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NOTES & COMMENTS

Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects

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I. INTRODUCTION

Federal agencies and, in particular, the military services have enthusiastically adopted the concept of accomplishing a Supplemental Environmental Project (SEP) in lieu of the payment of an environmental penalty.[1] The opportunities presented by the use of SEPs have made them a popular tool with non-governmental entities as well.[2] Unlike their counterparts in the private sector, federal facilities face unique legal issues and policy concerns that can affect their ability to agree to and implement a SEP. These concerns should be carefully evaluated to ensure military installations realize the greatest possible benefit from SEPs while ensuring that all actions taken are consistent with agency authority.

The need for this evaluation and the development of comprehensive guidance is made apparent by recent Congressional interest in the military's resolution of environmental enforcement actions. This interest was concretely demonstrated by the issuance of a report on the topic by the General Accounting Office (GAO).[3] By itself, Congressional attention to the payment of environmental penalties by military installations is certainly unremarkable. It dates back well before the passage of the Federal Facility Compliance Act of

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[1] *See, e.g.*, Department of Defense Instruction 4715.6, Environmental Compliance ¶ D.4 (Apr. 24, 1996) [hereinafter DODI 4715.6]; ENVIRONMENTAL LAW DIVISION, U.S. ARMY LEGAL SERVICES AGENCY, ENVIRONMENTAL CRIMINAL AND CIVIL LIABILITY HANDBOOK ¶ 7(g)(1) (1st ed. 1997) [hereinafter ARMY HANDBOOK].

[2] In 1993, ten percent of all of the Environmental Protection Agency's (EPA or EPA's) settlements of enforcement actions included SEPs. *Supplemental Environmental Projects Said Increasingly Used by EPA, States*, DAILY ENVIRON. REP. (Jun. 9, 1994).

[3] UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL FACILITIES: EPA'S PENALTIES FOR HAZARDOUS WASTE VIOLATIONS, GAO/RCED-97-42 (Feb. 1997) [hereinafter GAO Penalty Report]. The findings of this report, some of which are quite surprising, will be mentioned throughout this article.

1992[4] and continues to be focused.[5] What is surprising is the perspective from which the recent attention comes. Historically, most of the discussion regarding the payment of penalties by federal facilities has been aimed at ensuring that such facilities are subject to fines and penalties to the same extent as all other facilities. More recently, there are indications of an interest in ensuring that the amount of Department of Defense (DoD) dollars spent resolving environmental enforcement actions is not excessive.[6] There are two potential sources of this interest. The first is a desire to ensure that the services have improved in their compliance with environmental laws. A great deal of attention and effort has been devoted by DoD and the individual services to stress and improve compliance. Significantly less attention within DoD has been paid to the second potential source of heightened interest. It is important that an effective mechanism exists for ensuring that the resolution of a military installation's liability for an environmental penalty is accomplished in an appropriate manner that makes efficient use of federal resources.

Given the difficult and frequently contentious nature of any negotiation concerning an environmental penalty, the last sentence recites a very broad goal. The military services have taken effective steps to implement that goal, generally.[7] With regard to the accomplishment of SEPs, however, there is very little guidance to direct an installation on such issues as: when should a SEP be considered; what type of project can be considered; what resources are available to help accomplish that project; how much should such a project cost; and how much penalty reduction should be expected.[8]

II. OVERVIEW OF SEPS

A. Benefits of Agreeing to a SEP

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[4] Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (Oct. 6, 1992) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter FFCA]. The controversy surrounding the doctrine of sovereign immunity as it applies to the payment of environmental penalties came to a head as the result of the Supreme Court's decision in *Department of Energy v. Ohio*, 112 S. Ct. 1627 (1992). This article will make further reference to that case, which held that federal agencies were not subject to punitive fines under the Clean Water Act or the Solid Waste Disposal Act.

[5] The waiver of sovereign immunity in the Safe Drinking Water Act, 42 U.S.C.A. § 300j-6 (1997), was expanded to include the payment of penalties by the Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (Aug. 6, 1996). Proposals to expand the waivers in other statutes continue to be introduced.

[6] National Defense Authorization Act for Fiscal Year 1998 § 344, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

[7] ARMY HANDBOOK, *supra* note 1.

[8] ARMY HANDBOOK, *supra* note 1, has an excellent discussion of SEPs, but does not provide the detailed discussion of these issues that is envisioned by the author in order to answer the above questions.

"[T]urning lemons into lemonade" is how one regulator described the use of SEPs.[9] This is an accurate description in that an overriding purpose of SEPs from a regulatory perspective is to affirmatively create an environmental benefit as the result of an action that was detrimental to the environment.[10] More importantly, a settlement agreement involving a SEP will accomplish all of the traditional goals of punitive action,[11] but also will directly further the "goals of protecting and enhancing public health and the environment."[12] A benefit shared by the regulator and the regulated entity is the enhancement of the regulatory relationship that is generally achieved during the negotiation and accomplishment of a SEP. Thus, the accomplishment of a SEP represents a situation in which the regulator and the regulated entity work together to achieve a result which both sides find superior to the result that would be achieved through pure arms-length negotiation.

From the perspective of a violator, accomplishment of a SEP can serve multiple purposes as well. Generally, the primary purpose served is the resolution of an enforcement action. By resolving this action through the use of a SEP, the violator can accomplish an action that is otherwise desirable but, to date, has not been independently justified. Additional benefits flowing to the violator may include an enhanced public image[13] and the ability to productively use funds that would otherwise be lost. Another intangible benefit realized by a military service is the promotion of the federal policy favoring the accomplishment of SEPs. The Administration has repeatedly expressed its support for the expanded use of SEPs in the resolution of environmental violations,[14] and this support is shared by policy makers within agencies other than EPA.[15]

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[9] EPA Region I Administrator, John P. DeVillars *as quoted in Military To Pay $170,000 Fine For Hazardous Waste Violations At MMR*, DEFENSE ENVIRON. REP. (Aug. 27, 1997).

[10] Interim Revised EPA Supplemental Environmental Projects Policy ¶ A.1 (May 8, 1995) [hereinafter Revised Policy].

[11] 1 BARRY M. HARTMAN, EPA ENFORCEMENT MANUAL ¶ 102 (Nov., 1994) outlines the overall enforcement objective. It is to ensure compliance with all environmental laws. Within this objective are several goals: (1) ensure future compliance; (2) punish non-compliance; (3) deterrence of non-compliance; and (4) correction of the harm caused by non-compliance. *Id.*

[12] Revised Policy, *supra* note 10.

[13] *See, e.g.,* Revised Policy, *supra* note 10. EPA attempts to limit the somewhat mixed message that is sent when a violator is able to enhance its public image as an environmental steward as a result of noncompliance. Its revised policy provides, "[t]he defendant/respondent should agree that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action." *Id. ¶ G.*

[14] *See, e.g.,* United States Environmental Protection Agency, Office of Water, President Clinton's Clean Water Initiative, EPA 800-R-94-001, 100 (February 1994).

[15] *See, e.g.,* DODI 4715.6 ¶ D.4, *supra* note 1; Memorandum from James E. McCarthy, Major General, USAF, The Civil Engineer, to National Guard Bureau Civil Engineer, Payment of Supplemental Environmental Projects (February 21, 1995) (discussing the accomplishment of SEPs) (on file with the author).

It is the thesis of this article that a military installation's primary focus in the negotiation process should be on resolving its environmental liability efficiently. This will not always mean an installation will spend the least amount of money possible. Often the payment of a larger amount of money will be justified by the benefits received. In deciding whether to agree to accomplish a SEP, a military installation will have to weigh these benefits against the proposed cost of the SEP, which will, to some degree, be offset by a reduction in penalty. Because the benefits are so often intangible, this cost-benefit analysis can be difficult. The analysis will be simplified if the benefit that is considered almost exclusively by an installation deciding whether to accomplish a SEP is the ability to make productive use of funds that would otherwise be lost as a penalty. This is not intended just to ease the decision-making process, nor is it designed to minimize the importance of the public and regulatory relations benefits. While they are unquestionably of value, a concentration on these benefits in the decision making process could easily lead to a project that is, at best, inconsistent with the interests of the military service in question and, at worst, outside of the scope of that service's legal authority.

B. What is a SEP?

It is not possible to provide a single definition to encompass all projects a regulator might accept in lieu of payment of a penalty. The United States Environmental Protection Agency (EPA) has changed its policy twice and is scheduled to implement another revision in the spring of 1998.[16] These changes have altered what EPA and its regions will accept. In any event, state regulatory agencies are under no obligation to follow EPA's guidance and retain the freedom to develop and implement their own policies. Many states have formally implemented policies,[17] while other states have chosen to implement the concept without adoption of a formal policy.

In order to facilitate discussion, this article will rely primarily on EPA's current policy in explaining the concept and will note some significant departures by state policies. It is important to be aware of these differences, because as will be demonstrated, the current EPA policy is written in a manner that would alleviate several legal concerns that might be relevant to a military installation. The ability of state regulators to negotiate for SEPs without the

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[16] Steven Herman, Environmental Protection Agency, Assistant Administrator For Enforcement And Compliance Assurance, EPA's FY 1997 Enforcement and Compliance Assurance Priorities ¶ II (1996) [hereinafter 1997 Priorities Letter].

[17] *See, e.g.*, Maine Department of Environmental Protection, Supplemental Environmental Projects Policy (Aug. 1, 1996) [hereinafter Maine Policy]; New York State Department of Environmental Conservation, Environmental Benefit Project Policy (May 27, 1997) [hereinafter New York Policy].

same legal or policy constraints creates the potential for accomplishment of a SEP by a military installation that is outside of an installation's legal authority. While it may be unrealistic to assume that development of formal guidance will completely eliminate this problem, such guidance would, at the very least, enable the military departments to demonstrate that an appropriate degree of control is being exercised.

C. EPA's Policy

As stated above, the rise in the popularity of SEPs has been rapid. This popularity first led EPA to issue an extensive free-standing policy[18] to replace the three page discussion of "Alternative Payments" that had been only a minor portion of EPA's general enforcement policy.[19] Despite its popularity, the implementation of SEPs by EPA has not been without controversy. In the face of questions presented by an opinion of the Comptroller General, EPA was forced to revise its policy in 1995.[20] The interim revised policy issued in 1995 is scheduled to be supplanted by a new policy in the spring of 1998.[21]

EPA's current policy defines a SEP as an "environmentally beneficial project which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform."[22] This is a useful operating definition, because it is broad enough to encompass the typical state regulatory view.[23] Beyond the simple definition, however, the states and EPA can diverge on the types of activities that will qualify as a SEP and the requirements and details surrounding the accomplishment of such activities.

Although there is divergence, it is helpful, regardless of the regulatory body that has authority over an installation, for that installation to be familiar with the specifics of EPA's current policy. That policy has in some way been

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[18] Memorandum from Mr. James M. Strock, Assistant Administrator, Office of Enforcement, Environmental Protection Agency, to Regional Administrators, Deputy Regional Administrators, Regional Counsels, Regional Program Division Directors, Assistant Administrators, General Counsel, Program Compliance Directors, and Associate Enforcement Counsels, Policy on the Use of Supplemental Enforcement Projects in EPA Settlements (transmitting EPA Policy on SEPs) (February 12, 1991) [hereinafter Original Policy].

[19] A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, 24-27 (February 16, 1984).

[20] Memorandum from Robert Van Heuvelen, Director, Office of Regulatory Enforcement, United States Environmental Protection Agency to Joan Nelson, General Counsel, Deputy Regional Administrators, Regions I-X, Draft Revised SEP Policy for Regional Review, (Oct. 6, 1994) (on file with the author).

[21] 1997 Priorities Letter ¶ II, *supra* note 16.

[22] Revised Policy ¶ B, *supra* note 10.

[23] *See, e.g.,* Maine Policy and New York Policy, *supra* note 17.

relied upon by all of the states that have developed their own policies[24] and is used as the default guidance for many states that do not have their own policies.[25] Additionally, the process that EPA has followed in developing the policy is instructive for federal facilities that, although they are on the other side of the bargaining table, are faced with many of the same legal constraints identified by the Comptroller General. Thus, a military installation should not only be aware of the contents of EPA's policy, it should also understand the origins of the policy's requirements.

