

[8] *See infra* notes 116–119. Section 1207 of the National Defense Authorization Act will be discussed in more detail in this article. The section authorizes DOD to preferentially select bids by SDBs by adjusting bids submitted by non-SDBs up to 10%. *See* National Defense Authorization Act of 1997, Pub. L. No. 99-661, § 1207, 100 Stat. 3859, 3973 (1996) (codified at 10 U.S.C. § 2323).

adjustments,[9] members of Congress will become passive participants in perpetuating discrimination in public contracting if they do not enact legislation revitalizing the Small Business Act (SBA) and reauthorizing price evaluation adjustments.

This article discusses the history of race-conscious legislation in government procurement, highlighting the *Adarand Constructors Inc. v. Pena*[10] string of cases and discusses how the government changed the contracting rules following *Adarand*. It will further analyze whether the current rules as implemented effectively end SDBs preferences, despite the plan to "amend it, not end it."[11] Finally, this article will argue that the government should be required to try race-neutral measures before allowing race-based preferences. However, due to the unpleasant reality that race still matters, where evidence of the effects of current and past discrimination linger, race-based preferences should be allowed in order to ensure that disadvantaged businesses are afforded the opportunity to compete in the government contracting enterprise.

II. The History of Small Business Legislation in Government Contracting

A. The Small Business Act of 1958

Prior to the SBA of 1958,[12] there was very little statutory authority designed to "stimulate and encourage small business enterprise."[13]

The SBA originally assisted only small businesses.[14] There was no emphasis on minority businesses. Preferences towards minority owned businesses in government contracting were not initiated until 1961, when President John F. Kennedy "ordered federal contractors to make special efforts to ensure that workers be hired and treated without regard to race or ethnicity."[15] The formal use of the term "affirmative action" did not exist until 1965 when President Lyndon B. Johnson signed Executive Order 11246, requiring federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated fairly during employment, without regard to race, color, religion, sex, or national origin."[16]

B. The 1978 Amendment of the Small Business Act of 1958

It was not until the 1978 Amendment of Small Business Act of 1958 that Congress promulgated legislation that would allow greater minority participation in government contracting. This amendment required all 8(a) set-aside opportunities be

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[9] Rothe v. United States, 499 F. Supp. 2d 775 (2007). The constitutionality of Section 1207 came into question recently in *Rothe* and was upheld as its preferential price adjustment satisfied the requirements of strict scrutiny. *Id.*

[10] 515 U.S. 200 (1995).

[11] Public Papers of the Presidents, 34 WEEKLY COMP. PRES. DOC. 385 (Mar. 6, 1998) (written by President William J. Clinton.).

> I am pleased that the Senate, in a strong bipartisan vote of 58 to 37, today retained the Disadvantaged Business Enterprise program within the ISTEA bill, which provides expanded economic opportunity for women-and minority-owned businesses. This program was enacted into law by President Reagan in response to extremely low participation rates by women and minorities in federally assisted highway and transit construction projects. Today's vote reaffirms my administration's "Amend it; don't end it" approach to affirmative action and promoting equal opportunity.

Id.

[12] *See* Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384 (current version at 15 U.S.C.S. §§ 631–647 (LexisNexis 2008)).

[13] Major Patrick E. Tolan, Jr., *Government Contracting with Small Businesses in the Wake of the Federal Acquisition Streamlining Act, The Federal Acquisition Reform Act, and* Adarand*: Small Business as Usual?*, 44 A.F. L. REV. 75, 81 (1998) (noting that Congress created the Smaller War Plants (SWP) and the Small Defense Plants Administration (SDPA) prior to the Small Business Administration (SBA), created pursuant to the Small Business Act of 1953, but the organizations made little use of their authority to promote small businesses).

[14] *See* Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384 (current version at 15 U.S.C.S. §§ 631-647 (LexisNexis 2008)).

[15] Conway-Jones, *supra* note 5, at 392, (citing Holly Idelson, *A Thirty Year Experiment,* 53 CONG. Q. 1579 (1995)).

[16] Exec. Order No. 11,246, 3 C.F.R. 339, 340 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000e (1994); *see also* Stephen R. McAllister, *Controversial Decisions of the 1994–94 Supreme Court Term: One Anglo-Irish American's Observations on Affirmative Action*, 5 KAN. J. L & PUB. POL'Y 21, 22 (1996) (discussing the history of affirmative action).

subcontracted by the SBA to "socially and economically disadvantaged small business concerns."[17] "The statutory conversion of the historic 8(a) program, that fostered small business, to the modern 8(a) program, that promotes small disadvantaged business or minority business, occurred as part of the 1978 Act to amend the SBA and the Small Business Investment Act (SBIA) of 1958."[18] Section 8(a) of the Small Business Act established the government's new 8(a) program for SDBs.[19] This amendment established a minority business enterprise (MBE) program which provided preferential treatment to MBEs. In order to qualify for the MBE program, a business had to be owned and controlled by one or more "socially or economically disadvantaged persons."[20] The definition of MBE explicitly linked social and economic disadvantage to race.[21] "The SBA was charged with determining which businesses would qualify as 'socially and economically disadvantaged.'"[22]

Since 1989, the SBA has defined socially and economically disadvantaged as, "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of a group without regard to their individual qualities."[23] Historically, socially and economically disadvantaged individuals included African-Americans, Hispanic Americans, Native Americans, Eskimos, Asian Pacific Americans, Subcontinental Asian Americans, and certain other minority groups.[24] Under the 1978 Amendment, members of those designated minority groups were presumed to be socially disadvantaged.[25] However, as a result of *Adarand*, along with other significant regulatory changes, the amended Act now makes the presumption rebuttable.[26]

The 1978 Amendment to the SBA congressionally mandates that "a fair proportion of Government contracts and subcontracts be placed with small businesses."[27] As established by the 1978 Amendment, the statutorily mandated annual minimum contract award for SDBs was "five percent of the total value of all prime contract and subcontract awards."[28] In order to achieve the 5% goal, the federal government has allowed certain "preferences" for small businesses.[29] Such "preferences" include automatic set-asides,[30] where certain types of contracts are only awarded to "designated groups,"[31] and prioritized subcontracting opportunities[32] specifically for SDBs. In addition to set-asides and subcontracting opportunities, price evaluation adjustments for SDBs were authorized, providing a 10% preference in competitive acquisitions.[33] Preferences, as applied to small businesses, have long been an accepted practice.[34] However, when such preferences are

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[17] An Act to Amend the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, 92 Stat. 1757 (1978) (codified as amended in scattered sections of 15 U.S.C.). The 1978 Amendments required that all 8(a) set-aside opportunities be subcontracted by the SBA to "socially and economically disadvantaged small business concerns." *Id*,

[18] Tolan, *supra* note 13, at 83.

[19] Pub. L. No. 85-536, 8(a), 72 Stat. 384, 389 (1958) (as codified, the most recent version of the § 8(a) program may be found at 15 U.S.C. § 637(a) (2000)).

[20] 15 U.S.C.S. § 631 (LexisNexis 2008).

[21] *See id.*

[22] Tolan, *supra* note 13, at 83 (citing 15 U.S.C.A. § 637(a) (WEST 1997)); *see also* 15 U.S.C. § 637.

[23] Tolan, *supra* note 13, at 83 (quoting 15 U.S.C. § 637(a)(5) and citing the SBA definition of social disadvantage, 13 C.F.R. § 124.105 (1998)); *see also* 13 C.F.R. § 124.105 (2008) (most recent and unchanged definition of social disadvantage).

[24] Tolan, *supra* note 13, at 83.

[25] *Id.*

[26] *See* 13 C.F.R. § 124.103(b)(3) (1998).

[27] JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1417 (3d ed. 1998) (citing 15 U.S.C. § 631(a)).

[28] *Id.* at 1418 (citing 15 U.S.C. § 644(g)(1)).

[29] *See id.* at 1417–25.

[30] *Id.* at 1419 (citing 15 U.S.C. § 644).

[31] *Id*.

[32] *Id.* at 1424 (citing 15 U.S.C. § 637(d)(1)) (noting that many small businesses are incapable of serving as prime contractors, therefore the preference allows them to enter the procurement process through subcontracting, while awarding incentives to prime contractors for subcontracting to small businesses).

[33] *Id.* at 1435.

applied to SDBs, protestors contend that it is a violation of equal protection rights and that the government, while promoting affirmative action, is engaging in reverse discrimination.[35]

III. Affirmative Action Case Law

When asking what the appropriate standard of review should be for assessing racial classifications, the Supreme Court has firmly applied a strict scrutiny standard of review, where suspect classifications or infringement on fundamental rights were at issue.[36] However, with preferences to benefit those same classes or what has been referred to as reverse discrimination, the Courts remained divided.[37]

During the 1970's the Court began to examine whether the preferences should be subject to the same scrutiny as the invidious discrimination of the previous era, but no majority of justices could agree.[38] Not until 1989, in the landmark case of *City of Richmond v. J.A. Croson Co.*,[39] did the Supreme Court establish a standard of review holding that "all racial classifications, regardless of purpose, are suspect and should be strictly scrutinized."[40] The Court held that in order to pass strict scrutiny, state programs would have to demonstrate a compelling governmental interest, narrowly tailored to achieve that objective.[41]

In *Croson*, at issue was the state's sponsorship of a minority set-aside program in highway construction projects. The Court held that race-conscious policies were "allowable only to the extent necessary to remedy a Fourteenth Amendment violation."[42] Being able to statutorily provide such relief on a prospective basis, however, requires prior proof of such discrimination.[43]

The Court held that Richmond's program in question was not supported by a formal finding of past governmental discrimination.[44] Past societal discrimination was not sufficient to justify race based measures.[45] The Court would now

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[34] While there is on-going litigation regarding preferences given to small disadvantaged businesses, this author finds little opposition to preferences given to small businesses.

[35] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 459 (1989).

[36] Korematsu v. United States, 323 U.S. 214, 216 (1944). Korematsu declared that racial classifications were immediately suspect and subject to the highest judicial scrutiny. *Id.*

[37] *See* DONALD E. LIVELY ET AL., CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES 630 (2d ed. 2000); *see also* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 21 (2000).

> [T]he first judicial revolution started with *Brown v. Board of Education I* in 1954, when the Supreme Court rejected the "separate but equal" doctrine of *Plessy v. Ferguson* and held that maintaining segregated schools constituted a violation of the right of black children to equal protection under the Fourteenth Amendment. . . . In recent years, however, a separate strain of constitutional jurisprudence has emerged. Differing from the explicitly race-conscious policies supported by many post-*Brown* courts were other rulings, such as *City of Richmond v. Croson* and *Adarand Consructors v. Pena*,[which] purports to strive toward a color-blind ideal in government decisionmaking. The two lines of judicial rulings also diverge in their use of the Fourteenth Amendment. While the *Brown*-influenced jurisprudence sought to advance minority interests on the grounds of equal protection, the new jurisprudence has been invoking the same constitutional principles to advance the interest of whites who have been disadvantaged by minority-favoring policies and programs.

Id.

[38] *Compare* De Funis v. Odegaard, 416 U.S. 312 (1974), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), Fullilove v. Klutznick, 448 U.S. 448 (1980), Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), *J.A. Croson Co.*, 488 U.S. 459.

[39] 488 U.S. 459.

[40] *Id.* at 509.

[41] *See id.*at 507–08.

[42] *Id.*

[43] *See id.*

[44] *See id.* at 536–37.

[45] *See id.* at 498.

require such agencies to demonstrate a compelling governmental interest by justifying with specificity a particularized finding of past discrimination.[46] In addition to providing proof of past governmental discrimination, the *Croson* test would require the government's program to be narrowly tailored to achieve that objective.[47] The government would further be required to demonstrate that their program was flexible and contained waiver provisions for prime contractors who attempted to but could not meet minority business utilization goals.[48]

A year after *Croson*, the Supreme Court in *Metro Broadcasting, Inc. v. FCC*,[49] upheld two federal race-based policies against a Fifth Amendment challenge. The Court held that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny.[50] By imposing a lesser duty on the Federal Government than that imposed on the state, *Metro Broadcasting* departed from the *Croson* decision, rejecting the strict scrutiny standard of review of governmental racial classifications, thus allowing the Federal Government more leeway than the States.

IV. *Adarand Constructors*[51]

While the Supreme Court established a standard of review for state programs providing race-based preferences, the Court did not conclusively hold that the same standard applied to federal government sponsored programs until *Adarand*. In 1989, the same year as, but following the *Croson* decision, the Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT) awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (Mountain Gravel). Mountain Gravel then solicited bids for the guardrail work under the contract.[52] Adarand Constructors, Inc., a Colorado-based highway construction contractor, submitted the low bid for the work.[53] Gonzales Construction Company (Gonzales) also submitted a bid for the project.[54] Gonzales was certified by the SBA as a "socially and economically" disadvantaged small business.[55] While Adarand was a small business, it was not certified as a small and disadvantaged business.[56] The prime contract between Mountain Gravel and CFLHD granted Mountain Gravel additional compensation if it retained subcontractors controlled by small disadvantaged businesses pursuant to its subcontracting clause.[57] Therefore, despite Adarand's lower bid, Mountain Gavel awarded the subcontract to Gonzales, who certified that it would retain SDB subcontractors.[58]

Adarand, having lost the bid on the contract, filed suit in the United States District Court for the District of Colorado.[59] As a key witness to Adarand's claim, the Chief Estimator of Mountain Gavel submitted an affidavit to the Court stating "it would have accepted Adarand's bid had it not been for additional payment it received by hiring Gonzales instead."[60]

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[46] *See id.*

[47] *See id.* at 507–08.

[48] *See id.*

[49] 497 U.S. 547 (1990).

[50] *See id.* at 564. To withstand intermediate level scrutiny, also termed heightened scrutiny, benign racial classifications that serve important governmental objectives, must be substantially related to achievement of those objectives. *Id.*

[51] Adarand Constructors Inc. v. Pena, 515 U.S. 200, 205 (1995).

[52] *Id.*

[53] *See id.*

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] *See id.* at 210.

[60] *Id.* at 205.

Adarand argued that the presumption of socially and economically disadvantaged set forth in the Small Business Act "discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the law."[61] The government disagreed, and motioned for summary judgment which was granted by the district court. On appeal, the Tenth Circuit, affirmed the lower court's decision.[62] The United States Supreme Court granted certiorari.[63]

Despite the *Metro Broadcasting* holding, the *Croson* case set the stage for the Court's decision in *Adarand*. The *Adarand* decision was the turning point for all federal programs that sponsored affirmative action. The Court held that the strict scrutiny standard applied in *Croson* applied to federal programs as well.[64] In *Adarand*, the Court reversed the equal protection holding in *Metro Broadcasting* and determined that racial preferences—whether formulated by federal or state government, must be strictly scrutinized.[65] While the Court opined in *Croson* that Congress had special powers under Section 5 of the Fourteenth Amendment permitting it to use racial classifications that would be unconstitutional if used by the state,[66] it decided under *Adarand* that even those special powers were impermissible if not strictly scrutinized.