Issued in 1992, the Comptroller General's decision called into question EPA's authority to resolve environmental violations by requiring the violator to accomplish actions in addition to, or in lieu of, the payment of a penalty.[26] The decision generally challenged EPA's authority to settle violations through the use of SEPs. It also specifically identified legal problems with the manner in which EPA had implemented this questionable authority. These specific concerns were primarily based on fiscal law. The decision pointed out that, among other things, the original policy created the potential for circumvention of the "miscellaneous receipts" statute.[27] The statute requires, with limited exception, that any "official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[28] The Comptroller General opined that EPA's decision to allow a violator to spend amounts that would otherwise be collected as penalties violated this principle regardless of the purpose for which the money was spent.[29]

Often the flip side of the miscellaneous receipts issue is a prohibited augmentation of an appropriation. A federal agency is prohibited from using funds obtained from some other source to augment the appropriations provided that agency by Congress.[30] The miscellaneous receipts statute focuses only on whether the money in question is placed into the Treasury and is violated if the money is not so deposited. However, in order to evaluate whether an augmentation has resulted, it is necessary to consider the use of the funds that were inappropriately retained or diverted. The prohibition of augmentation is

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[24] *Id.*

[25] Telephone Interview with Mr. Frederick R. Dowsett, Jr., Compliance Coordinator, Hazardous Materials and Waste Management Division, Colorado Dept. of Public Health and the Environment (Sept. 10, 1997).

[26] Decision of Comptroller General of the United States, B-247155 (July 7, 1992) [hereinafter Comptroller General Decision].

[27] 31 U.S.C.A. § 3302(b) (1997).

[28] *Id.*

[29] Comptroller General Decision, *supra* note 26.

[30] OFFICE OF THE GENERAL COUNSEL, UNITED STATES GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 6-103 (2nd ed., Dec. 1992) [hereinafter THE RED BOOK].

rooted in the Congressional "power of the purse."[31] That is, the United States Constitution gives Congress the authority and responsibility to determine how federal money can be spent.[32] This power not only encompasses the permissible purposes for which appropriations can be used, but also the amount and timing of these uses. The rule against augmentation prevents executive agencies from assuming some of that power by developing additional or alternate sources of funding for agency programs.[33] In the eyes of the Comptroller General, EPA ran afoul of this principle when it allowed violators to reduce their penalties by performing activities which were intended to be accomplished using EPA's appropriations.[34] For example, SEPs designed to increase public awareness of the importance of environmental protection accomplished an action that properly should be funded from agency appropriations.[35]

The nature of EPA's response to the decision is a strong indication of the importance of the SEP program to the agency. The agency revised its policy[36] to address the issues raised and produced a lengthy and detailed legal opinion[37] to support its revised policy. The legal opinion recognized the legitimacy of the concerns, provided support for EPA's authority to agree to SEPs, and explained the manner in which EPA had addressed the legal issues in the development of the new policy. EPA demonstrated its authority to negotiate for accomplishment of a SEP by pointing to the broad discretion that it is accorded as part of its enforcement authority.[38] To demonstrate that the use of SEPs is within that discretion, EPA relied on statutory language, judicial precedent, and Congressional report language.[39] The result is a convincing argument that should put to rest challenges to EPA's authority to agree to SEPs.

To ensure that any SEP agreed to is a reasonable exercise of its discretion, EPA created controls designed to ensure that any SEP could be demonstrated to further the objectives of the statute being enforced.[40] From EPA's perspective, the requirement was to demonstrate that a policy favoring SEPs furthered the overall environmental protection mission and, at the same

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[31] *Id.*
[32] U.S. CONST. art. I, §§ 8, 9, cl. 7.
[33] THE RED BOOK at 6-103, *supra* note 30.
[34] Comptroller General Decision, *supra* note 26.
[35] *Id.*
[36] Revised Policy, *supra* note 10.
[37] Memorandum from Mr. James C. Nelson, Associate General Counsel, Pesticides and Toxic Substances Division to Mr. Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, Review of 1995 Revised Policy on Supplemental Environmental Projects (May 3, 1995) (on file with author) [hereinafter EPA Legal Opinion Supporting the Use of SEPs].
[38] *Id.* at 3-11.
[39] *Id.* at 11-12.
[40] *Id.* at 12-15.

time, showed that any SEP agreement to be implemented under the policy would not reduce the effectiveness of the subject enforcement action.[41] By establishing general limitations on the types of projects that can be approved, EPA satisfied this goal and has created a level of comfort that any specific project accomplished as a SEP is within its authority.

A significant environmental protection based limitation imposed by the policy is the "nexus" requirement.[42] All proposed projects must have an adequate relationship with the violation in question.[43] "This relationship exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future."[44] A similarly intended limitation is that a SEP must "advance at least one of the declared objectives of the environmental statute[] that [is] the basis of the enforcement action"[45] The policy's limitation on the amount of offset a violator can realize, and the prohibition of the acceptance of an action the violator was otherwise obligated to take, seeks to ensure that the effectiveness of enforcement is not diminished.[46]

In order to address the Comptroller General's specific fiscal law concerns, EPA first established a list of the permissible types of projects that can be considered.[47] Excluded from the list are the types of projects that were specifically questioned,[48] any project that EPA, itself, is required to perform, and any project that would provide additional resources in a manner that would augment EPA's appropriations.[49] These limitations alleviate augmentation concerns, while miscellaneous receipts concerns are addressed by providing that a project cannot result in the transfer of money to EPA or any other federal agency.[50] With an understanding of the issues reviewed by EPA in developing its policy, it is easier to address the concerns the military services will be required to address.

III. ISSUES FACING MILITARY INSTALLATIONS

As stated above, military installations are faced with many of the same types of legal concerns that EPA was forced to address. However, EPA

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[41] *Id.*
[42] Revised Policy ¶ C.1, *supra* note 10.
[43] *Id.*
[44] *Id.*
[45] *Id.* ¶ C.2.
[46] EPA Legal Opinion Supporting the Use of SEPs at 13-14, *supra* note 37.
[47] Revised Policy ¶ D, *supra* note 10.
[48] For example, public education programs. EPA Legal Opinion Supporting the Use of SEPs at 16-19, *supra* note 37.
[49] Revised Policy ¶ D.8.
[50] EPA Legal Opinion Supporting the Use of SEPs at 16-19, *supra* note 37.

analyzed its ability to accept a SEP, while military installations must understand their ability to offer a SEP. Thus, complete reliance on EPA's policy will not satisfy the needs of the military services. Installations faced with an environmental penalty need guidance that generally outlines the situations in which it should consider accomplishment of a SEP, the types of projects it can consider, the amount of money that can be spent, and the appropriate method of funding the project.

A. When Should an Installation Consider Offering a SEP?

1. *Installation's Authority to Accomplish a Project*

A preliminary issue that must be evaluated is the extent of an installation's authority to execute a SEP. As indicated above, a SEP agreement can entail a wide range of activities. When considering an activity, an agency must evaluate its authority to accomplish the action. Depending on the nature of the proposed activity, this may present a difficult issue. Several examples can be cited of situations in which agencies in the name of SEPs have taken actions ranging from providing training to the employees of regulatory agencies to constructing a public park in the center of town (not, in any way, related to the agency's facility). Absent liability for a penalty, such actions would clearly be unauthorized. What, if anything, about the requirement to pay a penalty provides the authority that is otherwise obviously lacking?

The language contained in the expanded waivers of sovereign immunity in Solid Waste Disposal Act, more commonly known as the Resource Conservation and Recovery Act (RCRA)[51] and the Safe Drinking Water Act (SDWA)[52] is virtually identical. There is no mention of the accomplishment of SEPs. However, covered federal entities are subject to "Federal, State, interstate, and local *requirements*, both substantive and procedural . . . ."[53] Because a SEP is by definition an "agreement,"[54] it is difficult to characterize its accomplishment as a requirement envisioned by the statutes. Since this is clearly not an explicit authorization, it is helpful to look for indications that the accomplishment of SEPs would be consistent with the intent of the legislature that passed the waivers.

The most persuasive argument concerning legislative intent centers around the designated uses of funds received by states in the form of

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[51] 42 U.S.C.A. § 6961 (1997).

[52] 42 U.S.C.A. § 300j-6 (1997). The waiver in the SDWA was modeled after and is nearly identical to the waiver in RCRA.

[53] *See, e.g.*, 42 U.S.C.A. § 6961(a) (1997) (emphasis added).

[54] Revised Policy ¶ B, *supra* note 10.

environmental penalties.[55] With limited exception, [56] any penalty amounts so received can be used by the state "only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement."[57] This language has been broadly cited as the basis of authority under which a federal agency could accomplish a SEP in resolving a regulatory action brought by a state. The argument is that in using the penalty amount to actually accomplish a "project[] designed to improve or protect the environment," an agency furthers the obvious intent of Congress. This argument has some logical appeal in that the agency seems to "cut out the middleman" and ensure that appropriated funds are used as Congress intended.

Recognizing this logic does not overcome the fundamental difficulty of the argument, however. The legislative history behind the Federal Facility Compliance Act,[58] which was the first statute to enact the limitation on the use of funds, clearly demonstrates the purpose of the limitation on the use of funds, by a state. This language was included in the statute at the urging of federal agencies concerned that the requirement to pay penalties would equate to the opening up of the agency budgets to attack from state governments hungry for federal dollars. The language was intended to limit the desire of states to treat environmental facilities as cash cows, the penalties from which could make up for a shortage of federal money available through other means.[59] It appears that the limitation has been in some measure successful, because the feared onslaught of enforcement actions and penalties has not occurred. It is ironic, then, that this language would be cited as support for the accomplishment of a SEP, such as the construction of a public park. The wisdom of a federal facility seeking to bypass the limitation to allow a regulator to directly determine how the funds will be spent is questionable. Providing such control over the expenditure of funds could certainly affect the incentive structure of a regulator charged with enforcing environmental statutes.[60]

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[55] *See, e.g.*, 42 U.S.C.A. § 6961(c) (1997).

[56] *Id.* The only way that a state can avoid the limitation placed by Congress on the use of amounts received as environmental penalties is to demonstrate that prior to the expansion of the waiver of sovereign immunity to include the payment of penalties (*e.g.*, Oct. 6, 1992 for RCRA), state law required the funds to be used in a different manner.

[57] *Id.*

[58] Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (Oct. 6, 1992).

[59] *See, e.g.*, Letter from Secretary of Defense, Richard Cheney, Secretary of Energy, James Watkins, and EPA Administrator William Reilly to Sen. John Chafee, Attachment A, page 9 (May 29, 1991) (on file with the author) [hereinafter Letter Regarding the Use of Penalties Paid to States].

[60] It can be assumed that most states have implemented a means for determining the usage of funds received as penalty amounts. *See, e.g.*, ARMY HANDBOOK ¶ 7(g)(1), *supra* note 1. It is difficult to see why it would, generally, be in the interest of the federal government to bypass the state's system.

This legislative history does not preclude the citation of the funds limitation as an indication of legislative intent. It does, however, provide grounds for rejection of that argument and practical support for reliance on the plain language of the statute. The statute provides for the payment of penalties. Further, the provision in question makes it clear that the penalty amounts will be "*collected by* a [s]tate" and "*used by* the [s]tate" for the purposes discussed above.[61] Thus, while the view that the requirement/ authority to pay penalties also independently authorizes the accomplishment of SEPs cannot be dismissed, the better legal view is that no such authority was provided. Since there is historical support for the conclusion that the better legal view is that alternative selected by agency heads,[62] this article will continue with the presumption that no independent legal authority to accomplish a SEP has been provided.

Since the existence of a penalty does not authorize SEPs, what authority *does* an installation have to accomplish a SEP? In answering this question, it is helpful to point out that the relevant waivers of sovereign immunity specifically define the term "requirement" to include "all civil and administrative penalties and fines."[63] While EPA's authority to negotiate penalty amounts and to perform SEPs has been the subject of question,[64] there can be no serious question regarding the authority of a federal facility to minimize its monetary liability in the face of an environmental penalty.[65]

EPA's policy of allowing 100% credit for federal agencies[66] will provide strong support to a federal official who seeks to maximize the benefit received from the expenditure of agency appropriations by agreeing to complete a SEP. Thus, while there is no specific authorization for accomplishment of SEPs, the accomplishment of a SEP seems to clearly fall within the parameters of an installation's authority to negotiate. Limitations on that authority are dependent on issues, like the type of project, that will be discussed below.