In *Croson*, the Supreme Court held that strict scrutiny applied where the state government sponsored race-based preferences.[67] In *Adarand*, that same premise was applied where the federal government granted race-based preferences.[68] The only issue before the Supreme Court was whether strict scrutiny should be applied where federal action allowed race-based preferences. The Court offered no judgment on whether the Subcontracting Compensation Clause (SCC) met the strict scrutiny test in *Adarand*.[69] Instead, the Court remanded the case to the district court. While the Supreme Court made it clear that the appropriate standard to apply to race-based classifications would be strict scrutiny, it did not address the underlying merits of the case itself. On remand, the United States District Court for the District of Colorado addressed the issue of whether the racial preference employed by the government passed strict scrutiny and concluded that the SCC program was not sufficiently narrowly tailored to pass the test, where the program lacked "individualized inquiries" into whether the participants were socially or economically disadvantaged.[70] Further the Court noted that the SCC program did not have a compelling interest in eliminating discriminatory barriers because there was no "particularized finding that the federal government had discriminated on the basis of race in awarding federal highway construction contracts in Colorado."[71]

In response to the Supreme Court ruling, the state of Colorado changed its Disadvantaged Business Enterprise (DBE) regulations to remove the presumption of social and economic disadvantage for racial and ethnic minorities.[72] Instead, the state of Colorado premised DBE status on the applicant's certification that he or she was socially disadvantaged.[73] Adarand ultimately re-applied and certified itself as socially and economically disadvantaged and as a result, was certified as a DBE.[74] As a non-minority, Adarand could gain DBE status because its exclusion from the SCC program caused it to be socially

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[61] *Id.* at 210.

[62] *See* Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. Colo 1994), *aff'g* Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992).

[63] *See Adarand*, 515 U.S. at 211. After granting certiorari, in a split five to four decision, the Supreme Court vacated and remanded the case to the lower courts for further consideration on the merits. *Id.*

[64] *See id.* at 200.

[65] *See id.* at 237 (citing and overruling Metro Broad. Inc. v. FCC, 497 U.S. 547 (1990), which concerned the federal program of granting radio stations broadcasting licenses and awarding points based on race in order to encourage diversity in programming).

[66] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 459, 488 (1989).

[67] *See J.A. Croson Co.*, 488 U.S. 459.

[68] *See Adarand*, 515 U.S. 200.

[69] *See id.* The Supreme Court reversed and remanded the case to the District Court of Colorado to determine whether the SCC program met the strict scrutiny test. *Id.*

[70] *Id.* at 237. The 8(a) program mandates an inquiry into each participant's economic disadvantage. *See* 15 U.S.C. § 634(b)(6) (2000).

[71] *Id.* at 238.

[72] *See* Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1577, 1584 (D. Colo. 1997).

[73] *See id.*

[74] *See* Adarand Constructors, Inc. v. Slater, 169 F.3d 1291, 1296–97 (10th Cir. 1999).

disadvantaged.[75] After Adarand certified itself as socially disadvantaged, the Tenth Circuit Court of Appeals "threw out as moot the long-running reverse discrimination suit"[76] holding that Adarand, now entitled to the benefits it previously challenged, could no longer "assert a cognizable constitutional injury."[77] Since there was no injury, the government then appealed the earlier decision of the United States District Court for the District of Colorado which had concluded that the SCC program was not sufficiently narrowly tailored to pass the strict scrutiny test.[78] Finding that Adarand benefited from the DBE status it once challenged, the Tenth Circuit Court of Appeals vacated the lower court's decision and remanded it with directions to dismiss.[79]

V. The Immediate Response to *Adarand*

Despite the end of legal segregation,[80] statistics document that disparity between ethnicity and gender continue to exist.[81] After *Adarand*, the Urban Institute conducted a study to determine the share of government dollars that minority-owned businesses received.[82] The study revealed "substantial disparities between the share of contract dollars received by minority-owned firms and the share of all firms that they represent."[83] "Based on their number, minority-owned firms received only fifty-seven cents for every dollar they would be expected to receive."[84] Notwithstanding the disparities, opponents of affirmative action took the position that "our Constitution is color-blind; thus race-focused affirmative action is constitutionally suspect."[85] Strong opposition to affirmative action and judicial decisions forced the federal government to change regulations post-*Adarand*. Now, with the focus on protecting equal rights, the federal government increasingly relies on race-neutral measures in awarding government contracts.

A. Responses to *Adarand*

Despite the fact that the Supreme Court offered no judgment on whether the SCC passed the strict scrutiny test in *Adarand*,[86] all levels of government began an immediate review of their affirmative action programs. The President of the United States, Congress, the Department of Justice (DOJ), the Department of Defense (DOD) and many other federal agencies, all took action with regard to federal contracting.

1. Presidential Response

Following the *Adarand* decision and attempts to weaken the DBE program, President William J. Clinton, in a statement on Senate action to continue the disadvantaged business enterprise initiative, reaffirmed his goal of the "amend it; don't end it" approach to affirmative action and promoting equal opportunity.[87] He later wrote to the Speaker of House on the DBE

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[75] Major Mary E. Harney et al., *Contract and Fiscal Law Developments of 1999: The Year in Review: Contract Formations: Small Business:* Adarand*: The Saga Continues*, ARMY LAW., Jan. 2000, at 39 (citing *Adarand*, 169 F.3d at 1296–97).

[76] *Id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding the separate but equal doctrine unconstitutional, ending legal segregation).

[81] LIVELY ET AL., *supra* note 37, at 812 (citing Peter T. Kilborn, *For Many in Work Force, 'Glass Ceiling' Still Exists*, N.Y. TIMES, Mar. 16, 1995).

[82] Maria E. Enchautegui et al., *Urban Inst.: Do Minority-Owned Businesses Get a Fair Share of Government Contracts?*, Dec. 1, 1997, *available at* http://www.urban.org/url.cfm?ID=307416.

[83] *Id.*

[84] *Id.*

[85] LIVELY ET AL., *supra* note 37, at 812.

[86] *See* Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995). The Supreme Court reversed and remanded the case to the District Court of Colorado to determine whether the SCC program met the strict scrutiny test. *Id.*

Program adamantly opposing any attempts to weaken or repeal the DBE program extension of the Building Effective Surface Transportation and Equity Act of 1998.[88] In this letter he wrote:

> We have seen time and time again that women and minorities are excluded from the contracting process when a DBE program is not in place. The DBE program is not a quota. The existing statute explicitly provides that the Secretary of Transportation may waive the 10 percent goal for any reason and that this benchmark is not to be imposed on any state or locality. Rather, the DBE program encourages participation without imposing rigid requirements of any type. I ask that you oppose any efforts to strike the DBE program from the bill.[89]

After issuing the statements to the Senate and Speaker of the House, the Clinton administration released the results of a five-month review of existing affirmative action programs.[90] The review recommended the following:

> (1) creating a uniform certification process for all SDBs (conducted by specially licensed firms where possible); (2) tightening the economic disadvantage test used to qualify for these programs; (3) applying the 8(a) Program's 9-year graduation limit to all SDB programs; (4) developing objective industry-specific criteria for determining when firms are no longer in need of set-asides; (5) placing caps on the dollar value of contracts, as well as caps on total dollars a firm can receive through set-asides; (6) increasing penalties against "front" companies; and (7) establishing measures to ensure that programs terminate when the affirmative action goals have been met.[91]

In addition to publishing this review, on July 19, 1995, President Clinton issued a directive to all federal agencies mandating that an affirmative action program must be eliminated or reformed if it: (1) creates a quota; (2) creates a preference for unqualified individuals; (3) creates reverse discrimination; or (4) continues after its equal opportunity purposes have been achieved.[92]

The President's "amend it, don't end it" approach is noteworthy in that the administration admitted that affirmative action programs need restructuring. Realizing that the need for remedial measures arguably still exists, the reformation allowed for the continuation of the program while ensuring that the preferences do not violate the equal rights of the non-beneficiaries.

2. Department of Justice (DOJ) Response

Following the Presidential order to review programs, DOJ issued a memorandum on June 28, 1995 providing guidelines for federal government agencies reviewing affirmative action programs.[93] The DOJ memorandum stated that "*Adarand*

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[87] Public Papers of the Presidents, 34 WEEKLY COMP. PRES. DOC. 385 (Mar. 6, 1998) (written by President William J. Clinton.).

> I am pleased that the Senate, in a strong bipartisan vote of 58 to 37, today retained the Disadvantaged Business Enterprise program within the ISTEA bill, which provides expanded economic opportunity for women-and minority-owned businesses. This program was enacted into law by President Reagan in response to extremely low participation rates by women and minorities in federally assisted highway and transit construction projects. Today's vote reaffirms my administration's "Amend it; don't end it" approach to affirmative action and promoting equal opportunity"

Id.

[88] Public Papers of the Presidents, 34 WEEKLY COMP. PRES. DOC. 385 (Apr. 1, 1998) (letter to the Speaker of the House on the Disadvantaged Business Enterprise).

[89] *Id.*

[90] *See* Gilbert J. Ginsburg & Janine S. Benton, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Article: One Year Later: Affirmative Action in Federal Government Contracting*, 45 AM. U. L. REV. 1903, 1925 (1996) (citing GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT (July 19, 1995), *reprinted in* Daily Lab. Rep. (BNA) No. 139, S-1 (July 20, 1995)).

[91] *Id.*

[92] *See* William Jefferson Clinton, Remarks on Affirmative Action at the National Archives Rotunda (July 19, 1995), http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=94409912987+6+0+0&WAISaction=retrieve.

[93] *See* Memorandum from the Office of Legal Counsel, U.S. Dept. of Justice, to General Counsels, subject: Legal Guidance on the Implications of the Supreme Court's Decision in *Adarant Constructors, Inc. v. Pena* (June 28, 1995), *reprinted in* Daily Lab. Rep. (BNA) No. 125, at E-1 (June 29, 1995)).

makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decision-making to determine if they comport with the strict scrutiny standard."[94] The memorandum set forth six factors agencies must consider in the narrow tailoring requirement of the strict scrutiny standard of review set forth in *Adarand* and other Supreme Court cases:

> (1) whether the governmental entity considered race neutral alternatives before implementing a "race-based measure"; (2) whether the program includes a flexible waiver mechanism for individualized consideration of a "particular minority contractor's bid"; (3) whether the program makes race a requirement for eligibility in the program or whether race is just one factor to be considered; (4) what appropriate measure is chosen to numerically compare the target to the number of minorities in the field; (5) the duration of the program and whether it is subject to meaningful periodic review; and (6) what degree and what type of burden is imposed on people who do not belong to racial or ethnic groups.[95]

3. Congressional Response

Following the decision in *Adarand*, the Federal Government began to revise their rules for applying race-based preferences in order to ensure there was a compelling governmental interest narrowly tailored to achieve the goal of remedying the effects of discrimination.[96] The Presidential and DOJ responses took the form of regulatory change when the Clinton Administration announced on June 24, 1998, that the rules permitting price evaluation adjustments to eligible SDBs would be overhauled.[97] The new rules, under the Federal Acquisition Regulation (FAR), required the Department of Commerce (DOC) to determine the price adjustment available to SDBs specified by Standard Industrial Classification (SIC) major groups and regions.[98] To establish price evaluation adjustments, the Office of the Chief Economist and the Office of Policy Development in the Economics and Statistics Administration of the DOC conducted an economic analysis to identify industries eligible for price evaluation adjustment based on ongoing evidence of discrimination in those specific industries.[99] The rules made the DOC responsible for: "(1) developing methods to calculate benchmark limitations, (2) developing methods to calculate the size of the price evaluation adjustment employed in a given industry, and (3) determining the applicable adjustment."[100] DOC was also charged with "providing information to the SBA for its use in administering the 8(a) program."[101]

DOC's methodology for determining which industries were allowed the price evaluation adjustment was designed to ensure the reforms were "narrowly tailored to remedy discrimination."[102] Only SDBs in DOC identified specific industries suffering the effects of on-going discrimination are eligible for the up to 10% price evaluation adjustment.[103]

In addition to changing the benchmarking rules, the new rules ended the self-certification process. Prior to the change, SDBs could self-certify[104] that they were small and disadvantaged based on the presumption that they were disadvantaged by being a member of a disadvantaged group as defined by the SBA. The new rules required the SBA to "certify the business or that the business complete an application at the SBA for certification, or be a private certifier at the time of its offer."[105] The

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[94] *Id.*

[95] *Id.*

[96] *See* Major David A. Wallace & Major Steven L. Schooner, *Affirmative Action in Procurement: A Preview of the Post-Adarand Regulations in the Context of an Uncertain Judicial Landscape*, ARMY LAW., Sept. 1997, at 3, 4.

[97] Major David Wallace et al., *Contract and Fiscal Law Developments of 1998: The Year in Review: Contract Formations: Small Business: More Rules and Regulations in 1998*, ARMY LAW., Jan. 1999, at 41, 42.

[98] *Id.*

[99] 63 Fed. Reg. 35,714 (June 30, 1998).

[100] Wallace, *supra* note 97, at 41, 42.

[101] 63 Fed. Reg. 35,714.

[102] *Id.*

[103] *Id.*

[104] *See* GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG., 48 C.F.R. § 19.301(a)–(d) (July 2007) [hereinafter FAR].

[105] Wallace, *supra* note 97, at 41, 42 (citing FAR, *supra* note 103, 19.304).

new rules considered individual qualities as opposed to mere presumed disadvantage, and thereby, arguably allow only the truly disadvantaged to be certified.

4. Department of Defense Response

In light of *Adarand*, and in the wake of the DOJ's government-wide review of all federal agencies' affirmative action programs, DOD issued a directive suspending certain SDB set-aside provisions of the Defense Federal Acquisition Regulations (DFARs).[106] One such set-aside provision was the "rule of two."[107] Under the rule of two, if two or more SDBs were available and qualified to bid for a DOD prime contract, then that contract had to be set-aside for SDBs, provided that the SDB price was not more than 10% above the fair market price.[108]

Two months after the suspension of the rule of two program, DOD announced a new program for small disadvantaged businesses.[109] This new program, while still aimed at SDBs, targeted environmental, manufacturing, health care, telecommunications, and management information system companies.[110] The targeting of these specific industries was supported by DOC's assessment that these specific industries suffered the continuing effect of past and on-going discrimination.[111]

The new DFARs rules were "initiatives designed to facilitate awards to SDBs while taking into account the Supreme Court's decision in *Adarand*."[112] Pursuant to these rules, evaluation preferences rather than quotas were considered when awards were made by negotiated procurements with small, small disadvantaged, and women-owned businesses.[113] This rule was designed to allow contracting officers to comport with the narrow tailoring requirement of strict scrutiny to the extent that such factors could be weighed more heavily in favor of SDBs in locations or industries where SDBs have demonstrated continued discrimination.[114] Where there is no such evidence of discrimination, the factors could be weighed more lightly.[115]

Section 1207 of the National Defense Authorization Act of 1987 (1207 Program) authorized DOD to preferentially select bids by SDBs by adjusting bids submitted by non-SDBs up to 10%.[116] However, following the Supreme Court's decision in *Adarand*, a revised version of the price preference program was implemented.[117]

In terms of federal dollars, the 1207 Program, allowing the 10% price evaluation adjustment, was the largest minority contracting program administered by the federal government.[118] Since the Strom Thurmond National Defense Authorization Act of 1999, this adjustment has been suspended for almost eight years.[119] This revision prohibits DOD from making awards with a 10% preference for one year after the 5% goal for SDB awards had been attained. The suspension of the 10% pricing

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[106] *See* Defense Federal Acquisition Regulation Supplement, 60 Fed. Reg. 54,954 (Oct. 27, 1995) (codified at 48 C.F.R. pts. 219, 252) (ordering suspension of SDB set-asides to be effective 23 October 1995).