2. Requirement that SEP Reduce Penalty

Generally, the requirement to pay a penalty has been a practical, rather than a legal, prerequisite to the accomplishment of a SEP. The definition of a

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[61] 42 U.S.C.A. § 6961(c) (1997) (emphasis added).
[62] Letter Regarding the Use of Penalties Paid to States, *supra* note 59.
[63] 42 U.S.C.A. § 6961(a) (1997).
[64] *See, e.g.,* Decision of Comptroller General, *supra* note 26.
[65] When negotiating monetary liability due to environmental violations, EPA and other federal agencies are in opposite positions with regard to the Federal Treasury. While federal agencies are trying to ensure that the *expenditure from the Treasury* is kept down to a level most beneficial to the agency, EPA is charged with ensuring that an amount of money commensurate with the violation is *deposited into the Treasury.*
[66] Revised Policy ¶ E, *supra* note 10.

SEP is broad enough to include projects performed where there is no underlying penalty.[67] Indeed, some agencies have accomplished SEPs in situations where no underlying liability for payment of a penalty existed. For example, there have been several instances in which an agency agreed to perform a SEP as part of Consent Decree for a Clean Water Act[68] (CWA) violation, for which it could not have been held responsible for the payment of a penalty.[69] The most likely explanation is that the agency did not realize that it was immune to penalties. However, it is possible to envision a scenario in which an agency is aware that it is not liable to pay a penalty, but chooses to accomplish a SEP anyway. Such a decision could be based on a desire to foster cooperative relations with the regulatory agency or on public relations concerns, in general. This is because SEP projects are generally desirable projects standing alone, but are prioritized below other funded projects. The ability to accomplish the several purposes discussed above, including the satisfaction of environmental liability, increases the priority of the project in question and, ultimately, forms the basis for the decision to fund the SEP. However, there is significant question as to whether the law requires the existence of monetary liability before an agency can accomplish a SEP. These legal questions can be addressed by providing, as a matter of policy, that SEPs are only to be accomplished in lieu of all or part of a penalty for which an installation is liable.

This practical recommendation is directly related to the overall goal of this article–to ensure that environmental violations are resolved in the most efficient manner. It might be possible to argue in a given circumstance that the goal of efficiency is accomplished by the execution of a SEP despite the non-existence of liability for a penalty. That is, given the protracted disputes that can occur when a regulator insists that an installation is liable for a penalty and refuses to accept legal arguments to the contrary, it may actually result in cost savings for the installation to agree to a small SEP rather than to continue the dispute. Despite the possibility that, in an isolated circumstance, such an agreement could save time and money, the overall impact to the military services will likely be detrimental. Such a capitulation to regulatory pressure would not only encourage further enforcement action by that regulator against military installations, it would make an already obstinate regulator more persistent in future negotiations. Federal facilities immune from penalties are already very familiar with the regulator that, despite a Supreme Court decision directly on point,[70] refuses to accept the validity of the installation's position because another federal facility within the jurisdiction has paid a penalty or accomplished a SEP for the same type of violation.

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[67] *Id.* ¶ B.
[68] Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 1997).
[69] Department of Energy v. Ohio, 112 S. Ct. 1627 (1992).
[70] *Id.*

While sovereign immunity precludes the payment of many environmental penalties,[71] a regulator may seek to force an installation to reimburse the regulator for the costs incurred in taking enforcement action. The liability for payment of such a fee is less clear than the liability for the payment of a penalty.[72] This is an issue of particular sensitivity, because of the natural concern that a regulator, frustrated by the inability to collect a penalty, will seek to "replace" this money by assessing an excessive or unjustified administrative enforcement fee. The concern was summarized by the Supreme Court in another context when it concluded that a state could not subvert the waiver of sovereign immunity simply by providing a different name to an assessment that is inconsistent with the principle of sovereign immunity.[73] In order to avoid such a disguised penalty, an installation will require evidence that a fee, similar in both type and amount, is assessed all violators. While it generally is very difficult to demonstrate discrimination against federal facilities, evidence a state has treated an installation differently would provide grounds to refuse payment.[74]

Some installations have been offered the opportunity to perform SEPs in lieu of payment of such fees. There is no legal obstacle to such an offset, but policy considerations demand that such offers be rejected without exception. Given the concern that regulators use these fees as a means to circumvent sovereign immunity, it would be unquestionably unwise for an installation to increase the regulatory incentive to assess such fees. Instead, since the assessment is appropriate only if it is designed to reimburse costs incurred by a regulator as a result of a violation, an installation should force the regulator to support, in detail, each aspect of the claimed cost and should provide monetary reimbursement only for costs that can be demonstrated to be legitimate. It should also firmly advise the regulator that its willingness to accept a SEP rather than monetary reimbursement is inconsistent with the purpose of the fee.

3. Installation Control Over SEP Negotiation

Having determined that a SEP will only be accomplished in lieu of all or a portion of liability for a penalty for which an installation may be liable, it

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[71] *Id.*

[72] *See, e.g.,* 33 U.S.C.A. § 1323(a) (1997), which subjects federal facilities to the payment of "reasonable service charges." While not directly applicable, 42 U.S.C.A. § 6961(a) (1997) defines "reasonable service charges" as any "nondiscriminatory charges that are assessed in connection with a Federal, State, interstate or local solid waste or hazardous waste regulatory program."

[73] Library of Congress v. Shaw, 106 S. Ct. 2957, 2965 (1986).

[74] *See, e.g.,* 42 U.S.C.A. § 6961(a), which provides that, in order to be considered a "reasonable service charge" within the waiver of sovereign immunity, a fee must be a "nondiscriminatory charge."

is helpful to briefly introduce matters concerning the offset. In order to fully understand the concept of penalty offset, it is helpful to first understand the regulator's policy regarding the underlying penalty. A discussion of regulatory penalty policy is beyond the scope of this article, but it is strongly recommended that an installation be fully apprised of the applicable policy at the outset of negotiations. A more thorough discussion of the offset is provided below. The offset is perhaps the aspect of SEP negotiation over which an installation will have the least control. For this reason, the guidance called for will merely make recommendations rather than imposing requirements regarding the offset. Because the installation cannot unilaterally control the flow of penalty negotiations, it is suggested that when a regulator raises the potential for agreement on a SEP, the installation advise that while it may be interested in discussing the potential for accomplishment of a SEP, it will not do so until agreement is reached on the amount of penalty liability. This ensures that any agreement reached actually offsets penalty liability rather than amounts that would have been conceded by the regulator through the negotiation process. However, it will not always be possible for an installation to control the timing of discussions regarding a SEP.[75] While the timing is important in ensuring the efficiency of the resolution, it is not essential. On the other hand, an installation may experience greater difficulty in controlling the types of projects that the regulator is willing to discuss as potential SEPs. On this issue, the willingness of the regulator to allow the installation to control the type of project to be accomplished will likely determine whether agreement will be reached on the accomplishment of a SEP.

The importance of exercising control over the type of project to be executed stems from both legal and policy oriented concerns. Of course, the authority issues discussed above will go a long way toward determining what an installation will be willing to do. Added to any authority based limitations are concerns imposed by fiscal law. Beyond these legal constraints, the recommended guidance will attempt to balance considerations regarding the immediate interest of the installation in question with the overall interest of the military services. Even a SEP that is permissible from a legal perspective may not be in the best interests of the military service.

Since the type of project proposed will be the single most critical factor in shaping its decision, an installation facing an enforcement action will be well served by, early in the negotiation process, becoming familiar with what it can agree to do. There may appear to be an element of "hurry up and wait" in the seemingly contrasting recommendations that an installation immediately consider its opportunities to accomplish a SEP while trying to delay discussion

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[75] An indication that an installation may face difficulty in controlling the time that a SEP is proposed is the policy implemented by the State of Maine, which requires "[a]ny proposal to incorporate a SEP into a settlement should be made early in the settlement discussions in order to provide sufficient time for consideration . . . ." Maine Policy, *supra* note 17.

of the prospect of a SEP until late in the negotiation process. The essence of both recommendations, however, is to confine what can be a difficult and time consuming negotiation. Ideally, an installation with a sufficient understanding of its limitations will be able to select a project that will provide maximum benefit to the military service and acceptance by the regulator. Even if the parties cannot agree on a particular project, an installation can largely control this portion of the process by clearly explaining what it can and cannot do to the regulator. Forthrightly advising the regulator of the types of projects that can be accomplished (and, if necessary, supporting this advice by showing written guidance from the headquarters level) should make it relatively easy to reach agreement on the type of project. Negotiations will, thus, be limited to the amount of any penalty that will be required in addition to the SEP. These negotiations will, in turn, be simplified and provide the greatest benefit to the military service if the amount of the penalty to be paid (as distinguished from the amount initially assessed) has been finally determined before the SEP is discussed.[76] By focusing discussion on the mitigation percentage to be applied to a pre-determined penalty, the process should be eased thereby permitting the installation to minimize its expenditure of funds.

B. What Types of Projects Can Generally Be Considered?

As discussed, the types of project a regulator will accept as a SEP can vary from jurisdiction to jurisdiction. Because of EPA's careful policy development in the face of many similar policy constraints, it is helpful to briefly review the types of projects allowed by EPA and to use EPA's list as a starting point. The Interim Revised Policy establishes seven acceptable categories of SEPs. The seven EPA categories are: (1) public health projects which promote human health care in a manner that is related to the violation; (2) pollution prevention projects, which reduce the generation of pollution; (3) pollution reduction projects, which result in a decrease in the amount and/or toxicity of pollution after it has been generated; (4) environmental restoration/protection projects, which enhance the condition of the ecosystem or area adversely affected by the violation; (5) assessments/audits of pollution prevention opportunities, the overall environmental condition of the site,

[76] It is noted that the Commonwealth of Pennsylvania requires that a penalty amount be decided upon before a SEP can be considered. Its policy provides, "[t]he [Pennsylvania] Department [of Environmental Protection (PADEP)] will . . . calculate the proposed penalty without regard to whether a CEP [Pennsylvania refers to them as Community Environmental Projects] will be considered. As a general rule the Department will not solicit or suggest a CEP. However, the Department may suggest a specific project once the alleged violator has suggested the use of a CEP." PADEP Office of Policy and Communications, Policy for the Acceptance of Community Environmental Projects in Lieu of a Portion of Civil Penalty Payments, Document Number: 012-4180-001 (Sept. 1, 1997) (on file with author).

existing environmental management policies, and/or the current state of environmental compliance; (6) provision of training or technical support (that promotes environmental compliance) to other members of the regulated community; and (7) emergency planning and preparedness projects, which provide assistance, generally in the form of equipment, to a state or local emergency response or planning entity.[77]

As noted above, states are not limited by EPA's guidance, so many other types of projects can be and have been accomplished as SEPs.[78] An installation will, of course, have to be familiar with whatever policy, formal or informal, is followed by the regulator in question. It is therefore advisable for the installation, as a routine matter, to retain current information on the relevant policy, without regard to any potential or ongoing enforcement action. Once equipped with this information, an installation can identify areas of overlap between the regulator's policy and the recommended guidance. Within this overlap, the installation can then prioritize projects that will benefit the installation.

It is intended that in this typical scenario, the needed guidance would act as the primary limiting factor on the scope of projects considered. Experience has shown that regulators are often willing to consider a very broad range of projects, and that installations have been able to find interesting justifications for a conclusion that projects proposed by regulators are also beneficial to the installation. The projects accepted by EPA serve as a useful starting point in determining what kind of projects a military installation should be able to consider.

This article has already concluded that the existence of a penalty or a SEP agreement does not provide any independent authority to accomplish the subject project. Since an installation will be relying upon its inherent authority to accomplish a SEP, it necessarily follows that some of the categories of SEPs accepted by EPA can be excluded from consideration. As a general matter, it is possible to eliminate the following: public health projects; training or technical support projects; and emergency planning and preparedness projects.

With the possible exception of public health projects, the excluded categories of projects are clearly outside of the authority provided to military installations. Nevertheless, both training projects and projects that fit within EPA's description of emergency planning and preparedness have been accomplished. It is essential that the military services acknowledge either that

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[77] Revised Policy ¶ 10, *supra* note 10.

[78] A good example of the breadth of projects that can be accepted as a SEP is provided by a recent enforcement action completed by the Los Angeles, California District Attorney's Office. The SEP required a direct payment of money to the Los Angeles District Attorney Crime Prevention Foundation. *Company To Pay $1 Million For UST Spill*, DAILY ENVIRON. REP. (May 2, 1995).

those situations involved unique circumstances that made them permissible,[79] or that the project in question was accomplished at a time when the services did not understand the limits on their authority and, thus, were not subject to the same legal and policy oriented requirements. For instance, in more than one circumstance, a military installation has provided training either to employees of the regulator or to other non-federal parties. While arguments can be made that such training is within the authority of EPA,[80] there can be little question that the provision of such training is outside the authority of the military services.

Public health projects are defined as activities that provide "human health care which is related to the actual or potential damage to human health caused by the violation,"[81] including medical examinations of potentially affected persons. It is possible to envision a situation in which a violation affects active duty service members. In this situation, EPA might agree to a SEP that entails the provision of some authorized medical services. Because this is a somewhat strained hypothetical and, in any event, not typically the kind of project EPA would accept,[82] public health projects will not be discussed as an acceptable SEP. As will be discussed in the waiver provision below, this will not absolutely preclude the accomplishment of such projects. But it will, however, subject them to a more stringent analysis and a higher level of approval authority.

The types of projects that EPA has identified as acceptable and that are potentially within the authority of a military installation to accomplish are: pollution prevention projects; pollution reduction projects; environmental restoration/protection projects; and assessments or audits. Each of these categories is discussed individually below.

1. Pollution Prevention Project

A pollution prevention (P2) project is any practice that "reduces the amount of any hazardous substance, pollutant or contaminant . . . released into the environment."[83] EPA has formally announced a preference for the

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[79] For example, a military service expended several hundred dollars to purchase computer software for a local regulator as a SEP. However, because the service had specific authorization from Congress to accomplish a SEP in those circumstances, there is legal support for the action taken. *Military to Pay $170,000 Fine for Hazardous Waste Violations at MMR*, DAILY ENVIRON. REP (Aug 27, 1997).

[80] Matter of: Use of Appropriated Funds in Connection with National Solid Waste Management Association Convention, B-166506 (July 15, 1975).

[81] Revised Policy ¶ D.1., *supra* note 10.

[82] Revised Policy ¶ B, *supra* note 10, provides that the project must not be something that the violator is otherwise legally required to perform (*i.e.*, the project cannot be independently required by any federal, state or local law or regulation).

[83] *Id.* ¶ D.2.

accomplishment of P2 projects as SEPs[84] and, in return for this accomplishment, will provide a higher mitigation percentage than is available for all other types of projects.[85] Following EPA's lead, other regulatory bodies have also placed emphasis on the accomplishment of P2 projects.[86] The explanation for this preference is that the other types of projects will likely not lead to a decrease in the amount of waste generated. The result can be "multi-media transfer of wastes and contaminants, continued environmental impact, continued oversight by the government and the long term expense to violators that is associated with waste generation and control."[87] As stated above, DoD also has a preference for pollution prevention projects,[88] which is at least partially explained by this potential for continued expense.

2. Pollution Reduction Projects

While P2 projects are designed to prevent the generation of pollution, a pollution reduction project improves the management and disposal of waste that has already been generated.[89] Because both types of projects result in a decrease in the amount and/or toxicity of releases into the environment,[90] they are easily confused. A reduction project generally involves installation of more effective end-of-process control or treatment technology, such as recycling, or improved treatment, containment or disposal techniques.[91] Clearly, such projects have the potential to enhance an installation's environmental stewardship and should receive strong consideration, although they are generally less favored than P2 projects.

3. Audit or Assessment

Within this broad category, EPA groups four types of actions: pollution prevention assessments; site assessments; environmental management system audits; and compliance audits. Any of these actions could be determined by the installation to be within its authority and beneficial, so further discussion is warranted. It is noted at the outset that EPA's policy requires that the results of

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[84] *Id.* ¶ A.2. Whereas, depending on the nature of the violator (*e.g.,* corporation vs. government entity), the mitigation percentage is limited for other types of SEPs, EPA will consider granting 100% credit for the accomplishment of a pollution prevention project.
[85] *Id.* ¶ E.3.
[86] *See, e.g,* Ohio Environmental Protection Agency, Office of Pollution Prevention, Pollution Prevention in Ohio Environmental Enforcement Settlements–Analysis and Update (Sept 1, 1995) (on file with author).
[87] *Id.* at 1.
[88] DODI 4715.6 ¶ D.4, *supra* note 1.
[89] Revised Policy ¶ D.5, *supra* note 10.
[90] *Id.*
[91] *Id.*

the audit/assessment be provided to the regulator.[92] Although a discussion of this requirement is beyond the scope of this article, depending on the service or installation in question, such a requirement could preclude this type of project from being considered.[93]

Related to the P2 type of SEP, pollution prevention assessments are "systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other waste,"[94] and can prove very beneficial to an installation. The close relationship to P2 projects not only leads to the conclusion that they fall within DoD's most favored category of SEPs,[95] but they are likely to qualify for greater credit under some of the regulatory policies.[96]

Compliance audit is an "independent evaluation of a defendant/ respondent's compliance status with environmental requirements"[97] and will be accepted by EPA only when the offering party is a small business. Although this clearly excludes military installations, there is the possibility a state regulator would accept such a project.

An environmental management system audit is defined as an "independent evaluation of a party's environmental policies, practices and controls."[98] This broad category can encompass evaluations of the need for:

> (1) a formal corporate environmental compliance policy, and procedures for implementation of that policy; (2) educational and training programs for employees; (3) equipment purchase, operation and maintenance programs; (4) environmental compliance officer programs; (5) budgeting and planning systems for environmental compliance; (6) monitoring, record keeping and reporting systems; (7) in-plant and community emergency plans; (8) internal communications and control systems; and (9) hazard identification, risk assessment."[99]

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[92] *Id.*

[93] The services may have formal or informal policies that prohibit sharing the results of audits in this manner. An installation should evaluate any applicable policy before agreeing to provide the results of an audit or assessment as a condition of a SEP. It is helpful at this point to note Air Force guidance regarding the type of audits that are most frequently conducted by Air Force installations. The general policy is that the results of assessments conducted pursuant to Air Force Instruction 32-7045, Environmental Compliance Assessment and Management Program ¶ 3.4 (Apr. 5, 1994) [hereinafter AFI 32-7045], will, subject to exception, be made available upon request. Of course, this guidance is not applicable to any other type of audit or assessment.

[94] Revised Policy ¶ D. 5, *supra* note 10.

[95] DODI 4715.6 ¶ D.4, *supra* note 1.

[96] *See, e.g.*, Revised Policy ¶ E.3, *supra* note 10.

[97] *Id.* ¶ D.5.d.

[98] *Id.* ¶ D.5.c.

[99] *Id.*

The final type of project included in this broad category are site assessments. By investigating the condition of the environment at the installation and the potential for any threats to human health or the environment stemming from the installation, a penalty can be reduced.[100] "To be eligible for SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken."[101]

4. Environmental Restoration / Protection Projects

Defined as a project that "goes beyond repairing the damage caused by [a] violation to enhance the condition of the ecosystem or immediate geographic area adversely affected,"[102] many restoration/protection projects will fall within an installation's authority. EPA makes it clear that restoration projects can focus on man-made environments, such as facilities and buildings, as well as natural environments or ecosystems.[103] Protection projects "protect[] the ecosystem from actual or potential damage resulting from the violation or improve[] the overall condition of the ecosystem."[104] Protection projects that arguably fall within an installation's authority include restoration or creation of a wetland on the installation, purchase and management of a watershed area, or a project that protects the habitat of endangered species located on the installation.[105]

5. Projects not Included in EPA's Guidance

It would be short-sighted to strictly limit an installation's consideration to only projects that would be considered by EPA. EPA's list, even when narrowed to be consistent with an installation's authority, provides a broad spectrum of projects to choose from. However, it should not be considered an exclusive list of the types of projects an installation might be able to accomplish. A review of some of the state policies raises some possibilities not included in EPA's guidance. For this and other reasons, all designed to permit some flexibility at the installation level, it is advisable to establish a procedure by which an installation can seek a waiver from the limitations in the new guidance. Such a waiver provision is discussed more fully below.

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[100] *Id.* ¶ D.5.
[101] *Id.*
[102] *Id.* ¶ D.4.
[103] *Id.*
[104] *Id.*
[105] *Id.*

D. Selection and Prioritization of Projects

Because the circumstances surrounding a given situation can be so diverse, the scope of the necessary guidance should be limited to identifying the types of projects an installation should consider and should leave it to the installation to determine which of these alternative types it prefers. Since any proposed project will require regulatory concurrence, the installation would be wise to identify and prioritize several potential projects. The installation can then decide whether to inform the regulator only of the preferred project, or to negotiate two or three projects with the regulators in an effort to determine which project will result in the greatest reduction in penalty.

It is helpful to identify a number of the considerations an installation may face in defining and prioritizing potential projects. The installation should consider: the mission enhancement that would be realized through the accomplishment of a potential action; the installation's ability to accomplish the proposed action; the willingness of the regulator to reduce the penalty for the project in question; and the amount of penalty reduction that could be achieved for that project. In the end, it is likely the installation will need to balance these considerations in selecting its project.

1. Mission Enhancement

The relationship between mission enhancement and an installation's authority is such that if a project is authorized, it is very likely to enhance the mission. Beyond that general statement, mission enhancement is such a fact-specific consideration that very little discussion is warranted in this article. It is important to stress, however, that on a general level, DoD has conducted an analysis of mission enhancement and has established a priority for the accomplishment of a P2 projects as SEPs.[106] This priority does not bind the hands of the service or installation making a decision regarding a SEP, but an installation should be aware of DoD's policy as it weighs its options.

2. Ability to Accomplish the Project

It is quite possible that individuals working on the installation will have ideas for improvements in operation that should be considered as potential SEPs. Because P2 projects are the preferred type of SEP, there are significant resources specifically designed to promote P2 projects within DoD.[107] The

[106] DODI 4715.6 ¶ D.4, *supra* note 1.

[107] For example, the Air Force Center for Environmental Excellence (AFCEE) is "the lead Air Force agency in providing installations technical services supporting the Air Force pollution prevention program" and the Air Force Civil Engineering Support Agency is also available to

inquiry may be eased significantly because an installation should have already identified a "to-do list" of desirable P2 projects, in accordance with Executive Order 12,856.[108] A typical requirement of these strategies is that each installation develop its own pollution prevention plan.[109] In this plan, an installation will have a series of previously identified activities it intends to undertake at a specified time in the future.[110]

Another source of previously identified projects specific to the installation is the list of desired environmental projects prepared pursuant to Office of Management and Budget (OMB) Circular A-106 (hereinafter A-106).[111] This list includes, but is not limited to, P2 projects.[112] By drawing from this list of desirable projects that have not yet been accomplished, an installation can ensure the SEP has previously been determined to be inherently valuable to the installation. This would, in turn, address questions about the authority to accomplish the project. However, this means of resolving the mission enhancement question has the potential to create funding issues that can affect the installation's ability to accomplish the activity as well as the regulator's willingness to provide penalty mitigation.[113]

In deciding on a SEP, an installation will necessarily address its ability to fund or ensure the availability of funding for a proposed project. The general principles of fiscal law can be appropriately categorized as purpose, time, and amount limitations and will be discussed individually. The view of the military services has traditionally been that since the primary purpose of a SEP is the resolution of liability for a penalty, SEPs should be funded in the same manner as the underlying penalty.[114] This traditional position requires analysis.

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provide technical support. Air Force Instruction 32-7080, Pollution Prevention Program ¶ 1.3.2.1-2 (May 12, 1994) [hereinafter AFI 32-7080].

[108] Exec. Order No 12,856, Federal Compliance with Right to Know Laws and Pollution Prevention Requirements, 58 Fed. Reg. 41,981 (August 4, 1993). This Executive Order established August, 1994 as the deadline for each installation's pollution prevention strategy.

[109] *Se,e e.g., Air Force Pollution Prevention Strategy Leads with Training, Education,* DEFENSE ENVIRON. REP. (Aug. 23, 1995).

[110] *See, e.g.* AFI 32-7080, *supra* note 107.

[111] OMB Circular A-106, Reporting Requirements in Connection With the Prevention, Control, and Abatement of Environmental Pollution at Existing Federal Facilities (December 31, 1974). An example of how this requirement has been incorporated into a service's environmental program is provided by AFI 32-7001, Environmental Budgeting (May 9, 1994) [hereinafter AFI 32-7001].

[112] For instance AFI 32-7001, *supra* note 111, discusses environmental compliance, cultural resource, and cleanup projects in addition to P2 projects. It is an especially helpful resource in that it provides examples of each type of project.

[113] *See infra* note 143 and accompanying text.