[107] *See id*.

[108] *See id.*

[109] 65 Fed. Cont. Rep. (BNA) 3 (Jan. 22, 1996) (announcing the new DOD program, "The Industry Thrust," for SDBs).

[110] *See id*.

[111] *See id*; *see also* 63 Fed. Reg. 35,714 (June 30, 1998).

[112] Tolan, *supra* note 13, at 108.

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] National Defense Authorization Act of 1997, Pub. L. No. 99-661, 100 Stat. 3859, 3973 § 1207 (1996) (codified at 10 U.S.C. § 2323).

[117] *See* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 801, 112 Stat. 1920 (1998) (codified at 10 U.S.C. § 2323(e)(3)(B)(ii)) [hereinafter NDAA 1999].

[118] 1 ANTHONY W. ROBINSON, THE NEW VANGUARD (1st ed. 2006) (No. 1).

[119] *See* NDAA 1999, *supra* note 117.

preference has a glass ceiling effect. Once DOD meets its 5% goal for contract awards to SDBs, disadvantaged enterprises must then compete with all other small businesses as if they are on an equal playing field. The suspension ensures that the SDBs be given just enough, but not too much advancement. In short, the quota has been met and little effort has been made to further advance SDBs.

5. The SBA's Response

As the FAR was modified, and the DFAR reflected those changes, the SBA also revised its rules to comport with *Adarand*. The SBA was amended to change the standard of proof required for non-minority applicants to claim eligibility in the SDB program.[120] The new preponderance of evidence standard lowered the burden of proof from clear and convincing evidence and improved opportunities for non-minorities to in poorer geographic areas to qualify more easily for preferences.

In addition to changing the standard of proof for social and economic disadvantage, the new regulation made the race-based presumption of disadvantage a rebuttable presumption that could be overcome with evidence to the contrary.[121] While recognizing there is a compelling interest to take remedial action in federal procurement,[122] rebutting a race-based presumption was "intended to prevent over-inclusion by eliminating those presumed to be, but who actually are not, disadvantaged."[123]

6. DOT's Response

The Department of Transportation's (DOT) MBE program was at issue in *Adarand*.[124] Under the program, federal law requires that a subcontracting clause appear in most federal agency contacts.[125] Therefore, pursuant to the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987,[126] the DOT in *Adarand* authorized the use of subcontractor bonuses to prime contractors who used SDBs.[127] The clause itself stated that "monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals."[128] The payment was intended to be compensation for the prime contractor's expense in monitoring SDBs and providing assistance.[129] However, opponents of the bonus viewed it as an incentive for subcontracting to SDBs, in violation of equal protection rights, rather than actual compensation for additional expenses.[130]

Since *Adarand*, the DOT's affirmative action program has gone through several statutory changes.[131] Currently, the Transportation Equity Act for the Twenty-First Century (TEA-21),[132] is the statutory authority used by DOT for extension of

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[120] *See* 13 C.F.R. § 124.103(c) (2008). Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by preponderance of the evidence. *See id.*. § 124.105(c)(1). Previously, individuals had to establish their disadvantage by clear and convincing evidence.

[121] *See id.* § 124.103(b)(3).

[122] *See, e.g.*, Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042 app. at 26,050 (1996).

[123] Tolan, *supra* note 13, at 112.

[124] *See* Adarand Constructors v. Pena, 515 U.S. 200, 208 (1995).

[125] *See* 15 U.S.C.S. § 687 (d)(2) (LexisNexis 2008).

[126] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (1987) [hereinafter STURRA].

[127] *See Adarand*, 515 U.S. at 207 (citing STURRA, *supra* note 126, a DOT appropriation measure).

[128] *Id.*

[129] *See id*. at 200, 201.

[130] *See id.*

[131] The Transportation Equity Act of the Twenty-First Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998) [hereinafter TEA-21], replaced the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919-21 (1991), preceded by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (1987), preceded by the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1982).

[132] TEA-21, *supra* note 131.

its affirmative action program. Under prior law, the 10% federal set-aside was mandatory. Under the revised program, a state receiving federal highway funds submits a goal for DBE participation in its federally funded highway contracts. The goal is based on "demonstrable evidence" of the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts.[133] The goal can be adjusted upward or downward and the state must meet its goals through race-neutral means. If such race-neutral means are ineffective, the state then must give preferences to certified DBEs. However, the preferences cannot include quotas, and set-aside contracts are limited to only those instances "where no other method could be reasonably expected to redress egregious instances of discrimination."[134] The regulation expressly declares that the statutory 10% provision "is an aspirational goal at the national level," not a mandatory requirement for the grantee state.[135]

B. Suspension of the Price Evaluation Adjustment

The Federal Acquisition Streamlining Act of 1994 (FASA),[136] enacted a year before the final *Adarand* decision, was not truly a "response" to *Adarand*. This Act, legislated while *Adarand* was before the Supreme Court, brought about several statutory changes to both procurements relating to small businesses and small and disadvantaged businesses.[137] FASA extended SDB initiatives beyond the DOD, to the National Aeronautics and Space Administration (NASA) and the Coast Guard.[138] FASA also extended SDB price evaluation preferences and competition restrictions to all federal and civilian agencies.[139]

In response to *Adarand*, though preferences were not held unconstitutional,[140] both civilian agencies and DOD agencies implemented change. While the statutory goal for contracting with SDBs at not less than 5% remained for all agencies, the price evaluation adjustment was suspended for both civilian and federal agencies.[141]

The price evaluation adjustment for civilian agencies, authorized under FASA, expired on December 9, 2004.[142] Although the SBA did not end its SDB program, the price evaluation adjustment was omitted from the Small Business Reauthorization and Manufacturing Assistance Act of 2004, and as a result the statutory authority of civilian agencies to apply the adjustment expired.[143] This expiration of authority applied only to civilian agencies, not to DOD, NASA, or the U.S. Coast Guard, which were all governed under separate authority.[144]

Pursuant to the price evaluation adjustment prescribed in FAR 19.11, the separate authority to apply price evaluation adjustments, granted to DOD, NASA and the Coast Guard, was first suspended in February 2000.[145] Due to DOD exceeding its 5% goal for contract awards to SDBs in the previous eight fiscal years,[146] the suspension remains in effect through March

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[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] FASA, *supra* note 6.

[137] *See generally id.*

[138] *See id.* § 7105.

[139] *See id.* § 7102.

[140] *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995).

[141] *See* Memorandum, Laura Auletta, Chair, Civilian Agency Acquisition Council (CAAC), to Directors, Civilian Agencies et al., subject: Expired Program Authority for the Price Evaluation Adjustment for Small Disadvantaged Businesses (Dec. 27, 2004) (on file with author).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See* Memorandum, R. D. Kerrins, Jr., Acting Director, Defense Procurement, to Directors of Defense Agencies et al., subject: Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (Jan. 25, 2000) (on file with author).

[146] 10 U.S.C. 2323 (a) (2000) The DOD is prohibited from granting price preferences for a one year period following a fiscal year in which DOD achieved the 5% goal for contract award. *Id.*

2009.[147] If the statutory language authorizing the price evaluation adjustment is not included in the bill recently introduced to Congress,[148] the omission may result in the authority for the adjustment to expire. If this occurs, agencies that fall below the 5% goal, will not be allowed to apply the 10% preference, likely placing SDB's in the same positions they were in pre-affirmative action.

C. Thirteen Years After *Adarand*, The True Affect of the "Amend It, Don't End It" Plan

1. There is Still a Compelling Interest

In order to implement remedial programs in light of *Adarand*, "government agencies have had to invest significant resources to produce statistical evidence establishing a level of racism sufficient enough to justify minority set-asides and preferences."[149] "Many have implemented set-asides with relatively little quantifiable empirical evidence, gathering the requisite data at the commencement of litigation and sometimes after enactment of the plan."[150] Other agencies have met some of the set aside goals but have far from exceeded them.[151]

The seminal pre-*Adarand* case that shaped the requirement of statistical evidence to support race-based preferential programs was *City of Richmond v. J.A. Croson Co.*[152] The Court found in *Croson* that Richmond's program in question was not supported by a formal finding of past discrimination in construction contracts, and thereby required agencies to demonstrate a compelling governmental interest by justifying with specificity a particularized finding of past discrimination in that particular industry.[153] Past societal discrimination was not sufficient enough to justify race based measures.[154] In his dissent, Justice Marshall noting that Richmond had been the capital of the Confederacy and renowned for strict segregation, could not believe that his colleagues would "doubt that blacks continued to suffer discrimination in the city."[155] He stated, "[A] majority of this court signals that it regards racial discrimination as largely a phenomenon of the past. . . . I, however, do not believe this nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice…"[156] Despite his dissent, the Court did not acknowledge past societal discrimination and would only rely on particularized findings of past discrimination within particular industries.

The first federal court of appeals to rule opposite of *Croson* regarding the admissibility of post-enactment evidence was the Ninth Circuit, in *Coral Construction Co. v. King County*.[157] Here, the county, defending its preferential program, introduced two post-enactment reports documenting the impact of discrimination in the local construction and goods and services industries.[158]

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[147] For the past eight years, the price evaluation adjustment for SDBs has been suspended for DOD procurements because the DOD exceeded its 5% goal for contract awards to SDBs. *See* Memorandum, Shay D. Assad, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies et al., subject: Class Deviation-Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (Feb. 9, 2007) (on file with author).

[148] SBCRA, *supra* note 7.

[149] Mark Johnson, *Legislate First, Ask Questions Later: Post-Enactment Evidence in Minority Set-Aside Litigation*, U. CHI. LEGAL F. 303, 304 (2002).

[150] *See id.* (citing for example, Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991), and Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2d Cir. 1992)). Such requisite data has been referred to as "post-enactment data."

[151] *See Small Business Contracting: Observations from Reviews of Contracting and Advocacy Activities of Federal Agencies: Testimony, Before the Subcomm. on Government Management, Organization, and Procurement; H. Comm. on Oversight and Government Reform*, GAO-07-1255T, Sept. 26, 2007 [hereinafter GAO-07-1255T] (statement of William B. Shear, Dir., Financial Markets and Community Investment), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-07-1255T.

[152] Johnson, *supra* note 149, at 305 (discussing the *Croson* Court's requirement for statistical evidence in City of Richmond v. J.A. Croson Co., 488 U.S. 459 (1989)).

[153] *See id*. (citing *J.A.Croson Co.*, 488 U.S. at 498).

[154] *Id.*

[155] JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 388 (1st ed. 1998) (citing Justice Marshall's dissent in *J.A. Croson Co.*, 488 U.S. 459).

[156] *See id*.

[157] 941 F.2d 910 (9th Cir. 1991).

The Ninth Circuit held that while a "municipality must have some concrete evidence of discrimination in a particular industry before it may adopt a remedial program," it would not automatically strike down a program if the evidence available at the time of the enactment did not completely satisfy both prongs of the strict scrutiny test.[159] Instead, the Ninth Circuit held that courts should evaluate such programs on the basis of all the evidence presented, whether that evidence was available to the legislature before or after enactment.[160] The *Coral Construction* court required sufficient evidence to establish that, at the time of enactment, the legislature had a good-faith reason to believe discrimination had occurred.[161]

Several circuits have followed the Ninth Circuit and found that less evidence is required for enactment than is required for judicial review.[162] In *Shaw v. Hunt*[163] the Supreme Court held that the state must identify the targeted discrimination with some specificity.[164] The Court further held that the legislature must have a "strong basis in evidence to conclude that remedial action was necessary "before it embarks on an affirmative-action program."[165] While decisions prior to *Shaw* allowed the admission of post-enactment evidence,[166] "the post-*Shaw* jurisprudential landscape is not nearly so neat and tidy."[167] "Some courts continue to consider post-enactment evidence,[168] while others have held that the Supreme Court decision in *Shaw* precludes such evidence."[169]

2. A Narrowly Tailored Glass Ceiling

Whether the government still has a compelling reason to implement remedial measures and whether racism exists will continue to be an issue, the revised rules pertaining to MBEs are tailored to place strong emphasis on using race neutral means to increase minority participation in government contracting.[170]

The revised rules, as discussed above, require that only contractors from certain industries, as prescribed by DOC, be given preferences; that the SBA certify MBEs as disadvantaged as opposed to self-certification; that non-minorities be allowed to demonstrate individual social disadvantage by preponderance of the evidence rather than by clear and convincing evidence; that 10% set-aside in the transportation industry be a goal for states in federally funded highway contracts as opposed to a mandate; and that price evaluation adjustments be suspended for one year following a fiscal year in which the 5% goal of all contract awards are achieved. The revised rules, as applied to post-*Adarand* cases, should arguably pass the narrowly tailored prong of the strict scrutiny test.

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[158] *See id.* at 915.

[159] *See id.* at 919. Concrete evidence could include limited disparity studies or anecdotal evidence. *Id*.

[160] *See id*.

[161] *See id.* at 921 ("Where a state has a good faith reason to believe that systematic discrimination has occurred, and is continuing to occur, in a local industry, we will not strike down the program for inadequacy of the record if subsequent factfinding bears out the need for the program.").

[162] *See* Johnson, *supra* note 149, at 310 (referencing several courts that have followed the Ninth Circuit); *see* Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2d Cir. 1992); Concrete Works of Colo. v. Denver, 36 F.3d 1513 (10th Cir. 1994); Ensley Branch NAACP v. Siebels, 31 F.3d 1548 (11th Cir. 1994); Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997); Contractors Ass'n of E. Penn., Inc. v. Philadelphia, 91 F.3d 586 (3d Cir. 1996).

[163] 517 U.S. 899 (1996).

[164] *See id*. at 909.

[165] *Id.* at 910.

[166] *See, e.g.*, Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50; Concrete Works of Colo. v. City of Denver, 36 F.3d 1513; Ensley Branch NAACP v. Siebels, 31 F.3d 1548; Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County, 122 F.3d 895; Contractors Ass'n of E. Penn., Inc. v. Philadelphia, 91 F.3d 586.

[167] Johnson, *supra* note 149, at 314.

[168] *Id.* (citing for example, *Eng'g Contractors*, 122 F.3d at 912 (ruling in 1997 that post-enactment evidence is admissible); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1166 (10th Cir. 2000) (admitting post-enactment evidence)).