[114] Memorandum from James E. McCarthy, Major General, USAF, The Civil Engineer to National Guard Bureau Civil Engineer, Payment of Supplemental Environmental Projects (February 21, 1995) (discussing the accomplishment of SEPs) [hereinafter Air Force Civil Engineer Memo] (on file with the author); ARMY HANDBOOK ¶ 7(g)(6), *supra* note 1.

When it waived sovereign immunity for the payment of penalties, Congress could have created an additional appropriation available for the payment of penalties or specifically designated an existing source of funds that would be available for this purpose, but it did not. Instead, it elected to remain silent on the appropriate source of funds to be used to satisfy this newly created responsibility.[115] This silence did not leave military installations unable to pay the costs of penalties; nor did it provide installations the unfettered discretion to choose the source of funds from which to pay penalties. Instead, agencies were given the implicit authority to use appropriated funds and were required to determine which appropriation is the proper source.

The principle that enables agencies to use appropriated funds to pay penalties even though no appropriation is specifically available for this purpose is the "necessary expense doctrine." This principle provides a federal agency with "reasonable discretion in determining how to carry out the objects of [its] appropriation[s]."[116] In order to determine whether a specific expenditure falls within the deference accorded an agency, three tests must be passed. First, the proposed expenditure must be reasonably related to the purpose for which Congress appropriated the funds. Second, the proposed expenditure must not be prohibited by law. Finally, the expenditure must not fall within the ambit of another appropriation.[117]

The Comptroller General addressed the payment of environmental penalties in 1978 in response to a question from the National Oceanic and Atmospheric Administration (NOAA). Although the issue in 1978 regarded the payment of Clean Air Act penalties,[118] the discussion has generally been applied to penalties under RCRA and undoubtedly will apply to the SDWA. The Comptroller General concluded that the penalties could be funded from NOAA's appropriation for "necessary expenses" assuming the penalties were "incurred in the course of activities necessary and proper or incidental to fulfilling the purposes for which the appropriation was made."[119]

That decision continues to guide the payment of penalties by the military services. Although the military services do not have a "necessary expense" appropriation, each service does receive an appropriation of Operation

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[115] President Bush's signing statement accompanying the FFCA stated that agency appropriations would be used to pay the costs of fines and penalties pursuant to the FFCA. 28 Weekly Comp. Pres. Doc. 1868 (Oct. 6, 1992) It did not direct the specific source of funds within each agency's appropriation to be used. This statement considered the available alternatives to be the Judgment Fund (31 U.S.C. § 1304) and agency appropriations.

[116] THE RED BOOK at 4-15, *supra* note 30.

[117] *Id.*

[118] Matter of: National Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards, B-191747 (June 6, 1978) [hereinafter NOAA Decision].

[119] *Id.*

and Maintenance (O&M) funds annually. This appropriation is used to fund the day-to-day operations of most military facilities. Since environmental penalties are generally incurred as a result of the daily operations of military facilities, penalties will generally be paid using O&M funds. Because the military has viewed SEPs primarily as an alternative means of satisfying penalty liability, the default position for the services has been that SEPs should be funded from an installation's O&M account.

This logical leap is not justified in every circumstance, however. Since the "necessary expense rule" can be applied only on a case-by-case basis,[120] it is possible to review the limitations placed on SEPs by the use of O&M funds only by considering the type of project involved. This evaluation is a multi-step inquiry. The first consideration, whether the project to be performed is authorized by law, has been thoroughly discussed above. Since one of the intentions of the needed guidance is to ensure that any action taken as a SEP is within the authority of the installation, the remaining discussion will assume that this condition has been satisfied.

The next consideration is that the proposed project must bear a relationship to the purpose of the appropriation intended to be charged. The purpose of an installation's O&M funds is to cover expenses that are necessary for the operation and maintenance of the installation in question and for which Congress has not otherwise provided.[121] Since the primary purpose behind the accomplishment of a SEP is to satisfy existing liability for payment of a penalty, any expenditure on a SEP will likely satisfy the necessity requirement. However, a SEP is, by definition, a multi-purpose expenditure. Thus, it is quite possible that Congress has otherwise provided for the accomplishment of one of the purposes of the expense.

The most obvious example involves the accomplishment of a military construction project. Annually, each service receives a military construction appropriation.[122] Many of the types of projects that have been identified as

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[120] THE RED BOOK at 4-15, *supra* note 30.

[121] *See, e.g.*, Pub. L. No. 101-148, 103 Stat. 920 (Nov. 10, 1989).

[122] Military Construction Appropriations Act of 1997, Pub. L. No. 104-196 (Sept. 16, 1996). This appropriation is available for "acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the [military service] as currently authorized by law . . . ." "Military construction" is defined to include "any construction, development, conversion, or extension of any kind carried out with respect to a military installation." 10 U.S.C.A. § 2801 (1997). The "nexus" requirement of the EPA policy renders it likely that any project performed pursuant to a SEP agreement with EPA will be performed "with respect to" the installation. Revised Policy ¶ C.1, *supra* note 10. The scope of military construction is further defined by the term "military construction project," to include all "military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility." 10 U.S.C.A. § 2801 (1997). "Facility," in turn, is defined as "a building, structure, or other improvement to real property." 10 U.S.C.A. § 2801 (1997).

possible SEPs to be accomplished by the military services would involve construction. For instance, EPA's discussion of P2 projects specifically envisions equipment or technology modifications.[123] Such modifications often entail changes to the design of a military facility. EPA describes pollution reduction projects to include installation of more effective end-of-process control or treatment technology.[124] Finally, examples of environmental restoration/protection projects are "restoration of a wetland" and "purchase and management of a watershed area".[125] Operation and maintenance funds are available to fund minor military construction projects, but larger projects must be funded using the military construction appropriation.[126]

While an installation can control its O&M budget, it can not be certain military construction funds will be available. Military construction projects intended, for instance, to promote environmental compliance will compete with all other compliance oriented construction projects for funding. Under the A-106 process, identified projects are prioritized by the military services. For example, a compliance project is classified with regard to its effect on the compliance status of the installation.[127] It is this categorization that largely determines whether a project will be accomplished. That is, unless it can be said that a project is necessary to bring an installation into compliance, there is a very good chance the project will not be funded. Because a SEP agreement creates an enforceable obligation,[128] the agreement could conceivably elevate the status of a project in a manner that enables its accomplishment, but the Air Force has specifically precluded the possibility of using this logic to leapfrog other projects.[129] The bottom line is that reliance on military construction appropriations introduces uncertainty in the SEP process.

The basic principle that an installation should never agree to a permit condition or compliance agreement when there is some question about its ability to satisfy the terms of that permit or agreement[130] is directly applicable. An installation could place itself in a precarious position by entering into an enforceable obligation to accomplish an action that will necessarily be funded externally. This is not to say that an installation should be discouraged from considering the availability of external resources to accomplish a SEP. Depending on the type of project in question, funds could be available. The needed guidance would include the possibility of a waiver for an appropriate SEP. The application for this waiver will identify the source of funds and

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[123] Revised Policy ¶ D.2, *supra* note 10.
[124] *Id.* ¶ D.3.
[125] *Id.* ¶ D.4.
[126] 10 U.S.C.A. § 2805(c)(1) (1997) defines "minor military construction project" as generally authorized projects costing no more than $500,000.
[127] *See, e.g.*, AFI 32-7001, ¶ 3.3.2, *supra* note 111.
[128] Revised Policy ¶ G, *supra* note 10.
[129] Air Force Civil Engineer Memo, *supra* note 114.
[130] *See, e.g.*, ARMY HANDBOOK ¶ 8(g), *supra* note 1.

demonstrate that these funds have been secured in advance. By requiring higher level approval of any part of a SEP that will be funded externally, the services can ensure that any SEP agreed upon can actually be accomplished.

As discussed above, an installation should ensure that negotiations in response to a penalty proceed in two distinct phases. The first phase of the negotiation will address the amount of the penalty that is acceptable to both parties. After this amount is determined, the parties then discuss the potential for reducing the amount of the penalty through the execution of a SEP agreement and the specifics of such an agreement.[131] Negotiations of this type are often lengthy, and it is reasonable to assume that discussions could carry over into a subsequent fiscal year.

It is quite likely an installation that receives a notice of violation (NOV) with an assessed penalty in fiscal year (FY) 1997 (October 1, 1996, to September 30, 1997) will agree to the execution of a SEP in FY 1998 or later. It is possible to conclude that while the underlying penalty should be paid using O&M funds that were current at the time an NOV was received (FY 1997 in the above example), the cost of the SEP should be funded from the O&M appropriation current at the time the SEP agreement was signed (FY 1998). However, the penalty would be paid from expired FY 1997 funds. The shifting of the financial burden into the current fiscal year reduces the installation's incentive to accomplish the SEP, because, given the scarcity of available funds, even the environmentally aware commander, fully recognizing the potential benefits of a SEP, will have a strong incentive to simply pay the penalty using expired funds.

The Air Force General Counsel has determined that the obligation for a SEP should be recorded in the fiscal year in which the underlying penalty would have been obligated.[132] This policy was developed after significant debate[133] and thorough legal review,[134] and will be advanced in the proposed guidance.

Given the historic reluctance of the government to accept liability for the payment of penalties, GAO's finding that federal facilities were so enthusiastic in their use of SEPs that they actually spent more money in resolving violations than the amount that was originally assessed as penalties

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[131] Revised Policy, *supra* note 10

[132] Memorandum from the Deputy General Counsel of the Air Force for Civilian Personnel and Fiscal Law to Staff Judge Advocate, Pacific Air Force, Proper Fiscal Year of Funds for Supplemental Environmental Projects and EPA Assessed Penalties (Oct. 20, 1995) (on file with the author).

[133] Memorandum From Staff Judge Advocate, Pacific Air Force, to Deputy General Counsel of the Air Force for Civilian Personnel and Fiscal Law, Proper Fiscal Year of Funds for Supplemental Environmental Projects in Lieu of Cash Fines (Apr. 29, 1995) (on file with the author).

[134] *See, e.g.*, Chris Carey, *Implementing Air Force Policy Favoring SEPs: Are They a Nonstarter Fiscally?*, 7 FED. FAC. ENVIRON. JOURNAL 71-83 (Spring 1996).

is somewhat surprising.[135] In light of the strict legal limits on the use of funds appropriated by Congress, there has been some concern over whether such expenditure are inappropriate. Because a SEP can only be accomplished pursuant to the installation's independent authority, it is that independent authority, rather than the existence of a penalty action, which provides the authority to accomplish a SEP. Therefore, one should not conclude that the penalty amount sets the legal limit on the agency's authority. It is possible that the military services would want to establish a policy-based limit on the total amount of money an installation will be allowed to spend on a SEP. However, for many of the same reasons discussed above, installations should retain some flexibility to determine for themselves whether the value of a SEP satisfies all other aspects of the guidance. It is clear that the installation is the entity most capable of evaluating the several complex considerations that determine this value on a case-by-case basis.

3. Available Penalty Reduction

A factor that will often be very important for an installation to consider in prioritizing possible projects is the amount of penalty reduction that will be provided for each project. While this can only be determined in negotiation with the regulator, it is possible to identify in advance significant factors that are likely to have an affect on the credit awarded.

With regard to the amount of offset that should be received, it is not possible or even desirable to establish a minimum amount of reduction an installation should be allowed to accept, because the amount of penalty mitigation regulators will consider granting can vary greatly among jurisdictions. In some jurisdictions, the amount of credit is actually a two part consideration. For instance, the State of Texas provides that, generally, a SEP will result in a maximum penalty reduction of 50%.[136] That is, an installation faced with a $200,000 liability would be expected to pay a penalty of at least $100,000, in addition to the SEP it accomplishes. The second issue that must be considered is how much money must be spent on the SEP to receive the penalty reduction offered. In other words, how much penalty reduction credit will the regulator allow for each dollar spent by the violator. Staying within the State of Texas, depending on the benefits of the SEP in question,[137] the permissible "mitigation percentage" can vary from 25% to 100%. Using the example posited above, in order to receive the maximum penalty reduction of

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[135] GAO Penalty Report, *supra* note 3.

[136] Texas Natural Resource Conservation Commission (TNRCC), Environmental Enforcement Policy Statement (Oct. 26,1995) (hereafter Texas Policy) (on file with author).

[137] For example pollution prevention and remediation projects may generally qualify for a 100% credit, while projects that clearly benefit the violator or that have only indirect benefits will receive less credit. Id. at 1-2.

$100,000, it would be necessary to spend between $100,000 (assuming 100% credit) and $400,000 (assuming 25% credit) on a SEP, in addition to paying $100,000 as a penalty.