[169] *Id.* (citing Rothe Dev. Corp. v. Dep't of Defense, 262 F.3d 1306, 1325–28 (Fed Cir 2001)).

[170] *See* Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964 (8th Cir. 2003), W. States Paving Co., Inc. v. Wash. State Dep't of Transp., 407 F.3d 983 (9th Cir. 2005).

In *Sherbrooke Turf*,[171] the United States Court of Appeals for the Eighth Circuit found that the revised DOT regulations were narrowly tailored. First the court stated that the regulations placed strong emphasis on "the use of race-neutral means to increase minority business participation in government contracting," explaining that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but it does require "serious, good faith consideration of workable race-neutral alternatives."[172] Second, the court stated that "the revised program was flexible in that it had threshold earning limitations so that any individual whose net worth was more than $750,000 could not qualify as economically disadvantaged."[173] Third, the revised rules were tied to participation in relevant labor markets where minorities would have received contracts but for past discrimination. And finally, the court stated that "DOT and Congress took significant steps to minimize the race-based nature of the DBE program by creating a rebuttable presumption for certain racial minorities and excluding wealthy minority owners while allowing non-minorities the opportunity to demonstrate social and economic disadvantage."[174] While race, under the new rules is still relevant, it is not a determinative factor. Instead, serious, good-faith, and workable race-neutral measures are considered first.

Sherbrooke Turf supports the contention that the government measures are narrowly tailored as long as alternative race-neutral remedies are considered; the measures are flexible and will expire when the disparity has been remedied; the remedial measures relate to the relevant labor market; and the impact of the remedy on third parties is considered. Arguably, the statutory and regulatory changes that took place after *Adarand* ensured the federal government's preferential policies would pass the narrowly tailored prong of the strict scrutiny standard. However, the issues that remain disputed are whether DOC's findings regarding the existence of past discrimination are substantial enough to withstand the compelling interest prong of strict scrutiny and whether state or federal data is admissible to establish such findings that support race-based preferential programs.

In *Western Paving Co., Inc. v. Washington State Department of Transportation*,[175] the United States Court of Appeals for the Ninth Circuit agreed with *Sherbrooke* and the Eighth Circuit, at least with regards to holding that Congress identified a compelling remedial interest when it enacted TEA-21 and that the revised DOT regulations were narrowly tailored to achieve that objective.[176] The court however held that the state actor in *Western Paving* "ha[d] not proffered any evidence of discrimination within its own contracting market and thus failed to meet its burden of demonstrating that its DBE program is narrowly tailored to further Congress's compelling remedial interest."[177] Unlike *Sherbrooke*, where the state actors, Minnesota and Nebraska, conducted market studies in their state's contracting market, the State of Washington relied on federal studies.

The *Western Paving* holding read in conjunction with the *Shaw* holding, arguably places an insurmountable burden on the states. These decisions may ultimately force the states to conduct separate studies, making affirmative action a state program as opposed to a federally mandated program to remedy discrimination. With knowledge of how "our" United States has been divided over the issue of race since before the Civil War, it again calls to question how our "inconsistencies cast doubt on how well opponents of affirmative action adhere to the principles of color blindness and meritocracy, hinting that the standards we choose may be arbitrary."[178]

Unless the Supreme Court allows pre-enactment evidence to include federal studies, state agencies will continue to invest significant resources to prove that racism still exists and that remedial measures are necessary. This places an undue burden on state agencies and will ultimately force them to reject any measures that ensure an equal distribution of wealth to minority contractors. Despite the fact that national studies conducted by the DOJ and the DOC justify and support the need for continued remedial measures, the additional requirement on the states makes it clear that the agencies themselves will be forced to ignore a congressionally mandated program in premonition that the Supreme Court will negate legislative intent by determining that federal programs violate equal protection rights.

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[171] *See Sherbrooke*, 345 F.3d at 964.

[172] *Id*. (quoting Grutter v. Bollinger, 539 U.S. 306 (2003)).

[173] *Id.* The newly proposed bill will increase the net worth due to inflation. *See* SBCRA, *supra* note 7.

[174] *See id*.

[175] W. States Paving Co., Inc. v. Wash. State Dep't of Transp., 407 F.3d 983.

[176] *See id.*

[177] *Id.*

[178] WU, *supra* note 1, at 162.

VI. Changes and Recommendations

Over thirteen years ago, following the decision in *Adarand*, the federal government revised their rules for applying race-based preferences.[179] The rules were revised in response to the Supreme Court's ruling that a strict scrutiny standard of review would be applied where the federal government sponsored race-based preferences in any program.[180] Despite the fact that such preferences have not been held unconstitutional,[181] government agencies have responded with hesitance in allowing continuation of the programs. While preferences are contested in Court, statutory provisions *permit* government agencies to apply race based preferences in government contracts in order to meet statutory goals for SDB procurements.[182] The FAR *requires* such preferences under certain circumstances.[183] However, the combination of litigation threats, statutory exceptions for DOD agencies, and the DOC's incomplete implementation of the FAR requirements have resulted in a situation where the statutorily permissible 10% price preference for SDB's, one of the most powerful tools available to agencies, is not widely applied.[184] It seems that Congress itself has ended their own program in premonition that the Supreme Court will negate legislative intent by determining that federal programs violate equal protection rights. Rather than allowing the preferential programs to end completely or to allow violations of equal protection rights, certain suggestions and alternatives should be considered.

1. Legislative Recommendations

Past societal discrimination is not necessarily an indication of present discrimination and pre-enactment evidence should only be considered to determine whether there has been compliance with preferential policies. However, government agencies have invested significant resources to produce statistical evidence establishing a level of racism sufficient enough to justify minority set-asides and preferences.[185] Expenses should not be on the agencies and states alone. In addition to the courts outlining admissible evidence, Congress should implement legislation that will not penalize jurisdictions financially for attempting to comply with judicial procedures. Where evidence of discrimination is substantiated, those specific industries that discriminate should be held accountable. Discriminating industries should be forced to contract with MBEs and fines should be implemented as reimbursement for the research required to make regulatory change. Additionally, the courts should enforce legislation that specifically prohibits race discrimination in public contracting and Congress should establish effective enforcement procedures.

2. Race-Neutral Measures for Awarding Contracts

Currently, the Supreme Court mandates that agencies consider race-neutral alternatives before employing preferences. However, it does not appear that either the DOJ or the Supreme Court offers direction regarding what agencies may do to demonstrate they are considering race-neutral alternatives. If such alternatives are going to be effective, the DOJ should develop guidance for agencies on how to implement race-neutral alternatives.

Debatably, race-neutral would require that preferential programs focus on disadvantaged status rather than race or ethnicity. If so, the disadvantaged status would be based solely on economic or social disadvantage. The post-*Adarand* regulations that make race a rebuttable presumption arguably gets us closer to a race-neutral alternative. Eliminating the race element completely would certainly be consistent with *Adarand*, however completely eliminating race as a consideration would not take into account the discriminatory practices of individuals who still use race as a reason for exclusion. Removing race as a consideration, in effect, makes affirmative action a program for the poor. Any preferences granted in

[179] *See* Wallace & Schooner, *supra* note 95, at 3.

[180] *See id.* at 4.

[181] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The ruling in *Adarand* held that strict scrutiny should be applied where federal government sponsored race based preferences, however the preferences themselves were not held unconstitutional. *Id.*; *see also* Rothe, *supra* note 9.

[182] *See* 10 U.S.C.S. § 2323 (LexisNexis 2008); 15 U.S.C.S. §§ 631–657.

[183] *See* FAR, *supra* note 104, §§19.000–19.1204.

[184] "On October 23, 1995, the DOD issued a directive suspending certain SDB set-aside provisions of the Defense Federal Acquisition Regulation Supplement, in light of *Adarand*." Tolan, *supra* note 13, at 107.

[185] Johnson, *supra* note 149, at 304.

order to redistribute wealth from the haves to the have-nots, is a positive step that would benefit both minorities and non-minorities. But, while poverty can be overcome, race is an immutable characteristic that will always put some at a disadvantage.

3. Defending Diversity - A Business Case for Diversity

The overall goal of both state and federal agencies should be to eliminate the need for affirmative action altogether. One method of doing so is by teaching diversity in the workplace. If the racist mentality is removed, the need for affirmative action may become obsolete.

> The business case for diversity in the workplace rests on the premise that organizations need well-managed diversity if they are to meet or exceed the expectations of key stakeholder groups: shareholders or taxpayers, customers and clients, employees, suppliers, and the communities and societies within which they operate. Further, at the level of public policy development, there is a clear recognition that workplace diversity is a critical variable in developing harmonious, stable, and progressive societies.[186]

Government agencies continue to face the pressure of protecting the equal rights of non-minority or non-disadvantaged contractors while also achieving the statutory goals for SDB procurements. In order to do both, it is integral that diversity training be given at all levels of government procurement. The key decision makers in contract award, to include the head of respective agencies and their contracting officers, should all receive diversity training. With this training, it is possible that affirmative action programs may not be necessary in the future.

As a business concept, diversity rejects quotas and much of the legislative and regulatory mandated targets of affirmative action.[187] Although the concept of affirmative action should not be rejected immediately, a new paradigm of diversity may be a better alternative.

VII. Conclusion

The Government spent an estimated $412 billion on contracting in 2006, yet only 20% went to small businesses, falling short of the 23% goal.[188] Further, only 6.75% of those contracting opportunities went to SDB's.[189] While this arguably exceeds the 5% goal, it does not exceed the number of eligible contractors who were not considered. Many believe that preferential policies aimed at assisting minorities are no longer necessary and that the government should not meddle in private wealth and business. However, it appears that without government interference, use of MBEs dramatically decreases.[190] The SBA is charged with negotiating procurement goals with each federal agency, reviewing each agency's results and ensuring that the statutory goals are met. Current reports indicate that the federal government is still not meeting its mandate despite the availability of SBE.[191] Opponents and supporters of government affirmative action policies have debated the issue of preferences awarded by the federal government to small disadvantaged businesses since inception. "Proponents regard the continuation of affirmative action as a litmus test of our nation's commitment to racial justice."[192] "Opponents see it as an unacceptable violation of the idea of equality of opportunity, and the principle that the government should treat its citizens in a color-blind fashion."[193] Unfortunately we do not live in a color-blind society and it is incumbent

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[186] Dr. Jeffrey Gandz, *A Business Case for Diversity*, HUM. RESS. & SOC. DEV. (Canada), Fall 2001, *available at* http://www.equalopportunity.on.ca/eng_g/documents/BusCase.html.

[187] *Id.*

[188] SBCRA, *supra* note 7 (statement of Sen. John Kerry, Chairman of the Senate Committee of Small Business and Entrepreneurship (citing Eagle Eye Publishing)).

[189] *Id.*

[190] Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed Reg. 26,042 (May 23, 1996).

[191] GAO-07-1255T, *supra* note 151.

[192] William A. Gaston, *The Affirmative Action Debate, in* AN AFFIRMATIVE ACTION STATUS REPORT: EVIDENCE AND OPTIONS 7, 1 PHIL. & PUB. POL'Y Q. (Winter/Spring 1997) (quoting Glen C. Loury), *available at* http://www.puaf.umd.edu/IPP/1QQ.HTM.

[193] *Id.*

upon the government to broaden access to America's prosperity. It will take more than the fifty-four years since the end of segregation to cure the effects of centuries of discrimination.

In his dissent of *Bakke*, Justice Marshall stated:

> It must be remembered that during most of the past 200 years, the Constitution as interpreted by this court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.[194]

[194] WILLIAMS, *supra* note 155, at 367 (quoting Justice Thurgood Marshall's dissenting opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

Navigating an Enforced Leave Appeal

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Introduction

Enforced leave cases are frequently misunderstood by agency attorneys and personnel specialists. Understanding the type of situations where enforced leave comes up will help the agency avoid problems as well as enable the agency to correct mistakes before they become costly.

This article will define enforced leave and provide counsel with an analytical framework for evaluating such cases. The article will also address public policy problems created by the current enforced leave case law and suggest reform to cure these problems.

Enforced leave is any situation where management requires a civilian employee to take leave, whether it is annual leave, leave without pay, or sick leave.[1] On the other hand, there is no enforced leave when the employee voluntarily initiates an absence, even an indefinite one.[2] Put another way, enforced leave is a type of constructive suspension. An employee who is put on enforced leave for thirty days is considered to have been suspended for thirty days.

An agency may formally propose an employee's placement on enforced leave for fifteen days or more, in accordance with Title 5 procedures,[3] affording the employee thirty days advanced notice of the reasons for the action and an opportunity to respond to the deciding official either orally, in writing, or both. Such actions are plainly within the Merit Systems Protection Board's (MSPB) jurisdiction and are not the subject of this article. This article focuses on the problems created when an agency does not follow Title 5 procedures and the employee claims to have been placed on enforced leave.

Similar to an employee who is given a disciplinary suspension, an employee who is placed on enforced leave may be entitled to file a grievance, an appeal to the MSPB, or an Equal Employment Opportunity (EEO) complaint. The key to analyzing an enforced leave case is determining whether the employee was actually required to take leave by the agency or whether the employee voluntarily requested leave.

Determining whether there is an enforced leave situation may turn on whether the agency was obligated to accommodate the employee. Making this determination requires a thorough understanding of the agency's obligations under the Rehabilitation Act,[4] as well as an evaluation of any obligations owed to the employee under the collective bargaining

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[1] An authorized absence with pay, although commonly called "administrative leave," is not really leave since the employee remains in a duty status for pay purposes. Since the employee is paid for such absences, administrative leave is not appealable to the Merit Systems Protection Board. LaMell v. Armed Forces Retirement Home, 104 M.S.P.R. 413, ¶ 9 (2007).

[2] *See* Perez v. Merit Sys. Protection Bd., 931 F.2d 853, 854 (Fed. Cir. 1991).

[3] 5 U.S.C. § 7513 (2000). Federal civilian employees may submit appeals to the MSPB from any agency action which is appealable to the MSPB under any law, rule, or regulation. *Id.* § 7701(a). Under Chapter 75 of Title 5, an agency may take disciplinary action for "such cause as will promote the efficiency of the service." *Id.* § 7513(a). These actions include generally removals, suspensions for more than 14 days, reductions in grade reductions in pay, and furloughs of thirty days or less. *Id.* § 7512. To take an action under Chapter 75, an agency must provide the employee with procedural protections to include:

> (1) at least thirty days' advance written notice . . .;
> (2) a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
> (3) be represented by an attorney or other representative; and
> (4) a written decision and the specific reasons therefore at the earliest practicable date.

Id. § 7513(b). Federal employees who are removed or demoted under Chapter 43 of Title 5 receive comparable procedural protections. *Id.* § 4303. An appellant has a right to judicial review of MSPB decisions in the U.S. Court of Appeals for the Federal Circuit. *Id.* § 7703(a)(1). Although federal agencies may not directly appeal an adverse MSPB decision to the Court of Appeals, the Director of Office of Personnel Management may obtain such review upon certification that the MSPB erred in interpreting civil service law and that the MSPB's decision will have a substantial impact on the civil service law. *Id.* § 7703(d). The Federal Circuit's statutory review of the substance of MSPB decisions is limited to determining whether they are unsupported by substantial evidence or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7703(c).

[4] Rehabilitation Act of 1973, 87 Stat. 357, *amended by* 29 U.S.C. §§ 701–797.

agreement, agency regulations or policy, or other requirements of law.

The MSPB enforced leave cases often pose jurisdictional issues. The MSPB only has jurisdiction over suspensions longer than fourteen days[5] and, therefore, appeals of enforced leave actions of fourteen days or less will be dismissed for lack of jurisdiction.[6]

Requests for leave are presumed voluntary. Where the employee has a signed leave slip, the MSPB will only have jurisdiction if the employee can show that his absence from the workplace was involuntary, such as where he was instructed to request leave by a supervisor.[7] If he cannot prove the leave was involuntary, the administrative judge will dismiss the case for lack of jurisdiction. However, if the employee establishes that his leave request for fifteen days or more was involuntary, he will win his case by operation of law since enforced leave is a constructive suspension and, unlike a disciplinary suspension, the employee will not have received any due process rights.[8]

In the case of an alleged constructive suspension, the employee is entitled to a hearing on the issue of MSPB jurisdiction only if he makes a non-frivolous allegation[9] casting doubt on the presumption of voluntariness.[10] However, the MSPB tends to construe non-frivolous allegations liberally, generally erring on the side of affording the employee a hearing.

Finally, enforced leave cases are especially confusing because an employee placed on enforced leave may still not be entitled to back pay if he was not ready, willing, and able to work.[11] In other words, the MSPB may determine that the employee was constructively suspended, but the agency may still win the war by avoiding back pay liability.

The Two Types of Enforced Leave

There are two types of enforced leave situations, and each has its own analytical framework. The threshold question is to determine which of the two types applies to your situation. The distinction is simple, but essential. The first type is where an employee is at work and leaves. The second is where an employee is not at work and is prevented from coming back.

Type 1: The Employee Is at Work and Leaves

When the employee is at work, leaves, and then later claims that his absence was enforced leave, the merits of the enforced leave claim turns entirely on the answer to a single question: Who initiated the absence? If the employee initiated the absence, the agency will win. If the agency initiated the employee's absence, the employee may win if the MSPB finds that the employee was placed on enforced leave.

This concept may sound simple, but in many cases, understanding who initiated the absence can be difficult. If the

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[5] *See* 5 U.S.C. §§ 7512(2), 7513(d), 7701(a).

[6] *See* Williams v. U.S. Postal Serv., 95 M.S.P.R. 16, ¶¶ 9–10 (2003).

[7] *See* Burns v. Dep't of the Navy, 67 M.S.P.R. 285, 288–89 (1995).

[8] Barnes v. U.S. Postal Serv., 103 M.S.P.R. 103, ¶ 10 (2006).

[9] Nonfrivolous allegations of MSPB jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the MSPB has jurisdiction over the matter at issue. Solomon v. Dep't of Agric., 106 M.S.P.R. 172, ¶ 11 (2007).

[10] *See* Burgess v. Merit Sys. Protection Bd., 758 F.2d 641, 643 (Fed. Cir. 1985).

[11] *See, e.g.*, Donovan v. U.S. Postal Serv., 101 M.S.P.R. 628 ¶ 11 (2006). In the past, to constitute a constructive suspension, and therefore a valid appealable action, it was necessary for an employee's placement in a nonpay status be: (1) involuntary; (2) occur when the employee is ready, willing, and able to work; and (3) stem from a disciplinary situation. Mosely v. Dep't of the Navy, 4 M.S.P.R. 135, 137 (1980), *aff'd*, 229 Ct. Cl. 718 (1981). The three-part test articulated in *Mosely*, has been overruled sub silentio. Specifically, jurisdiction over an appeal from enforced leave no longer depends on whether the employee was ready, willing, and able to work. *See* Vargo v. U.S. Postal Serv., 49 M.S.P.R. 284, 286–87 (1991). Furthermore, whether there is work available within any medical restrictions an employee may be under has no bearing on jurisdiction over an appeal from the employee's placement on enforced leave. *See* Rivas v. U.S. Postal Serv., 61 M.S.P.R. 121, 126 (1994). Finally, enforced leave based not on alleged misconduct, but on the agency's belief that an employee cannot perform his duties without endangering himself or others, is nevertheless "'disciplinary' in the broader sense of maintaining the orderly working of the Government. . . ." Pittman v. Merit Sys. Protection Bd., 832 F.2d 598, 599 (Fed. Cir. 1987) (quoting Thomas v. Gen. Servs. Admin., 756 F.2d 86, 89 (Fed. Cir.), *cert. denied*, 474 U.S. 843 (1985)).

employee is entitled to an accommodation under the Rehabilitation Act,[12] and requested leave because of the agency's unlawful failure to accommodate his disability, the employee is on enforced leave and suffered a constructive suspension because his absence was involuntary.[13]

On the other hand, as discussed below, if the employee requests leave reluctantly because he was denied a light-duty assignment, but is not entitled to an accommodation under the Rehabilitation Act, then the employee is not on enforced leave. This is true even though the appellant may well believe that his subsequent request for leave was involuntary.

The MSPB recognizes that a choice of unpleasant alternatives does not render an employee's decision not to request leave rather than return to her regular position, involuntary.[14] In *Moon v. Department of the Army*, the MSPB rejected an appellant's argument that the agency initiated the leave where the agency issued her a letter informing her that it would not be feasible for her to continue in her light-duty status. The agency offered her the option of returning to her regular position or requesting leave.[15] The MSPB emphasized that the crux of the matter was whether the agency's letter terminating the light-duty assignment instructed the appellant to cease reporting to work.[16] The MSPB determined that the letter did not and, therefore, a mere choice of unpleasant alternatives did not make the leave request involuntary.[17]

In contrast, where the employee has not requested leave, the MSPB may find enforced leave.[18] In these situations, agency managers and personnel specialists may believe that the employee's absence is voluntary if the agency was not obligated to provide an accommodation. In management's view, sick leave is intended to compensate employees who are incapacitated for the performance of duties by illness.[19] Managers and personnel supervisors will typically see nothing inappropriate about telling the employee who cannot work due to illness to go home and take sick leave.

This framework is problematic because it can result in unanticipated outcomes by potentially requiring the agency to pay people who cannot work.[20] If an employee says to the boss, "I'm not feeling well today, can I take sick leave and go home?," the employee has initiated the absence and there is no enforced leave. On the other hand, if the employee collapses to the workroom floor suffering a heart attack and the supervisor calls an ambulance, the agency has, arguably, initiated the employee's absence and placed him on enforced leave because the employee, physically unable to do so, did not request leave.

One could argue that the employee who suffers a heart attack has "constructively" requested leave, since he would obviously desire medical attention. Yet, a review of MSPB cases in the enforced leave area suggests that the MSPB takes a more literal approach, rather than the common sense one, to determining who has initiated an absence from the workplace.

For example, in *Bennett v. Department of Transportation*,[21] an Air Traffic Controller whose doctor had imposed medical restrictions preventing him from controlling live aircraft had been temporarily assigned administrative duties. Subsequently, the agency informed him that those administrative duties were no longer available and that he would have to take sick leave, annual leave, or leave without pay. The MSPB held that this constituted enforced leave since Mr. Bennett did not initiate his absence by requesting sick leave, and the agency did not allow him to remain in the workplace despite his inability to work in his assigned position.

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[12] 29 U.S.C. §§ 791–794 (2000). Federal employees are covered by the Rehabilitation Act and not the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, *amended by*, 42 U.S.C. §§ 12,101–12,213. However, in a 1992 amendment to the Rehabilitation Act, the employment-related portions of the ADA were incorporated by reference into the Rehabilitation Act. *See* 29 U.S.C. § 791(g); Fraser v. Dep't of Agric., 95 M.S.P.R. 72, 76 n.* (2003).

[13] Conaway v. U.S. Postal Serv., 93 M.S.P.R. 6, ¶¶ 7–8 (2002).

[14] *See* Moon v. Dep't of the Army, 63 M.S.P.R. 412, 419–20 (1994).

[15] *Id*. at 419. The agency also informed the appellant of her opportunity to apply for Office of Workers' Compensation Programs (OWCP) benefits. *Id.*

[16] *Id.*

[17] *Id*. at 419–20.

[18] *See* Barnes v. U.S. Postal Serv., 103 M.S.P.R. 103, ¶ 8 (2006).

[19] *See* 5 C.F.R. § 630.401 (2008).

[20] After the MSPB makes a finding that the employee was placed on enforced leave, the agency can potentially avoid unanticipated outcomes by arguing that the employee is not entitled to any back pay as he was not "ready, willing, and able to work."

[21] 105 M.S.P.R. 634 (2007).

Bennett is a highly troublesome case from a public policy perspective. If the agency cannot make an employee take sick leave when he cannot work safely, what exactly should the agency do? Agency's "options" include:

> (1) The agency can allow its employee to perform his air traffic controller duties even though he cannot perform them safely.

The agency cannot jeopardize aviation safety so this is a nonstarter.

> (2) The agency can pay the employee for doing nothing, or create "make work" for him.

This solution puts the employee who cannot perform his duties, but refuses to request leave, in a better position than a good, loyal employee who, acknowledging that he cannot work, applies for sick leave.

> (3) The agency can put the employee on paid administrative leave.

This solution is little better than option (2). On the one hand, the employee is out of sight and this may help the morale of his coworkers since they will be unaware that he is being paid for doing nothing. On the other hand, option (2) forces the employee to get up in the morning and come into work like everybody else.

> (4) The agency can give the employee thirty days advanced written notice of its intent to place him on enforced leave.

Presumably, this is the textbook solution under the MSPB's enforced leave case law. However, this solution means that the agency is required to keep an incapacitated employee in a duty status and pay his salary for at least thirty days. In reality, the period will be more than thirty days because of the time necessary for the personnel office to draft and staff the proposal letter.

This is an insidious option because this extra "thirty days" constitutes more paid time than a federal employee accrues in sick leave in an entire year. Federal employees earn four hours of sick leave per pay period or 104 hours per year. This means that the incapacitated employee, who does not request sick leave, can increase the time for which he is paid while incapacitated by 150% since the extra thirty days amounts to at least an extra 160 hours of pay.

> (5) The agency can put the employee on enforced leave in fourteen day increments and, thus, avoid imposing an action appealable to the MSPB.

This is the approach that the U.S. Postal Service seems to follow. Knowing that the MSPB lacks jurisdiction over suspensions of fourteen days or less, constructive or otherwise, the Postal Service and some other agencies ensure that periods of enforced leave do not exceed fourteen days, and are, therefore, not appealable to the MSPB.[22] This approach may serve as a useful plaster for a wounded system by reducing the agency's payroll expense. Yet, an agency should not be required to take an unwarranted personnel action to accomplish this end, regardless of whether the action is within the MSPB's appellate jurisdiction.

> (6) The agency can put the employee on enforced leave without advanced notice and argue later that it is not liable for back pay.

The fact that an employee was placed on "enforced leave" does not mean that the employee is automatically entitled to back pay. Office of Personnel Management regulations and the MSPB's case law provide that an individual is not entitled to back pay for any period of time during which he was not "ready, willing, and able" to perform his duties because of an incapacitating illness or injury, or for reasons unrelated to or not caused by the unjustified or unwarranted personnel action.[23] Assuming, therefore, that the employee was placed on enforced leave because he was incapacitated for duty, there would be no back pay liability because the employee is not ready, willing, and able to work.

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[22] *See* 5 U.S.C. §§ 7512(2), 7513(d), 7701(a) (2000).

[23] 5 C.F.R. 550.805(c)(1); King v. Dep't of the Navy, 100 M.S.P.R. 116, ¶ 12 (2005); Lyle v. Dep't of the Treasury, 85 M.S.P.R. 324, ¶ 6 (2000).

The MSPB has long held that jurisdiction over an appeal from an alleged constructive suspension does not depend on whether the employee was ready, willing, and able to work.[24] The fact that an appellant was ready, willing, and able to work is a back pay/compliance issue, not a jurisdictional requirement.[25] Therefore, the agency may put the employee who is unable to work on enforced leave without notice, and argue later during the backpay/compliance phase of the MSPB litigation that no back pay is owed.

The downside of this option is that, by putting the employee on enforced leave without advanced notice, the agency is, in effect, intentionally violating the employee's due process rights and taking an action "not in accordance with law."[26]

None of the agency's options are desirable. To managers, unstudied in the intricacies of the law, if an employee is not ready, willing, or able to work it makes far more sense to send him home on leave. Yet, Option (6), which is arguably the agency's best course of action, requires management officials to consciously violate the law and commit an unwarranted personnel action.

The root of the problem is that the MSPB considers an agency decision to place an employee who is incapacitated for duty into a leave status as a constructive suspension. Title 5 defines "suspension" as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."[27] The MSPB appears to have expanded its definition of "disciplinary reason" to include being sick.

The Federal Circuit has interpreted the term "disciplinary" broadly. In *Thomas v. General Services Administration*,[28] the Court considered the legislative history of the Civil Service Reform Act and concluded that Congress wished to continue the practice of the former Civil Service Commission, which specifically defined "suspension" as including the placing of an employee in a temporary non-duty and non-pay status "for disciplinary reasons or for other reasons pending inquiry."[29]

Putting an incapacitated employee into a leave status is not "for disciplinary reasons." It is not misconduct to get sick and agencies do not routinely treat such periods of enforced leave as disciplinary suspensions. Indeed, in 1984 in *Pierce v. Department of Air Force*,[30] the MSPB found that placement of an incapacitated employee on enforced leave was not an appealable action because it was not a disciplinary suspension. *Pierce* has neither been overruled by the MSPB, nor has it been followed.

In contrast, not allowing an employee who states he is ready, willing, and able to work to do so pending inquiry into the employee's physical or mental status—the situation posed by *Thomas*—is materially different. That type of action was treated as an adverse personnel action before the Civil Service Reform Act,[31] and it should continue to be treated as such.

The MSPB should reconsider the enforced leave doctrine and its unsalutary impact on federal managers in the context of dealing with incapacitated employees. For enforced leave situations which are disciplinary in nature, the law should remain as it is. Alternatively, Congress should consider amending the definition of "suspension" to specifically exclude an agency action placing an employee who is incapacitated for duty into an approved leave status.

Neither following *Pierce* nor legislatively changing the definition of suspension would harm employees. Putting an employee who is capable of working on enforced leave is disciplinary in nature. Therefore, where the employee does not agree that he is incapacitated for duty when sent home by the agency and, where the period of enforced leave exceeds

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[24] *See, e.g.*, Gallegos v. Dep't of the Air Force, 70 M.S.P.R. 483, 485 (1996).

[25] Vargo v. U.S. Postal Serv., 49 M.S.P.R. 284, 286–87 (1991).

[26] 5 U.S.C. § 7701(c)(2)(C) (an agency action may not be sustained if the appellant shows that it was not in accordance with law); Stephen v. Dep't of the Air Force, 47 M.S.P.R. 672, 683–84 (1991) (an appealable action should be reversed as being "not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C) if the agency's action is unlawful in its entirety, i.e., if there is no legal authority for the action).