EPA's policy does not specify a maximum penalty reduction. Instead it requires that, regardless of the accomplishment of a SEP, a penalty must be paid that exceeds the economic benefit realized by the violator as a result of its violation.[138] The maximum mitigation percentage is generally 80% of the cost of the SEP.[139] The percentage can go as high as 100% based on a number of circumstances including the type of project accomplished.[140] One of the circumstances under which EPA will allow 100% credit is the situation where the violator is a government or other non-profit entity.[141] EPA's deference to the specific circumstances of government agencies is reflected in varying degrees by the state policies.[142]

The vast difference among regulatory bodies with respect to the credit to be provided is perhaps the strongest argument against specifying the minimum credit for an installation as a condition precedent to a SEP agreement. To establish a minimum credit would require comparing the policies of all the regulators, and finding the common amount that would be acceptable to all regulators and beneficial to all installations regardless of circumstance. If the minimum amount was set too high, it would likely rule out the accomplishment of beneficial SEPs in states that have unyielding policies, which preclude extending the credit insisted upon by the needed guidance. On the other hand, if the limit was set too low, a regulator that might otherwise be inclined to offer more credit could easily turn the floor into the ceiling. That is, if the policy notifies the regulator of the amount of credit an installation can accept, the regulator may become convinced it should not offer a higher amount. The general regulatory willingness to treat government entities in a more favored manner demonstrates that such entities have some persuasive arguments in favor of receiving higher credit than is accorded other parties.

Thus, if the amount of credit required is left open to determination on a case-by-case basis by each installation, a regulator will not have a pre-conceived notion of what the installation will be willing to accept. Perhaps, more importantly, the installation will be able to decide for itself the value of the SEP. It is in this limited aspect of the decision-making process that it is appropriate for the installation to consider the public and regulatory relations

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[138] Revised Policy ¶ E.1, *supra* note 10.

[139] *Id.* ¶ E.3.

[140] *Id.* If a project has P2 benefits, the credit ratio can be 1:1 (*i.e.*, $1 penalty reduction for each $1 spent on the SEP).

[141] *Id.* The permissible mitigation percentage is also increased for small businesses and for any party that accomplishes a pollution prevention project as its SEP.

[142] Texas, for example, will consider providing 100% credit to state agencies and other political subdivisions, but not to federal facilities. Texas Policy at 2, *supra* note 136.

benefits available through the accomplishment of a SEP. While these considerations should not impact the decisions as to whether a SEP is appropriate and the type of project to be accomplished, they are certainly relevant to an installation's determination of how much it is willing to pay for the SEP.

One suggestion of this article has been that installations strongly consider as SEPs projects that have been previously identified as beneficial for the installation. While making this suggestion, the article noted concerns that a service may have internally with the accomplishment of such projects. An additional concern external to the military services, and thus largely beyond their contro, is the potential that a regulator could refuse to reduce a penalty or significantly limit the amount of penalty reduction that will be realized by such a project.

EPA will not accept as a SEP any project that is required by any law or regulation.[143] This would clearly preclude credit for actions that an installation is required to undertake pursuant to the Endangered Species Act,[144] for instance, which imposes requirements on installations beyond those faced by non-government entities. Even requirements that are imposed internally could prevent accomplishment of an action as a SEP. Depending on the type of project and the regulatory interpretation of the installation's legal position, a regulator might refuse a project which it views as a regulatory requirement. For example, an Air Force installation is required to periodically "assess all pollutant sources and determine opportunities to reduce or minimize waste."[145] Although such P2 "opportunity assessments"[146] clearly fit the definition of a "pollution prevention assessment" under EPA's policy,[147] it is quite likely that EPA or another regulator would refuse to provide the credit, citing the provisions of the Air Force's own regulation. Similar regulatory reluctance can be anticipated with regard to the Air Force's Environmental Compliance Assessment and Management Program (ECAMP).[148] EPA does allow "accelerated compliance" projects, which it defines as "activities which the defendant/respondent will become legally obligated to undertake two or more

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[143] Revised Policy ¶ B, *supra* note 10.
[144] Endangered Species Act, 16 U.S.C.A. §§ 1531-1534 (1997).
[145] AFI 32-7080 ¶ 2.2.1., *supra* note 107.
[146] *Id.*
[147] Revised Policy ¶ 5.a., *supra* note 10.
[148] AFI 32-7045, *supra* note 93, establishes the Environmental Compliance Assessment and Management Program (ECAMP) to implement DoD's policy to "[c]onduct internal and external compliance self assessments at installations." DODI 4715.6 ¶ D.9, *supra* note 1. The ECAMP is a process to help commanders assess the status of environmental compliance, and to identify and track solutions to compliance problems. AFI 32-7045 ¶ 1.2. Installations are required to implement an ECAMP unless specifically exempted by higher headquarters. *Id.* at 1.1.1. This demonstration of environmental responsibility could inadvertently lead a regulator to reject an assessment or audit that could be encompassed under an installation's ECAMP.

years in the future."[149] The State of New York, on the other hand, is significantly more strict. Its policy specifically precludes the acceptance of any action the violator intended to accomplish (without regard to the ongoing enforcement action) within the next five years.[150] Obviously, that could encompass a much broader range of actions than those that were required by law. EPA's original policy was similarly broad. It provided that a project the violator would undertake for normal business reasons without regard to the existence of an enforcement action could not be a SEP.[151] The current policy does not explicitly rule out such projects, but does state that "the primary goal of SEPs is to secure a favorable environmental or public health outcome which would not have occurred but for the enforcement case settlement."[152] These specific limitations should not prevent an installation from offering the projects as potential SEPs, but can be used to tailor the proposal to address these concerns in advance.

4. Waiver Provision

Certainly it is not possible to anticipate all the circumstances an installation might face in negotiating its environmental penalty liability and considering the possibility of a SEP. For this reason, it is important to ensure that the needed guidance carefully avoids inhibiting the flexibility an installation should exercise to efficiently resolve its liability. This concern has been recognized through this article's recommendations that the installation not be unduly restricted with regard to the timing of SEP negotiations and the amount of penalty mitigation that is realized. Perhaps the most important concern with regard to leaving the installation with the necessary flexibility relates to the selection of the project in question. Unfortunately, this is the area with the greatest potential for abuse of authority and in which an installation can most benefit from guidance. The necessary balancing between these concerns indicates that except where specified (*e.g.*, timing of negotiations and amount of penalty reduction), mandatory guidance be established with the possibility of approval of variances from higher headquarters. The necessary waiver provision will allow an installation to, for instance, seek approval of and ultimately propose a type of project that is not generally approved by the guidance. In order to receive the waiver, such a project will be subjected independently to the same type of evaluation that has been conducted above.

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[149] Revised Policy ¶ B, *supra* note 10.
[150] New York Policy, *supra* note 17.
[151] Original Policy, *supra* note 18.
[152] Revised Policy ¶ E.2, *supra* note 10.

IV. CONCLUSION

Military installations and the military services will benefit greatly from guidance that provides an installation insight on the benefits available through the accomplishment of a SEP, identifies the necessary issues that must be evaluated, addresses some of the resources available, and defines general limitations on an installation's ability to accomplish a SEP. It is anticipated that the guidance will be prescriptive where necessary but will not preclude consideration of projects outside of its parameters. Given the complexity that is created by the sheer number of regulatory authorities military installations could have to deal with, and the significant differences among these regulators, it is beneficial to draft the guidance in a manner that is intended to be limiting. This will avoid the need for higher level review of all potential projects, while exercising the appropriate level of control. It is in this manner that the military services can take the first step to ensuring that any SEP accomplished is within the installation's authority and promotes the best interests of the installation in question and the military service, in general. That is, it will be an important element in the military's effort to efficiently resolve its liability in environmental penalty actions.

A Case Study of Rules of Engagement in Joint Operations: The Air Force Shootdown of Army Helicopters in Operation PROVIDE COMFORT

MAJOR DAWN R. EFLEIN*

> *"Our operational flying missions in support of U.N. peacekeeping have not required special training programs . . . . Pre-mission briefings are sufficient."*[1]

These words, written by Air Force Secretary Sheila Widnall in 1993, proved fatally inaccurate on 14 April 1994. On that date, two United States Air Force F-15 fighters shot down two United States Army UH-60 Blackhawk helicopters in the skies over northern Iraq.[2] The fighters were on a defensive counterair mission as part of Operation PROVIDE COMFORT. Their mission was to ensure that no Iraqi aircraft were flying inside a coalition-imposed no-fly zone, which barred Iraqi military aircraft north of the thirty-sixth parallel. The helicopters were ferrying military personnel and United Nations officials to villages inside of the no-fly zone in support of Operation PROVIDE COMFORT. All twenty-six people on board the two helicopters were killed.[3]

The accident ultimately was attributed to a variety of factors.[4] However, the justifications put forth do not answer the basic, underlying

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[1] Bruce B. Auster, *The Perils of Peacekeeping*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 28, 30 (quoting a memorandum written by Air Force Secretary Sheila Widnall in the Fall of 1993).

[2] *See, e.g., Id.* at 28; John F. Harris & John Lancaster, *Jets over Iraq Mistakenly Down American Helicopters, Killing 26*, WASH. POST, Apr. 15, 1994, at A1; Michael R. Gordon, *26 Killed as U.S. Warplanes Down Two U.S. Helicopters over Kurdish Area of Iraq*, N.Y. TIMES, Apr. 15, 1994, at A1.

[3] *See, e.g.*, Gordon, *supra* note 2. The dead included fifteen Americans, five Kurds, three Turkish officers, two British officers, and a French officer.

[4] Several different factors were found by the Aircraft Accident Investigation Board to have influenced crew members' actions that day, including a "breakdown of clear guidance from the Combined Task Force to its component organizations"; a "lack of clear understanding among the components of their respective responsibilities"; a lack of "consistent and comprehensive [ROE] training"; poor communication; an unqualified AWACS mission crew commander; equipment mistakes or failure; improperly conducted visual recognition passes; and inadequate visual identification training. U.S. AIR FORCE, AIRCRAFT ACCIDENT INVESTIGATION BOARD REPORT: U.S. ARMY UH-60 BLACKHAWK HELICOPTERS, 87-26000 & 88-26020, vol. 2 at 46-48 (27 May 1994) [hereinafter AIRCRAFT ACCIDENT BOARD REPORT].

question of how this tragedy could have happened. The military leadership believed that Operation PROVIDE COMFORT had rules of engagement (ROE) in effect that would prevent precisely this type of scenario. Unfortunately, "[Operation PROVIDE COMFORT] personnel did not receive consistent, comprehensive training to ensure they had a thorough understanding of the ROE,"[5] resulting in a fatal "mission-ROE disconnect."[6]

> The "mission-ROE disconnect" was avoidable. Ironically, Secretary Widnall's perception prior to the shootdown that no special training was required contrasted sharply with that expressed by Defense Secretary William Perry after the shootdown: "[w]hat we have disclosed is deficiencies in the training . . . primarily relative to joint training, joint operations, and operations between fixed-wing and helicopters."[7]

I. INTRODUCTION

Joint and combined operations are the wave of the future. Regional conflicts are increasingly the focus of the United States military, which will likely deploy an integrated, joint force when called on to respond to an international disturbance.[8] Additionally, armed forces are likely to be part of a coalition when engaged in a future war or operation other than war (OOTW).[9] Therefore, success in future operations depends on effective joint and combined training, communications, and interoperability.

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[5] *Id. at* 47 (quoting the Statement of Opinion of Major General James Andrus, Aircraft Accident Investigation Board President, discussing the multiple reasons behind the shootdown).

[6] "Mission-ROE disconnect" refers to circumstances in which the Rules of Engagement, either as promulgated or executed, fail to adequately reflect and consider the military mission at issue or its underlying political policies and goals.

[7] John D. Morocco, *Fratricide Investigation Spurs U.S. Training Review*, AVIATION WEEK & SPACE TECH., July 18, 1994, at 25, 26 (quoting Secretary Perry's discussion of the results of the Accident Investigation).

[8] In discussing the purpose behind the development of Army doctrine on joint operations, the Army's Field Manual on Operations states that "[t]his doctrine recognizes that the Cold War has ended and the nature of the threat, hence the strategy of the United States as well, has changed. This doctrine reflects the shift to stronger joint operations, prompted by the *Goldwater-Nichols Act of 1986.*" U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS vi (June 1993) [hereinafter FM 100-5].