[27] 5 U.S.C. §§ 7501(2), 7511(a)(2).

[28] 756 F.2d 86, 89 (Fed. Cir. 1985).

[29] *Id.* In *Thomas* and cases following it, the agency proposed and took suspension actions which the court found to be appealable to the MSPB. *See, e.g.*, Pittman v. Merit Sys. Protection Bd., 832 F.2d 598, 599 (Fed. Cir. 1987); Mercer v. Dep't of Health & Human Servs., 772 F.2d 856, 857 (Fed. Cir. 1985). More recently, the court in an unpublished decision found a "constructive suspension" where an agency barred an employee from returning to work based upon his apparent mental limitations. *See, e.g.*, Trobovic v. Gen. Servs. Admin., 232 Fed. Appx. 958 (Fed. Cir. 2007).

[30] 19 M.S.P.R. 548, 552 (1984).

[31] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 1978 U.S.C.C.A.N. (92 Stat.) 1111 (codified in scattered section sof 5 U.S.C.).

fourteen days, the MSPB can and should continue to review such cases. But in those cases, the question of whether the employee is ready, willing, and able to work should be jurisdictional in nature.

In other words, the appellant should be able to get a hearing if he makes a nonfrivolous allegation that he was placed upon enforced leave for a period in excess of fourteen days while he was ready, willing, and able to work. If the MSPB subsequently finds that the employee was, in fact, ready, willing, and able to work, the MSPB should find jurisdiction and reverse the action as a constructive suspension. But if the MSPB finds that the employee was not ready, willing, or able to work, the MSPB would dismiss the appeal for lack of jurisdiction on the ground that there was no disciplinary suspension.

Until such time as the MSPB modifies its enforced leave doctrine or Congress amends Title 5, agency counsel defending enforced leave actions should first determine who initiated the absence. If the employee did, the agency should defend the case, presenting evidence sufficient to show that the employee voluntarily requested leave. But, if agency counsel determine that the agency initiated the absence, either by sending the employee home or telling him that he had to request leave, the agency's best recourse is to confess error on the merits of the case, but deny back pay on the theory that the appellant was not entitled to back pay because he was not ready, willing, or able to work.

Type 2: Employee Is Not at Work and Is Prevented from Returning

This situation must be further broken in to two subparts for clarity. While an employee has the right to return to full duty upon his request, and it is enforced leave if an agency denies that request, a different analysis is required depending on whether the employee wishes to return to his employee in the same job, or whether he wishes to return with altered duties.

A Type 2a situation arises when an employee who is no longer incapacitated from duty desires to return to his regular employ. For example, in *Tyler v. U.S. Postal Service*,[32] the MSPB found enforced leave when an employee who was voluntarily out on sick leave was not permitted to return to work. Tyler had repeatedly requested to return to work but was not permitted to do so until a fitness-for-duty medical examination was completed, the medical evidence reviewed, and a decision made regarding his status. Furthermore, once the fitness-for-duty examination was completed, and Tyler was determined fit to return to his old duties, the agency still continued to refuse his request to return to work.[33]

The issue here is similar to the public policy problem encountered in the first type of enforced leave situation. The administrative judge in *Tyler* found that the appellant was unable to work and yet the MSPB found that he was on enforced leave. The MSPB dismissed the administrative judge's concern that the employee could not work with the now familiar refrain that whether the appellant was "ready, willing, and able to work" is a back pay, compliance issue and not a jurisdictional one.[34]

Many agencies require employees who have been on extended sick leave to obtain medical clearance before they return to work in order to ensure that their return to the workplace will not pose a danger to either themselves or others. These rules are intended to protect employee safety, but also to help avoid Office of Workers' Compensation Programs (OWCP) claims when an employee "reinjures" himself upon returning to duty.

As with the problems addressed under the first type of enforced leave, the agency is put to a Hobson's choice.[35] The agency can either allow an employee to return to work although he may not be able to do so safely, or potentially commit an unwarranted personnel action by placing the employee on enforced leave. Again, through want of any real alternative, the agency will probably choose not to allow the employee to return to work, paying back pay for its decision if it is later determined that the employee had recovered sufficiently to resume his regular duties, and successfully avoiding back pay if it is later determined that the employee was not ready, willing, and able to work.

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[32] 62 M.S.P.R. 509 (1994).

[33] *Id.* at 512 (citing Rivas v. U.S. Postal Serv., 61 M.S.P.R. 121, 127 (1994) (the appellant's absence was involuntary because the agency told him to leave and not return, and advised him that if he failed to update his medical information he would not be permitted to work in either a light duty or regular capacity)); *see also* Lewis v. U.S. Postal Serv., 82 M.S.P.R. 254, 257 (1999) (the medical unit's action in preventing the appellant from returning to duty without clearance warranted a finding that the agency initiated the appellant's absence); Lohf v. U.S. Postal Serv., 71 M.S.P.R. 81, 84–85 (1996) (the agency initiated the appellant's absence by placing him on enforced leave and preventing him from returning to duty until he completed a 90-day inpatient treatment program for post-traumatic stress disorder).

[34] *Tyler*, 62 M.S.P.R. at 512.

[35] "Hobson's choice" means no choice at all. Merriam-Webster's Collegiate Dictionary (11th ed. 2003).

A Type 2b situation arises when the employee who has been absent from work for medical reasons asks to return to work with altered duties. In this situation, where the employee cannot perform his regular duties but indicates that he can perform limited or light duty,[36] the agency is only required to provide the employee work with altered duties to the extent the agency is required to do so by agency policy, regulation, or contractual provision.[37] If the agency is so obligated and fails to do so, the employee is deemed to be on enforced leave. If the agency is not so obligated, the employee's continued absence is deemed voluntarily.[38]

The Postal Service's collective bargaining agreements, for example, typically require the agency to make an effort to assign available light-duty, but do not guarantee a light-duty position for an ill or injured employee.[39] Therefore, where a collective bargaining agreement creates an agency obligation to assist employees in finding light-duty, determining whether an employee who requests light-duty was on enforced leave will typically rely on the evaluation of evidence concerning the availability of light duty work, the employee's medical restrictions, and whether the available light duty is within those restrictions.

Conclusion

The MSPB should reconsider the enforced leave doctrine in light of its underlying rationale: to prevent agencies from circumventing Title 5's procedures by constructively suspending employees. Employees who are incapacitated from duty and required to take leave because they cannot work are not being disciplined. They are not permitted to work and are not paid because they are not ready, willing, and able to work.

The MSPB's current enforced leave doctrine presents agencies with the Hobson's choice of paying an employee who is incapacitated from duty without charge to her leave account, or taking an unwarranted personnel action. The doctrine creates needless litigation when the real issue—and the outcome determinative issue on back pay—is whether the appellant can work.

If the MSPB does not reevaluate current law, Congress should amend Title 5 to exclude from the definition of "suspension" situations where a medically incapacitated employee is required to take leave. This proposed law reform does not deprive the employee who is required to take leave but is ready, willing, and able to work from receiving an appropriate remedy for an unwarranted constructive suspension.

In the meantime, unless and until there is some change in the law, counsel should evaluate an enforced leave situation through the analytical framework set forth in this article. A chart setting forth this framework follows.

[36] Some agencies draw a distinction between altered duties for employees who have had on the job injuries versus those who have not. For example, in the U.S. Postal Service, "limited duty" refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas "light duty" refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries. Simonton v. U.S. Postal Serv., 85 M.S.P.R. 189, ¶ 8 (2000).

[37] McFadden v. Dep't of Def., 85 M.S.P.R. 18, ¶ 10 (1999).

[38] *Id.* ¶ 11.

[39] *See* Okleson v. U.S. Postal Serv., 90 M.S.P.R. 415, ¶ 16 (2001).

Appendix

ANALYZING ENFORCED LEAVE CASES

Which type of enforced leave claim is being raised?	Type 1—where the employee is at work and leaves Type 2—where the employee who is out on leave requests to come back to work and is not permitted to.
If Type 1, who initiated the absence?	If the agency initiated the absence, the employee was placed on enforced leave. If the appellant initiated the absence, the employee was not placed on enforced leave.
If Type 2, has the employee requested to return to full duty (Type 2a), or altered duties (Type 2b)?	If the employee has requested to return to full duty (Type 2a), and the agency did not allow him to do so, the employee was placed on enforced leave. If the employee requested to return with altered duties (Type 2b), more analysis is necessary.
If Type 2b, is the agency bound by agency policy, regulation, or contractual provision to provide light-duty to employees who seek to return?	If the agency is bound by agency policy, regulation, or contractual provision to provide light-duty to employees who desire to return to work but cannot perform their regular duties, and the agency fails to do so, the employee was placed on enforced leave. If the agency is not so bound, the employee was not placed on enforced leave.
If the employee was placed on enforced leave, was the employee ready, willing, and able to work?	If the employee was ready, willing, and able to work, the agency will be obligated to pay back pay. If not, the agency will not be liable for back pay. In that event, the agency should consider stipulating to the MSPB that the employee was placed on enforced leave, to expedite the litigation, and allow the MSPB to proceed more quickly to the back pay/compliance issue.

BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ[1]

REVIEWED BY MAJOR TIMOTHY AUSTIN FURIN[2]

Our policy is directed not against any country or doctrine but against hunger, poverty, desperation, and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist. Such assistance, I am convinced, must not be on a piecemeal basis as various crises develop. Any assistance that this government may render in the future should provide a cure rather than a mere palliative.[3]

A. Introduction

Blood Money: Wasted Billions, Lost Lives, and Corporate Greed in Iraq is a gripping account of the U.S Government's reconstruction effort in Iraq.[4] T. Christian Miller, an award-winning investigative reporter for the *Los Angeles Times*, does an outstanding job of supporting his thesis that the U.S. Government is failing in the crucial task of rebuilding Iraq.[5] His book takes an in-depth look at the policies and politics that he believes are causing this failure.[6]

Blood Money is an exceptionally well-researched effort based on hundreds of interviews conducted over a two year period.[7] The author's extensive research also includes information from numerous documents and official records, as well as travels to Iraq on four separate occasions.[8]

Blood Money is a reasonably balanced book that not only tells the negative side of the reconstruction story, but also highlights some of the successes that have been accomplished in Iraq.[9] It is these accomplishments that ultimately leave the reader feeling that victory can still be achieved with proper planning and an appropriately focused, unified effort.

Miller's stated purpose for writing this book is twofold: (1) to find out why the U.S. Government's reconstruction effort in Iraq is failing, and (2) to serve as a warning that if the reconstruction effort doesn't succeed "we will all pay the price—in lives lost, in money wasted, in opportunity squandered."[10] Miller stays within the scope of these purposes, yet along the way he manages to weave in personal stories of some of the heroes, villains, and victims of this botched effort.[11]

This book review analyzes Miller's work as he attempts to learn why "the most economically and militarily powerful nation on earth" is failing in this critical reconstruction effort.[12] It will focus on the three common themes that are woven throughout the story and that seem to answer that question. These three themes are: (1) a lack of unity of effort between U.S. Government agencies, (2) a series of critical miscalculations concerning the status of Iraq's infrastructure and the needs of the Iraqi people, and (3) a contracting process wrought with fraud, waste, and abuse. This book review will then discuss

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[1] T. CHRISTIAN MILLER, BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ (2006).

[2] U.S. Army. Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. and Sch., U.S. Army, Charlottesville, Va.

[3] George C. Marshall, Jr., U.S. Sec'y of State, The European Recovery Plan, Address at Harvard University (June 5, 1947) (more commonly known as The Marshall Plan).

[4] MILLER, *supra* note 1.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 297–99.

[8] *Id.* at 297–317.

[9] MILLER, *supra* note 1.

[10] *Id.* at 7.

[11] MILLER, *supra* note 1.

[12] *Id.* at 6.

how *Blood Money* serves to warn the American public why we must succeed in reconstructing Iraq. Finally, this book review will attempt to emphasize the lessons learned that are most applicable to today's Judge Advocate (JA) practitioner.

B. Common Themes

1. Lack of a Unified Effort

"Military efforts are necessary and important to counterinsurgency (COIN) efforts, but they are only effective when integrated into a comprehensive strategy employing all instruments of national power."[13] This principle, taken from the Army's new Counterinsurgency Field Manual, highlights the importance of developing a thorough plan and focusing the necessary resources of all available agencies to achieve that plan.[14]

In *Blood Money*, Miller asserts that the government's failure to unify the military and civilian efforts led to ineffective pre-invasion planning that significantly impacted the conduct of the post-invasion reconstruction effort.[15] To support this point he offers several examples where U.S. Government agencies conducted their own decentralized planning that was erroneous and ineffective.[16] Miller later provides other examples that illustrate how these pre-invasion planning errors greatly contributed to the reactive nature of the post-invasion reconstruction effort.[17]

The political battle that occurred between the State Department and the Pentagon over appointments to the Office of Reconstruction and Humanitarian Assistance (ORHA) provides the books most vivid example of how the government failed to unify its reconstruction efforts.[18] In January of 2003, the President created the ORHA "to synthesize the plans created by disparate agencies, then deploy to the field in Iraq as an 'expeditionary unit.'"[19] The head of OHRA, a retired Army general named Jay Garner, invited several State Department officials to join the ORHA team.[20] Secretary of Defense, Donald Rumsfeld, told Garner to strike their names.[21] Secretary of State, Colin Powell, saw this as an attack upon his agency and complained to Secretary Rumsfeld.[22] Eventually, Secretary Rumsfeld approved some of the appointments but the episode highlights the power struggle that existed "between the State Department and the Pentagon about control over postwar Iraq."[23]

Miller's point is independently reinforced through the findings and recommendations of the Iraq Study Group, a bi-partisan assembly who examined the U.S.-led reconstruction effort.[24] The Iraq Study Group found that, "The coordination of assistance programs by the Defense Department, State Department, United States Agency for International Development, and other agencies has been ineffective. There are no clear lines establishing who is in charge of reconstruction."[25]

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[13] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006).

[14] *Id.* at 2-1.

[15] MILLER, *supra* note 1.

[16] *Id.* at 26.

[17] *Id.* at 34.

[18] *Id.* at 30–32.

[19] *Id.* at 31.

[20] *Id.* at 32.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] JAMES A BAKER, III ET AL., THE IRAQ STUDY GROUP REPORT 25 (2006).

[25] *Id.* at 23.

Contrary to Miller's thesis, *Blood Money* does present several examples of reconstruction projects that achieved unity of effort at lower-level echelons and were considered largely successful.[26] One of the most successful projects was a joint effort between the U.S. Army's 1st Cavalry Division and the U.S. Agency for International Development rebuilding the critical infrastructure of Sadr City.[27] This reconstruction project could serve as a model of how a unified and integrated effort on the national level may have produced similar results across Iraq.

2. A Series of Miscalculations

The second theme that appears throughout *Blood Money* could arguably be a direct result of the first.[28] However, Miller treated it separately.

Miller contends that the U.S. Government seriously miscalculated the status of Iraq's infrastructure and the needs of the Iraqi people.[29] He asserts that these mistakes caused the U.S. Government to be unprepared for what they encountered in post-invasion Iraq.[30] Additionally, he claims that in many cases these miscalculations led the U.S. Government to award contracts and to start reconstruction projects that did not serve the Iraqi people.[31]

Blood Money contains numerous examples where the U.S. Government miscalculated the status of Iraq's infrastructure.[32] These mistakes seriously impacted the effectiveness of the reconstruction effort. Miller effectively uses Iraq's oil industry to demonstrate this point when he writes of how the U.S. Government was planning to use the revenue from this industry to refinance the reconstruction effort.[33]

> From the start the Pentagon's most senior officials counted on oil to fund the rebuilding program. They believed that Iraq's oil industry could generate up to $100 billion over a three-year period, an average of $30 billion per year. Oil revenues were supposed to pay down Iraq's foreign debt, provide raises for government bureaucrats, and fund the reconstruction.[34]

The United States failed to realize that "Iraq's oil industry was in an advanced state of decay" caused by years of economic sanctions, political corruption, and uncontrolled post-invasion looting.[35] Two years after the invasion, the number produced by Iraq's oil industry was still well below the number produced before the invasion.[36] Iraq's oil industry has still not significantly contributed to the reconstruction effort.[37]

Miller also does an excellent job of demonstrating how the U.S. Government's miscalculations led to reconstruction projects that did not meet the true needs of the Iraqi people.[38] He uses the construction of a state-of-the-art pediatric care

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[26] MILLER, *supra* note 1.

[27] *Id.* at 216–22 (rebuilding included sewage, water, electricity and trash collection).

[28] MILLER, *supra* note 1.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 93.

[34] *Id.*

[35] *Id.* at 96.

[36] *Id.* at 93.

[37] *Id.*

[38] MILLER, *supra* note 1.

center in Basra to express this point.[39] Miller takes the position that the millions of dollars spent building this children's hospital would have been more valuable to the Iraqi people if it had been spent on immediate health care needs such as immunizations, clean water, and community health clinics.[40]

3. A Contracting Process Wrought With Fraud, Waste, and Abuse

The third theme that appears throughout *Blood Money* addresses Miller's belief that the contracting process used for the reconstruction effort was wrought with fraud, waste, and abuse.[41] The author does assume that the reader has some knowledge of contracting procedures; however, these assumptions are minimal and do not affect the point the author makes.

"When selecting contracting approaches and techniques for an award, the government's objective is to negotiate a contract type and price that will result in reasonable risk and provide the contractor with the greatest incentive for efficient and economical performance."[42] In *Blood Money*, Miller asserts that the U.S. Government failed to adhere to this principle by bending or breaking standard contracting procedures and by awarding contracts based on political partisanship.[43] Miller contends that these practices led to numerous instances of contract fraud and abuse, to include awarding some contracts to wholly unqualified contractors.[44]

Miller provides several examples where the U.S. Government failed to comply with competition requirements by awarding sole source contracts.[45] In some instances, companies with very close political ties to the current administration were the recipients of these contracts.[46] Although there are exceptions to the full and open competition requirements mandated by federal law, it is hard to determine whether those exceptions applied in these instances.[47] The fact that individuals with close ties to the government were awarded sole source contracts in itself makes the awards suspect.

Another issue that Miller points out concerning abuse in the contracting process is the extensive use of cost-plus contracts.[48] Cost-plus contracts are intended for use in limited situations because the government bears the majority of performance risk. Miller contends that the extensive use of these contracts contributed to sub-standard performance on many reconstruction projects because the contractors did not bear any performance risk and there was little or no government oversight.[49] Again, Miller's point is independently reinforced through the findings and recommendations of the Iraq Study Group, which found that reconstruction contracting is starting to improve as the government exercises more oversight and awards fewer cost-plus contracts.[50]

One of the more interesting contract issues addressed by Miller concerns alleged reprisals against officials who protested abuses in the contracting system.[51] One of those officials was Bunnatine Greenhouse, the most senior contracting official in the U.S. Army Corps of Engineers.[52]

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[39] *Id.* at 46–48.

[40] *Id.* at 51.

[41] MILLER, *supra* note 1.

[42] U.S. GOV'T ACCOUNTABILITY OFF., GAO 06-838R, CONTRACT MANAGEMENT: DOD VULNERABILITIES TO CONTRACTING FRAUD, WASTE, AND ABUSE 11 (July 7, 2006).

[43] MILLER, *supra* note 1.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 72–74.

[47] The Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2304–2305 (1947), *amended by* The Competition in Contracting Act of 1984, Pub. L. No. 93-369, tit. VII, § 2701, 98 Stat. 1175.

[48] MILLER, *supra* note 1.

[49] *Id.*

[50] BAKER, *supra* note 24, at 26.

[51] MILLER, *supra* note 1, at 90.

Greenhouse objected to Halliburton receiving a sole source contract for a period of five years.[53] Miller writes that she objected to this contract because awarding "this sole source effort beyond a one year period could convey an invalid perception that there is not strong intent for a limited competition."[54] A few months later, Greenhouse objected to Halliburton being awarded another sole source contract.[55] Shortly afterward Greenhouse was demoted.[56] "In short order her salary was cut, her staff was removed, and she was put into a junior position."[57] While her demotion could be attributed to any number of unknown factors, the author does a compelling job of making the reader feel as though Greenhouse were demoted because she protested perceived abuses in the contracting system.

Miller's point, that the contracting process was wrought with fraud, waste, and abuse, is further supported by the Special Inspector General for Iraq Reconstruction (SIGIR).[58] The SIGIR recently reported that there are "57 ongoing investigations into fraud, waste, and abuse in Iraq reconstruction, 28 of which are at the Department of Justice for prosecution. As of July 30, 2007, SIGIR investigations have resulted in 5 convictions, 13 arrests, and 8 pending trials."[59]

C. A Warning to the Public

Miller's second stated purpose for writing this book, to serve as a warning to the American public that we must succeed in reconstructing Iraq, requires little analysis.[60] The last portion of the book addresses how the reconstruction effort is changing.[61] Miller contends that successfully reconstructing Iraq is critical to our national security.[62] He argues that if we continue on our current path we will surely fail, yet he believes that we have contributed too much in terms of lives lost and money wasted to walk away from this crucial effort.[63] Throughout the book he does an excellent job of demonstrating how the current strategy is failing.[64] By personalizing the heroes and victims of the reconstruction effort, Miller makes the reader believe that we have, in fact, invested too much to simply walk away.[65]

D. Lessons for JAs

Blood Money is relevant to today's JA practitioner because it offers many lessons that can be applied in the Global War on Terror. Today's JA often finds himself thrust into roles that have not been traditionally assigned to JAs. This is especially true in rule of law missions where JAs are deeply involved with planning and executing reconstruction efforts. The three big takeaways for the JA "pent-athlete" coincide with the three themes that Miller uses to support his thesis: (1) ensure unity of effort in all reconstruction projects, (2) ensure that all reconstruction planning is detailed and meets the needs of the people being served, and (3) follow established contracting procedures and provide oversight for all reconstruction projects.

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[52] *Id.* at 84–90.

[53] *Id.* at 86.

[54] *Id.* (quoting from the objections that Bunnatine Greenhouse wrote on the KBR contract).

[55] *Id.* at 90.

[56] *Id.*

[57] *Id.*

[58] SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, QUARTERLY REPORT AND SEMIANNUAL REPORT TO THE U.S. CONG. (July 30, 2007).

[59] *Id.* at Summary, p. 2.

[60] MILLER, *supra* note 1, at 7.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] MILLER, *supra* note 1.

[65] *Id.*

E. Conclusion

In conclusion, *Blood Money* is a well-written and well-organized book that is a must read for any scholar who seeks an alternative viewpoint on the reconstruction effort in Iraq. Miller does an exceptional job of supporting his thesis by providing a balanced look into the policies and politics that are shaping the rebuilding effort. Although the focus tends to be on reconstruction failures, Miller leaves the reader with a feeling that victory can still be achieved through proper planning and with an appropriately focused, unified effort.

THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR[1]

REVIEWED BY MAJOR WILLIAM E. MULLEE[2]

"There is a whiff of armchair generalship, or Monday-morning quarterbacking, in the writings of Civil War historians (myself included) who have never been in combat."[3]

I. Introduction

In *This Mighty Scourge: Perspectives on the Civil War*,[4] James M. McPherson, presents a collection of essays, both old and new, covering a broad range of topics dealing with the Civil War.[5] McPherson's collection tackles topics as diverse as: the causes and strategy of the war; analysis of the myths surrounding Harriet Tubman, John Brown, and Jesse James; and the revisionist history campaign that McPherson coins the "Lost Cause Textbook Crusade."[6] *This Mighty Scourge* allows even the Civil War neophyte[7] to quickly come up to speed on the issues that have framed the debate surrounding the Civil War and its aftermath more than one hundred and fifty-six years ago. Remarkably, McPherson manages to accomplish this without sacrificing any of the scholarship for which he is admired.[8] Seeming to argue that the Civil War was one of the only truly just wars of modern times, *This Mighty Scourge* offers contemporary relevance for the military reader and policymaker alike. The book manages to showcase McPherson's analytical methodology in a way that will stimulate scholarship and understanding in a reader's mind.[9] Despite McPherson's assertion that he may be prone to armchair generalship or Monday-morning quarterbacking,[10] *This Mighty Scourge* is a work that is unpretentious and generally even-handed, though some may see it as being tinged with a Northerner's bias. It offers enlightened insight sure to promote further scholarship and greater understanding of the Civil War.

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[1] JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR (2007).

[2] U.S. Army. Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., Charlottesville, Va.

[3] MCPHERSON, *supra* note 1, at 117.

[4] McPherson, award-winning author and the George Henry Davis 1886 Professor of History Emeritus at Princeton University, won a 1989 Pulitzer Prize for his work *Battle Cry of Freedom: The Civil War Era*. The Pulitzer Prizes, http://www.pulitzer.org/index.html (follow "1989" hyperlink) (last visited Mar. 4, 2008). In 1998, McPherson won the Lincoln Prize, for his work, *For Cause and Comrade: Why Men Fought in the Civil War*. Lincoln Prize, http://www.gettysburg.edu/about/offices/provost/cwi/lincoln_prize/lincoln_prizepastwinner.dot (last visited Mar. 4, 2008). McPherson also won a 1965 Anisfield-Wolf Book Award, for his work, *The Struggle For Equality: Abolitionists and the Negro in the Civil War and Reconstruction*. The Anisfield-Wolf Book Awards, http://www.anisfield-wolf.org/Winners/PastWinners/default.aspx?FilterLetter=M (last visited Mar. 4, 2008). On 16 July 2007, McPherson was named the first Pritzker Military Library Literature Award winner for lifetime achievement in military writing, Pritzker Military Library Literature Award, http://www.tawanifoundation.org/LTA/index.html (last visited Mar. 4, 2008). In addition to these award-winning books, McPherson is the author of numerous books and articles on the Civil War. Meet James McPherson, http://www.neh.gov/whoweare/mcpherson/meet.html (last visited Mar. 4, 2008).

[5] MCPHERSON, *supra* note 1, at xi–xii. McPherson informs the reader that he originally published chapters 2, 3, 7, 9, 10, 12, and 15 in the *New York Review of Books*, but that he dramatically altered and revised their format for this book. McPherson also says that he originally published chapters 1, 4, 5, 8, 13, and 14 in various periodicals or books between 1998 and 2005. McPherson is publishing chapters 6, 11, and 16 for the first time in *This Mighty Scourge*. Ironically, *This Mighty Scourge* is largely a collection of McPherson's book reviews, making this book review a book review of other book reviews.

[6] *Id.* at vii.

[7] Sam Allis, *An Eye-Opening March Through the Civil War*, B. GLOBE, Mar. 5, 2007 (reviewing JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR (2007)), *available at* http://www.boston.com/news/globe/living/articles/2007/03/05/an_eye_opening_march_through_the_civil_war/. I took Allis' term, "Civil War neophyte," from his review. *Id.*

[8] *See* Christopher Phillips, *A Noted Historian's Thoughts on the Civil War*, CIV. WAR BK. REV., Spring 2007 (reviewing JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR (2007)), *available at* http://www.cwbr.com/cgi-bin/dbman/cwbr/cwbr.cgi?db=cwbr&uid=default&bool=and&keyword=&ISBN=&Title=&Auth_1=&Publisher=&Reviewer=Issue_date=Spring+2007&Record_type=---&sb1=12&so1=descend&view_records=View+Records&nh=14&mh=1. McPherson does a great job documenting the book with 502 endnotes. McPherson's use of endnotes caused him to become a little sloppy in his citations. In particular, McPherson often presented multiple quotes or thoughts in a single paragraph and ended the paragraph with a single endnote that included all the cites. This is confusing in his larger paragraphs, and a cleaner technique would have been to endnote each quote or thought separately. Also, only approximately 5% of the 502 endnotes were textual endnotes. More textual footnotes would have been helpful to flesh out some of McPherson's more generalized assertions which he left uncited.

[9] MCPHERSON, *supra* note 1, at ix.

[10] *Id.* at 117.

II. A Unique Format

In the preface, McPherson frames his thesis that the Civil War was one of the only truly just wars of modern times by using prescient quotes from British pacifist John Morley in 1917 and from President Lincoln in 1865.[11] McPherson then explains that he will prove his thesis with essays that address the questions of:

> Why *did* the war come? What were the war aims of each side? What strategies did they employ to achieve these aims? How do we evaluate the leadership of both sides? Did the war's outcome justify the immense sacrifice of lives? What impact did the experience of war have on the people who lived through it? How did later generations remember and commemorate that experience?[12]

To this end, McPherson organizes his sixteen essays into five sections, grouping them in a way that roughly answers each of these questions. His essays ultimately lead readers to conclude that the Civil War was, as McPherson asserts, most likely a just war.[13]

McPherson focuses heavily on strategy and leadership throughout the book. The book is effectively organized and McPherson breaks the monotony of the leadership and strategy essays with lighter fare such as essays concerning the mythical characters of the war, the effect of the war on those who lived through it, and the way that some Southerners came to remember and commemorate the experience.[14] This somewhat wandering format, and McPherson's compilation of sixteen disparate essays written over the course of several years, succeeds because the book provides readers with the prospect of a new and discrete topic in each chapter. This format makes it easy to read in short stints and suitable as a student text, or perhaps even useful in a unit's long term officer professional development program.