[9] "Any future crisis in which force is used likely will be fought by coalition troops rather than on a unilateral basis." Lieutenant Commander Guy Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4 (citing Waldo Freeman, *The Challenges of Combined Operations*, MILITARY REV., Nov. 1992, at 2). For a good discussion of OOTW, see U.S. ARMY INTERNATIONAL & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL PUB. JA-422, OPERATIONAL LAW HANDBOOK ¶ 13-1 n.3 (1996) [hereinafter OPS LAW HANDBOOK].

This article will focus on ROE in joint operations, using Operation PROVIDE COMFORT as an example.[10] Specifically, it will focus on the devastating consequences of command failure in promulgating ROE, communication, and training in joint operations. It will identify and examine the breakdowns in the ROE that contributed to the Blackhawk shootdown. In the wake of the investigation into the accident, the Air Force asserted that the pilots who fired the two missiles were acting in accordance with the ROE.[11] If true, then the ROE may have been seriously deficient.

To lay the groundwork for the analysis, this article will first outline the purposes for ROE in OOTW, identify three types of ROE, and highlight the differences between them. Next, it will describe the mission, mandates, and command structure of Operation PROVIDE COMFORT, from its inception to its status on 14 April 1994. Within that framework, it will analyze the events leading up to the shootdown, examine the ROE then in effect, and explain how these ROE were understood and implemented at the crew level.[12] Finally, it

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[10] Operation PROVIDE COMFORT was a joint and combined operation. According to the AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 5, the United States Commander in Chief, Europe, directed the creation of a Combined Task Force (CTF) to conduct operations in northern Iraq. CTFs are joint task forces incorporating forces of other nations. Under OPLAN 91-7, CTF PROVIDE COMFORT was organized using a modified joint task force (JTF) structure. *Id.*

[11] *Id.* at 48 (quoting the Statement of Opinion of Major General James Andrus, Board President: "The flight lead, acting within the specified ROE, fired a single missile and shot down the trail Blackhawk helicopter. At flight lead's direction, the F-15 wingman also fired a single missile and shot down the lead Blackhawk helicopter."). Following the accident, the Secretary of Defense ordered an investigation into the causes of the accident. The product of that investigation was a 22-volume report, *supra* note 4. The investigation was conducted in accordance with Air Force Regulation 110-14, Aircraft Accident Investigation (replaced by Air Force Instruction 51-503, Aircraft, Missle, Nuclear and Space Accident Investigations (1 July 1995)). This means that testimony was taken under oath and was available for use against service personnel. No safety investigation was done. *See* David A. Fulghum & Jeffrey M. Lenorovitz, *Iraq Shootdown May Trigger Legal Action*, AVIATION WEEK & SPACE TECH., May 2, 1994, at 18. The Secretary of Defense also ordered an investigation into the ROE; *see* Richard Lacayo, *Deadly Mistaken Identity*, TIME, Apr. 25, 1994, at 50, 51 ("[Secretary of Defense] Perry ordered one investigation into the event and another into the rules of engagement that govern the two no-fly zones in Iraq, as well as the one over Bosnia.").

[12] It is not the author's intention to cast blame or fault upon the individuals whose acts or omissions contributed somehow to the long chain of events that led to the shootdown. Enough of that has been done. *See, e.g.*, *Six Officers Charged in Connection with Blackhawk Shootdown*, SHEPPARD SENATOR, Sept. 15, 1994, at 11; Steven Watkins, *Charges Mount in Shootdown*, AIR FORCE TIMES, Sept. 19, 1994, at 3; Robert Burns, *Career-Ending Reprimands Sent Seven Officers in Iraq Shootdown*, SAN ANTONIO EXPRESS-NEWS, Aug. 14, 1995, at A1; Robert Burns, *Air Force Grounds Five Officers Involved in Friendly Fire Shootdown*, SAN ANTONIO EXPRESS-NEWS, Aug. 15, 1995, at A1. At this juncture, the military is better served by identifying and correcting problems rather than pointing accusing fingers. For this reason, this article will not identify individual crew members by name. It will refer to their crew positions or military ranks when an identifier is necessary.

will identify areas of contention surrounding two critical issues: whether the pilots followed the ROE, and whether the ROE in effect were appropriate.

II. RULES OF ENGAGEMENT IN OPERATIONS OTHER THAN WAR

The United States is engaged in increasing numbers of OOTW. Since the end of Operation DESERT STORM, our Armed Forces have not been engaged in any international armed conflicts, but have actively participated in over forty OOTW.[13] Little settled guidance exists to govern OOTW, partially because OOTW encompass so many different types of operations, and partially because the authority by which the military engages in OOTW varies from one operation to the next. Additionally, each operation can change over time, and the rules by which the military operates must be flexible enough to adapt to these changes. The policies and regulations that apply in OOTW must be responsive to the changing mission requirements of a particular operation.

One of the primary tools that the National Command Authority (NCA) uses to promulgate guidance to commanders and troops in the field is Rules of Engagement. Practically, "[ROE] are the commander's rules for the use of force,"[14] "specify[ing] the circumstances and limitations in which forces may engage the enemy. Many factors influence an operation's [ROE], including national command policy, mission, operational environment, commander's intent, and international law."[15]

Thus, ROE have political, military, and legal purposes.[16] These considerations influence the planning of an operation and guide its development. The ROE place limits on what methods the military can use to accomplish the mission. "Leaders must make important decisions before the operation begins. It is extremely important to determine whether deadly force can be used to protect weapons and equipment and to consider what nondeadly means of force may be appropriate for the situation."[17]

For political reasons, troops may be limited in the amount and type of force that they are permitted to use. The ROE must reflect the national policy as determined by civilian and military leaders. The United States follows courses of action designed to further political goals, and the ROE must be

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[13] Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 3.

[14] OPS LAW HANDBOOK *supra* note 9, ¶ 8-1. *See also* THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02: DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (1989).

[15] FM 100-5, *supra* note 8, at ¶ 2-4.

[16] Captain J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV., Jan.-Feb. 1983, at 46 (stating that "ROE also reflect the influence of operational, political, and diplomatic factors.").

[17] Jonathan T. Dworken, *Rules of Engagement: Lessons from Restore Hope*, MILITARY REV., Sept. 1994, at 26, 33.

tailored to prevent unnecessary escalation.[18] Generally, decisions that impact national policy (like the use of nuclear or chemical weapons) are reserved to the NCA.[19]

Militarily, ROE may actually restrict the manner in which a commander can carry out his mission.[20] They form the outer boundaries that the commander, and his troops, must stay within while trying to accomplish the mission. The ROE guide the troops in the field by delineating the circumstances in which they can use force either to respond to a threat or to accomplish a military objective.[21] The military rationale for limitations on the use of force is to prevent a situation where the United States is unnecessarily seen as the aggressor. In that situation, the opponent may believe that the use of force is essential for its own self-defense, and the conflict can escalate rapidly.[22] "The aggressiveness that is important in wartime operations must be tempered with restraint in the ambiguous environment of peace time operations."[23]

Further, the ROE reflect legal limitations on the use of force. These limitations help to ensure that an operation is accomplished legally in both the domestic and international arenas. An explanation of the lawful use of force, including the parameters of the right to use force in self-defense, eliminates uncertainty, thereby helping the troops to focus on their mission. This frees up the commander to concentrate on achieving his military objective.[24]

An OOTW is fluid and dynamic. Logic dictates that if the political objectives and the military mission change, as they likely will over time, then the ROE should change as well.[25] The longer an operation continues, the more likely it is to change focus, or to become a different OOTW altogether. An OOTW is usually conducted in an environment that is neither strictly peace nor strictly war, but rather in between the two on a continuum. The law that

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[18] Roach, *supra* note 16, at 47.

[19] *Id. at* 47-48.

[20] *See, e.g.*, Commander Mark E. Newcomb, Professor of International and Operational Law, Rules of Engagement, Lecture at The Army Judge Advocate General's School, United States Army (Fall 1996) (outline on file with the International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia) [hereinafter Newcomb Lecture].

[21] THE JOINT CHIEFS OF STAFF, JOINT PUB. 5-00.2, JOINT TASK FORCE PLANNING GUIDANCE AND PROCEDURES, iv-7 [hereinafter JTF PLANNING GUIDE] (forthcoming publication on file with the U.S. Army, Center for Law and Military Operations (CLAMO), The Judge Advocate General's School, Charlottesville, Virginia).

[22] Roach, *supra* note 16, at 49.

[23] JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS 76 (1995) [hereinafter JTF COMMANDER'S HANDBOOK].

[24] Roach, *supra* note 16, at 49.

[25] As one commentator has noted in discussing ROE in OOTW: "In the OOTW environment, the development and promulgation of ROE are much more challenging than in wartime, due to the ambiguous and changing threat conditions." F.M. Lorenz, *Rules of Engagement in Somalia: Were They Effective?*, 42 NAVAL L. REV. 62, 71 (1995).

applies in an OOTW is likewise neither the law of peace nor the law of war. However, the law is the foundation for the ROE; when the ROE are overlaid onto the operational continuum, they must necessarily correlate with the operation's position on the continuum.[26] Over time, the operation can shift from almost a peacetime operation to nearly a wartime operation, or vice versa. As the threat changes, the mission may change, and so should the ROE.[27] "Mission creep" can make the initial ROE obsolete.[28] Further, because of the differences between war and OOTW, "[s]pecialized training is essential for OOTW operations."[29] Given that mission creep will likely change the mission and therefore the ROE, what types of rules should be considered for use in an operation?

III. TYPES OF RULES OF ENGAGEMENT

Prior to 1994, peacetime rules of engagement (PROE) governed peace operations and wartime ROE governed combat operations. The standing rules of engagement (SROE) were promulgated by the Joint Chiefs of Staff in 1994. They are designed to reach across the spectrum from peace to war.[30]

A. Peacetime Rules of Engagement

Some operations are intended to remain within the ambit of "peace": humanitarian assistance and disaster relief, for example. Other operations, although not war, have the potential to escalate into violence. Peacekeeping, antiterrorism, and security assistance are examples of operations in which deployed United States forces may be thrust into a situation in which they will be forced to respond violently.[31] The planners of these types of operations

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[26] The idea for using a "continuum model" to describe OOTW came from Major Richard M. Whitaker, United States Army, Professor of International and Operational Law at The Army Judge Advocate General's School. He has used this model to describe the law that applies to civilians during OOTW. *See* Whitaker, *supra* note 13, at 3.

[27] "Changing threat [conditions require] a formal change to the ROE." Lorenz, *supra* note 25, at 74. *See also* JTF COMMANDER'S HANDBOOK, *supra* note 23, at 76 ("[C]hanges in the threat situation or political situation may dictate a formal change to the ROE and require immediate distribution.").

[28] "Mission creep" is the phenomenon that inevitably happens in a lengthy operation. The initial purpose for intervention is met, (or is not met, and must be modified), while the objective for remaining in the operation changes.

[29] "Operations Other Than War are characterized by restraint in the use of firepower and violence. This stands in contrast to the wartime environment, which places a premium on aggressiveness once the enemy has been identified." Lorenz, *supra* note 25, at 75.

[30] CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994) [hereinafter SROE].

[31] Other examples of operations that may or may not be peaceful include noncombatant evacuation operations, nation assistance, civil disturbance operations, counterdrug operations,

must consider the threat of violence to United States forces. They also must consider whether it is permissible for the troops to use force to accomplish their mission.[32] Generally, PROE[33] limit the use of force by military personnel to defensive reactions. A military member can only use force in response to a hostile act or to a particular demonstration of hostile intent.[34] Peacetime rules of engagement are premised on the right of self-defense.[35] Operational guidance on how to exercise the right of self-defense is not always spelled out in the PROE, but that right is never limited.[36] Rather, PROE "provide guidance" as to when troops can use force to defend foreign nationals, property, and "larger national interests, such as the territory of the United States, or to defend against attacks on other United States forces [under another] command."[37]

Prerequisites to the legitimate use of force in self-defense are necessity and proportionality.[38] "Necessity is the requirement that force be used in

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shows of force, strikes, raids, and support for insurgencies or counterinsurgencies. *See* FM 100-5, *supra* note 8, at 13-4 to 13-8.

[32] If the offensive use of force is contemplated for mission accomplishment, then using wartime ROE, or at the very least, modified peacetime ROE, should be considered. *See* JTF PLANNING GUIDE, *supra* note 21, at iv-7; *see also* Phillips, *supra* note 9, at 22.