III. A Genius for Promoting Scholarship and Understanding

In his preface, McPherson states, "Old or new, my conclusions suggest additional questions that I hope readers will ponder, perhaps arriving at judgments different from mine."[15] With this assertion, he suggests that one of his goals for this work is to advance scholarship and understanding.[16] While McPherson does this throughout the book, nowhere in the book is this more apparent than in the chapter entitled "Brahmins at War."[17] This chapter is typical of the other chapters in *This Mighty Scourge*, in that it raises thought-provoking questions in the reader's mind. The chapter details the sacrifices made by many Harvard alumni who joined the war effort before the draft, and who had the means to purchase exemptions even after the draft began.[18] McPherson describes many of these men as descendants of the Revolutionary War generation, who when faced with the destruction of the nation for which their fore bearers had so greatly sacrificed, found themselves experiencing "hereditary, even proprietary feelings."[19] McPherson also describes in them the "noblesse-oblige conviction that the privileged classes had a greater obligation to defend the country precisely because of the privileged status they enjoyed."[20]

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[11] *Id.* at ix.

[12] *Id.*

[13] *Id.* at 221. McPherson brings this point home with his analysis of President Lincoln's dramatic expansion of presidential war powers during the Civil War. In this chapter, McPherson presents an "end justifies the means" approach to his resolution of whether the Civil War was a just war. He lays out the instances during the war in which President Lincoln clearly violated the plain language of the Constitution. *Id.* at 210–11. He addresses President Lincoln's dramatic curtailment of civil liberties through the suspension of the writ of habeas corpus, the declaration of martial law, the arrest of antiwar activists, and the use of military tribunals. *Id.* at 213–17. McPherson then concludes with a parable from President Lincoln that he uses to show that the reunification of the nation and abolition of slavery formed the basis of a just war. *Id.* at 221. This chapter, more than any other, offers the most contemporary relevance in light of current events. *Compare id.* at 209–21, *with* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES 393–95 (n.d.) (suggesting that a shift in power and authority to the government requires an enhanced system of checks and balances to safeguard civil liberties).

[14] *See* MCPHERSON, *supra* note 1, at 21–39, 87–106, 145–66.

[15] *Id.* at ix.

[16] *Id.*

[17] *Id.* at 145–53.

[18] *Id.* at 146–47. McPherson mentions that ninety of the five hundred seventy-eight Harvard men that fought in the Civil War were killed. *Id.*

[19] *Id.* at 147 (quoting CAROL BUNDY, THE NATURE OF SACRIFICE: A BIOGRAPHY OF CHARLES RUSSELL LOWELL, JR., 1835–1864, at 314 (2005)).

McPherson's genius for furthering scholarship and understanding reveals itself in this chapter because at a time when the nation is again at war, this book causes the reader to ask, whether these hereditary, even proprietary feelings, and noblesse-oblige convictions still exist among this nation's privileged classes, and if not, the consequences this holds for the nation. Nagged by this question, many readers may seek further insight, and in doing so, would learn that recent enlistment data from elitist, Ivy League Universities may suggest that these feelings and convictions no longer exist in the nation's privileged classes.[21] As for the consequences this holds, they remain unknown, but through this research process, the reader discovers McPherson's skill for promoting scholarship and understanding.

IV. A Compelling Analytical Methodology

This Mighty Scourge showcases McPherson's analytical methodology. Throughout his work, McPherson dismantles widely held conceptions on the causes of the war,[22] legends or myths surrounding Civil War figures,[23] and the legacy of General Sherman.[24] McPherson's consideration of these topics is interesting, and his analytical methodology is persuasive. In the majority of his chapters, McPherson sets up his analysis by presenting the counterargument to his argument, then masses his sources to respond with an argument supported by compelling research that reveals a depth the reader would expect from an author of McPherson's stature.[25] Much like his explanation for Union victory in chapter two, McPherson uses numbers and resources in concert with his "will and skill" to produce compelling conclusions.[26] McPherson's methodology is persuasive because it illustrates how he has really thought through his analysis and mustered compelling facts in support of his conclusions. Unlike the works that McPherson critiques in chapter eight on the Lost Cause Textbook Crusade, whose authors at times make broad and meaningless assertions unsupported by fact,[27] *This Mighty Scourge* proves McPherson's competency to speak with authority on these issues. Amazingly, Professor McPherson convincingly does so in only two hundred and twenty-one pages of very easy reading.

V. Contemporary Relevance

This Mighty Scourge offers contemporary relevance for the military reader and policymaker. It presents issues that are strikingly similar to those this nation faces in the Global War on Terrorism,[28] and presents their resolution through the lens of a far greater challenging period of the nation's history.[29] McPherson's analysis of superior and inferior strategic and operational leadership by Generals Grant, Lee, and Sherman,[30] and inspirational leadership by tactical leaders,[31] provides

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[20] *Id.*

[21] *See* KATHY ROTH-DOUQUET & FRANK SCHAEFFER, AWOL: THE UNEXCUSED ABSENCE OF AMERICA'S UPPER CLASSES FROM MILITARY SERVICE— AND HOW IT HURTS OUR COUNTRY 43–51 (2006).

[22] MCPHERSON, *supra* note 1, at 3–19. Here McPherson debunks the notion that state sovereignty was the precipitating cause of the war, showing instead that the expansion of slavery issue was the root cause of secession and that secession was the cause of the war. *Id.*

[23] *Id.* at 21–39, 87–92. Here McPherson proves through convincing evidence of individuals in circumstances similar to Harriet Tubman's, that the Harriet Tubman story is likely embellished; McPherson suggests through compelling evidence of John Brown's previous tactical prowess that John Brown likely planned for martyrdom; and McPherson provides strong evidence to debunk the myths surrounding Jesse James, suggesting that he was nothing more than a cold blooded killer. *Id.*

[24] *Id.* at 114–19, 123–29. Here McPherson proves that General Sherman was not "a ferocious ogre of vengeance and spoliation, [but rather,] he was actually sparing of the lives of his own soldiers, the enemy's soldiers, and of civilians." *Id.* at 116. Also that Sherman's destructive march from Atlanta to Savannah was not as destructive as widely believed. *Id.* at 129.

[25] *See supra* note 5.

[26] MCPHERSON, *supra* note 1, at 49. Here McPherson says that numbers and resources do not prevail in war without the will and skill to use them. *Id.*

[27] *See generally id.* at 93–106.

[28] *See supra* note 14.

[29] *Contra This Mighty Scourge: Perspectives on the Civil War* (CSPAN2 television broadcast July 28, 2007), *available at* http://www.booktv.org/program.aspx?ProgramId=7943&SectionName=History&PlayMedia=No. McPherson suggests that he is leery about drawing parallels between the Civil War and current events, saying that while Lincoln certainly trampled civil liberties then, it does not compare to what is going on at the detention facility at Guantanamo Bay, Cuba. *Contra Lincoln, Congress, and 'This Mighty Scourge'* (NPR radio broadcast Feb. 3, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=7146831. McPherson suggests that any analogy between current events and the Civil War is superficial at best. *Id.*

ample vignettes ripe for discussion as military officer professional development topics. McPherson's analysis of Sherman's leadership will also provide military readers with a timely example of effective counterinsurgency strategy[32] that could easily be something a military reader might find in U.S. Army Field Manual 3-24, *Counterinsurgency*.[33] McPherson's discussion of legal matters such as President Lincoln's suspension of the writ of habeas corpus, declaration of martial law, detention of antiwar activists, use of military tribunals, and general expansion of presidential war powers[34] provides Judge Advocates with similar opportunities for professional development, as well as potential teaching points for the commanders and Soldiers they support. Policymakers will likely draw insight from McPherson's discussion of the difficulties of extracting the nation from a war in which one of the nation's war aims is to effect a regime change in an enemy country, the necessity of staying the course in such situations, and the importance of honoring presidential promises.[35] Moreover, McPherson's work may help the policymaker to understand the genesis of some of the presidential war powers at issue today.[36]

VI. Conclusion

This Mighty Scourge is an enjoyable and worthwhile read that achieves McPherson's goal of furthering scholarship and understanding of the Civil War and its aftermath. Its didactic nature makes it a useful read for the military reader and policymaker, and it will surely stimulate instructive debate among this ilk. At only two hundred and twenty-one pages, and with a compelling analytical framework, this work is an easy starting point for anyone seeking to further his knowledge of this important phase of American history. Add to this the book's contemporary relevance and it becomes even more appealing for anyone with even a passing interest in the Civil War.

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[30] MCPHERSON, *supra* note 1, at 112. McPherson presents views on all the leaders. He notes that "Grant possessed that most uncommon quality, common sense." *Id.* He also states that "one of [Grant's] virtues as commander was the clarity of his orders and dispatches." *Id*. Of both Grant and Lee he says "Grant and Lee were the preeminent Civil War commanders because, more than any others, they were the ones willing to take the largest risks." *Id.* Of Sherman he says "Sherman's march from Atlanta to Savannah . . . has become the stuff of legend, but the campaign of his army northward from Savannah to North Carolina . . . was even more of a stunning achievement." *Id.* at 118. All of these basic skills, clear orders, calculated risk taking, and endurance, are valuable skills for any leader.

[31] *Id.* at 150–52. Here McPherson describes Captain John Kelliher, a former boot maker with a battlefield commission, as being so badly wounded at Spotsylvania in May 1864 that "the surgeon who removed his lower jaw, one arm, a shoulder blade, a clavicle, and two of his ribs had no hope for recovery," yet Kelliher returned to his unit in November 1864 at the rank of major to command his regiment. *Id.* at 150. McPherson describes Colonel Charles R. Lowell, who when shot in the chest "refusing to go to the rear, Lowell had himself lifted onto a borrowed horse, so weak that he had to be strapped in the saddle," and yet he rode to the head of his unit to lead a counterattack, only to be shot and killed during the counterattack. *Id.* at 152. McPherson describes in each instance how these leaders suffered wounds that would have sent them home with honorable discharges, yet they refused to leave their units. These powerful examples of physical courage are instructive for any leader.

[32] *Id.* at 125. In this chapter, McPherson discusses "'hard war' characterized by a military policy of 'directed severity.'" *Id.* at 124–25. McPherson quotes Sherman as saying, "No goths or vandals ever had less respect for the lives and property of friends and foes, and henceforth we ought to never hope for any friends in Virginia." *Id.* at 125 (quoting Letter from General Sherman to Ellen Ewing Sherman, July 28, 1861, *in* BROOKS D. SIMPSON, SHERMAN'S CIVIL WAR: SELECTED CORRESPONDENCE OF WILLIAM T. SHERMAN, 1860–1865, at 125 (Jean V. Berlin ed. 1999). McPherson also quotes Sherman as saying "This demoralizing and disgraceful practice of pillage must cease." *Id.* (quoting Letter from General Sherman to General Stephen A Hurlbut, July 10, 1862, O.R., ser. 1, vol. 17, pt. 2, 88–89). Finally, McPherson quotes Sherman saying "else the country will rise on us and justly shoot us down like dogs and wild beasts."). *Id.* (quoting MARK GRIMSLEY, THE HAND OF WAR: UNION MILITARY POLICY TOWARD SOUTHERN CIVILIANS, 1861–1865, at 100 (1995).

[33] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 7–21 (Dec. 2006) ("The principles of discrimination in the use of force and proportionality in actions are important to counterinsurgents for practical reasons as well as for their ethical or moral implications. Fires that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency's appeal—especially if the populace perceives a lack of discrimination in their use.").

[34] *Id.* at 209–21.

[35] *Id.* at 167–83. This insight may be instructive at a time when there is uncertainty surrounding this nation's commitments overseas. *See, e.g.*, Dana Bash & Ted Barrett, Democrats: Bush Troops Cuts Not New Iraq Plan, http://www.cnn.com/2007/POLITICS/09/12/iraq.congress/index.html (last visited Mar. 4, 2008).

[36] *Id.* at 209–21; *see supra* note 14.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
ENLISTED COURSES		
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27D-CLNCO	10th Chief Paralegal BCT NCO Course	21 – 25 Apr 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F24	32d Administrative Law for Military Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08
5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08

5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
BOLT	BOLT (030) BOLT (030)	4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (020)	22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (020)	14 – 18 Apr (Norfolk)
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)

4048	Estate Planning (010)	21 – 25 Jul 08
748A	Law of Naval Operations (020)	15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (020)	12 – 16 May 08 (Okinawa)

	USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (020)	1 – 2 May 08 (Naples)
03RF	Legalman Accession Course (030)	9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (020)	5 – 16 May 08
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (020)	12 – 23 May 08 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08
947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08
3759	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 08
Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 08
CONUS Trial Advocacy Course, Class 08-A	7 – 11 Apr 08
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 08

Reserve Forces Judge Advocate Course, Class 08-B	19 – 20 Apr 08
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 08
Legal Assistance Course 1 (Estate Planning), Class 08-A	21 – 25 Apr 08 (Montgomery, AL)
Environmental Law Course, Class 08-A	28 Apr – 2 May 08
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 08
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 08
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 08
Operations Law Course, Class 08-A	12 – 22 May 08
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 08
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 08
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 08
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Legal Assistance Course 2 (Estate Planning)	9 – 13 Jun 08 (Dayton, OH)
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08
Law Office Management Course, Class 08-A	16 – 27 Jun 08
Legal Assistance Course 3 (Family Law), Class 08-C	7 – 11 Jul 08 (Montgomery, AL)
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Legal Assistance 4 (Family Law), Class 08-D	21 – 25 Jul 08 (Dayton, OH)
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2007 issue of *The Army Lawyer*.

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG Universiry. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within a three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in an even-numbered year, period ends in even-numbered years, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Illinois*	Requirements vary; see www.mcleboard.org
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December

Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period ends 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state)
**Must declare exemption

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
18-20 Apr 2008	1st LSO/90th RRC Oklahoma City, OK	008	International & Operational Law, Contract & Fiscal Law	LTC Randy Fluke, 409-981-7950; randall.fluke@us.army.mil
26-27 Apr 2008	91st LSO/9th LSO 1st Division Museum at Cantigny Wheaton, IL	009	Administrative & Civil Law, Contract & Fiscal Law	1LT Ewa Dabrowski Ewa.dabrowski@us.army.mil 773.593.5978
25-27 Apr 2008	8th LSO/89th RRC Kansas City, MO	010	Administrative & Civil Law, Contract & Fiscal Law	LTC Tracy Diel & SFC Larry Barker tracy.t.diel@us.army.mil SFC Larry Barker Larry.R.Barker@us.army.mil 816-836-0005 ext 2155/2156
26-27 Apr 2008	Indiana ARNG Indianapolis, IN	011	Administrative & Civil Law, International & Operational Law	1LT Kevin Leslie, (317) 247-3491, kevin.leslie@us.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the September 2007, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by

accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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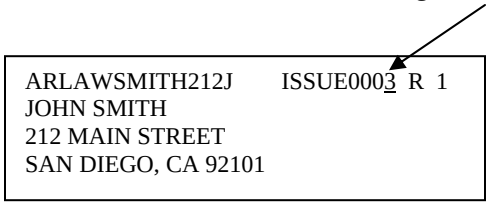

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Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

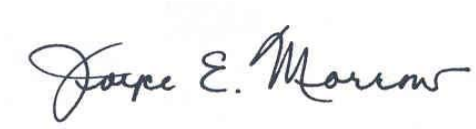
Authorizing signature

11/02

By Order of the Secretary of the Army:

GEORGE W. CASEY, JR
General, United States Army
Chief of Staff

Official:



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