[33] For the purposes of this paper, PROE refers to peacetime rules of engagement generally. It is not meant to refer to the old JCS Peacetime Rules of Engagement, JCS SM-846-88 PROE (Oct. 28, 1988), which is commonly referred to as "the PROE."

[34] Roach, *supra* note 16, at 49.

[35] Phillips explains that PROE are based on the "inherent right of self-defense as codified in the U.N. Charter." Phillips, *supra* note 9, at 7. The United Nations Charter recognizes a nation's inherent right to use force to defend itself, as long as the use of force is necessary, and the type of force used is proportional to the threat. That right extends not only to defensive reactions to a first use of force, but also to collective and anticipatory self-defense. Thus, a state can assist another state to defend itself, and a threatened state is not required to "take the first hit" before it may protect itself. The basic requisites of necessity and proportionality still apply. *See* OPS LAW HANDBOOK, *supra* note 9, at 4-2 (explaining that the United Nations Charter proscribes the aggressive use of force), 4-3 (explaining the genesis and parameters of the permissible use of force in self-defense), and 4-6 (discussing self-defense against an imminent attack).

[36] A soldier always has the right to protect himself, and members of his unit, against a hostile act or hostile intent. "[M]ost every [PROE] contains a warning to the effect that 'nothing in these rules is intended to limit the commander's right of self-defense.'" Roach, *supra* note 16, at 49. *See also* JTF COMMANDER'S HANDBOOK, *supra* note 23, at 74 ("ROE cannot interfere with your right and responsibility to protect your force against an actual or imminent threat of attack."). The SROE, *supra* note 30, define the following terms: inherent right of self-defense, national self-defense, collective self-defense, and unit self-defense. *See also* OPS LAW HANDBOOK, *supra* note 9, at 8-15.

[37] Roach, *supra* note 16, at 49. *See also* JTF COMMANDER'S HANDBOOK, *supra* note 23 (describing national self-defense).

[38] Phillips, *supra* note 9, at 12 (citing U.S. DEP'T OF NAVY, COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 9 § 4.3.2 (1987) [hereinafter NWP 9]. *See also* Phillips, *supra* note 9, at 13, 27 n.118 (observing that some commentators

response to a hostile act or in situations in which the hostile intent is evident."[39] Additionally, "necessity also must relate to the requirement to use force because other measures are unavailable"[40] or obviously would be futile. "Proportionality" means that the amount of force used in response to a threat must be of reasonable intensity, duration, and magnitude to counter the threat.[41] On the soldier level, this means that "soldiers will use only the amount of firepower necessary" to respond against the threat.[42] The use of force must be "scaled to the threat" confronting the soldier.[43]

B. Wartime Rules of Engagement

The use of force for offensive purposes, such as to achieve an objective for mission accomplishment, is the subject matter of wartime rules of engagement (WROE).[44] Wartime rules of engagement are governed by the laws of war (or the laws of armed conflict).[45] The primary issues in WROE are targeting and use of weapons.[46]

Wartime rules of engagement can place certain targets off limits and the commander charged with carrying out an operation may not be given the reasons why certain targets are excluded.[47] Often, "target denial" is influenced by political sensitivities.[48] When selecting targets, planners consider the principles of military necessity, unnecessary suffering, proportionality, and

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also believe "immediacy" is a prerequisite to the use of force in collective self-defense, citing DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 2000, 250 (1988)).

[39] Phillips, *supra* note 9, at 12. *See also* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 29-30 (1994).

[40] Phillips, *supra* note 9, at 12 (citing NWP 9, *supra* note 38).

[41] OPS LAW HANDBOOK, *supra* note 9, ¶ 8-19. *See also* Roach, *supra* note 16, at 50 (explaining that the use of force must be limited to that reasonably required to counter the attack or threat of attack. Further, "[i]n peacetime, force may never be used with a view to inflicting punishment for acts already committed.").

[42] Martins, *supra* note 39, at 30.

[43] *Id.*

[44] Phillips, *supra* note 9, at 14, 22 (distinguishing between WROE, which have an offensive mindset, and PROE, which have a defensive mindset). *See also* Roach, *supra* note 16, at 54.

[45] Phillips, *supra* note 9, at 22. *See also* Roach, *supra* note 16, at 54.

[46] *See, e.g.*, Phillips, *supra* note 9, at 14 ("Two issues predominate ROE formulation. The primary issue will be the laws that deal with targeting. The second area of concern involves permissible weapons."). *See also* Newcomb Lecture, *supra* note 20.

[47] W. Hays Parks, Righting the Rules of Engagement 83, 90, Address at U.S. NAVAL INSTITUTE PROCEEDINGS (May 1989) (on file with author).

[48] *Id.* (discussing tactics used in Vietnam whereby American Prisoners of War would be moved into likely military target areas to preclude United States airstrikes on valuable parts of Hanoi's infrastructure).

discrimination between combatants and noncombatants.[49] Attacks on civilian noncombatants are never permitted, and care should be taken when choosing targets to minimize collateral civilian casualties and destruction of property that is not essential to the enemy's military efforts.[50] Valid military targets are generally those that "make an effective contribution to the enemy's military effort, and [whose] destruction offers a definite military advantage."[51] Numerous treaties prohibit or limit the use of certain weapons, even in war. For example, the Geneva Protocol of 1925 prohibits the use of "asphyxiating, poisonous, or other gasses" during war.[52] If conventional international law does not proscribe the use of certain weapons, the WROE may still limit the commander's use of the weapons because of "political sensitivities."[53]

C. The Joint Chiefs of Staff Standing Rules of Engagement

For United States forces, the concepts of PROE and WROE have been merged doctrinally into the standing rules of engagement (SROE):[54] "[t]he purpose of the SROE is to provide implementation guidance on the inherent right of self-defense and the application of force for mission accomplishment" within the bounds of the United Nations Charter and international law.[55] The SROE is how the NCA delivers its guidance to the soldiers in the field. It is a compilation of "standing rules and policies which apply, unless superseded, in 'peacetime, transition to war, and wartime.'"[56] The SROE "can be easily and quickly amended or clarified by mission-specific [ROE]."[57]

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[49] OPS LAW HANDBOOK, *supra* note 9, ¶ 18-1, 18-2 (discussing generally what is prohibited under the law of war. The selection of proper targets must also involve an understanding of exactly what constitutes a "valid military objective.").

[50] *Id.* ¶ 18-2 (explaining the concept of proportionality as "[t]he loss of life and damage to property incidental to military action must not be excessive in relation to the concrete and direct military advantage expected to be gained.").

[51] *Id.*

[52] *Id.* ¶ 18-3. The United States has been a party to the Protocol since 1975.

[53] Parks, *supra* note 47, at 93. *See also* INTERNATIONAL & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL , U.S. ARMY, OPERATIONAL LAW DESKBOOK, at 9-28 (1996) [hereinafter OPS LAW DESKBOOK]. An example of this type of limitation in a WROE is the domestic prohibition on the use of riot control agents and herbicides. *See, e.g.*, OPS LAW HANDBOOK, *supra* note 9, ¶ 18-3, 18-4 (discussing Executive Order 11,850 and its interplay with the new Chemical Weapons Convention that the United States signed in 1993, but which has not been ratified. Executive Order 11,850 requires Presidential approval of riot control agents and herbicides before first use in armed conflict.).

[54] SROE, *supra* note 30. Although the Joint Chiefs of Staff promulgated the SROE in October, 1994, after the shootdown that is the focus of this article, the SROE still provide an important conceptual model that can be used to understand the shootdown.

[55] OPS LAW HANDBOOK, *supra* note 9, ¶ 8-4.

[56] *Id.*

[57] JTF PLANNING GUIDE, *supra* note 21, at iv-8.

The SROE is a good example of how ROE can be envisioned along an operational continuum, with peace at one end of the continuum and war at the other.[58] The SROE provides a variable mechanism that changes as the operation's position on the continuum changes. For operations that are inherently peaceful, the SROE allows the use of force for defensive purposes and only in reaction to a hostile act or clear indication of hostile intent.[59] For hostile operations approaching war, on the other end of the continuum, the SROE still provides for the use of force defensively, but also delineates when offensive force may be used. The supplemental rules give targeting and weaponry restrictions, consistent with the principles of domestic and international law, political objectives, and the mission. The numbered supplemental measures and enclosures allow tailoring of the ROE to a particular operation; the commanders can pick and choose from an array of measures to find the provisions that should apply to their particular operation, or phase of an operation.[60]

The SROE defines many of the key terms that are related to ROE, including "hostile act" and "hostile intent," as discussed above. It explains that the defensive use of force in response to a hostile act or clear evidence of a hostile intent is permitted, within the bounds of necessity and proportionality. The SROE, however, goes further, defining "hostile force" as "[a]ny force or terrorist unit (civilian, paramilitary, or military), with or without national designation, that has committed a hostile act, demonstrated hostile intent, or has been declared hostile."[61] The SROE explains that "[o]nce a force has been declared hostile by appropriate authority, U.S. units *need not* observe a hostile act or a demonstration of hostile intent before engaging that force."[62] Thus, once a force has been declared hostile, it is "the enemy," and the basis for engagement is status alone.[63] A status-based ROE is one "in which pre-

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[58] *See supra* note 26 and accompanying text.

[59] SROE, *supra* note 30. Enclosure A of the SROE, which is unclassified, defines national, unit, and individual self-defense.

[60] JTF PLANNING GUIDE, *supra* note 21, at iv-8.

[61] SROE, *supra* note 30.

[62] *Id. at* encl. A, ¶ 6 (emphasis added). Paragraph 6 goes on to state:

> The responsibility for executing the right and obligation of national self-defense and declaring a force hostile is a matter of the utmost importance demanding considerable judgment of command. All available intelligence, the status of international relationships, the requirements of international law, the possible need for a political decision, and the potential consequences for the United States must be carefully weighed.

Id. See Martins, *supra* note 39, at 27 (discussing the idea that once a force has been declared hostile, the PROE are effectively changed into WROE).

[63] *See, e.g.*, Martins, *supra* note 39, at 27; Newcomb Lecture, *supra* note 20.

declared enemy forces may be shot on sight."[64] For policy reasons, the NCA limits a commander's authority to declare forces hostile to circumstances akin to war.

The basic SROE is written to govern all military operations.[65] Depending on the nature and mission of an operation, some or all of the supplemental measures may be implemented, allowing the commander to pick and choose from predetermined lists of available options. The farther an operation moves on the operational continuum from peace toward war, the more likely it is for commanders to add some of the specific enabling measures from the lists in the enclosures. The converse is also true. Once a war (or hostile operation) is over, if United States forces are withdrawing from the region, the ROE should shift to incorporate more restrictive supplemental measures. The shift should be designed to approach the generic SROE. Ideally, by the time United States forces conclude an operation, they will do so under the "basic" SROE.

As an operation changes, the ROE should be reviewed periodically to see if they still make sense. Otherwise, the ROE will not be properly tailored to the mission.[66] In an inherently hostile operation such as a military strike or raid, the offensive use of force may be justified.[67] The offensive use of force may be limited by concerns for safety of friendly forces,[68] or curtailed by

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[64] U.S. ARMY, CLAMO, THE JUDGE ADVOCATE GENERAL'S SCHOOL, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES, 35 (1995).

[65] The SROE is divided into three enclosures. Each enclosure gives guidance on when and how force may be used. *See* OPS LAW HANDBOOK, *supra* note 9, ¶ 8-4. Enclosure A is the SROE itself and it is unclassified. It explains the procedures and policies for the defensive use of force. It is supplemented by two enclosures, labeled "B" and "C." Enclosure B describes how to supplement Enclosure A when more specific guidance is needed. It also contains specific supplemental rules that can be adopted for use in contingencies. These supplemental rules govern when force can be used offensively; that is, for mission accomplishment. It is classified "secret." Enclosure C, also classified "secret," contains ROE for specific areas of responsibility. These latter rules are promulgated by the combatant commanders in charge of the different regions of the world, and are approved by the JCS. In addition to the three enclosures, a number of appendices contain specific details about air, land, and sea operations, and some of the specific types of OOTW. *See id*, at 8-5 (stating that guidance in the appendices and annexes also cover counterdrug support operations, noncombatant evacuation operations, and peace operations). This allows commanders of particular types of forces to include material applicable to their particular operation into their rules of engagement.

[66] Harry L. Heintzelman, IV, & Edmund S. Bloom, *A Planning Primer: How to Provide Effective Legal Input into the War Planning and Combat Execution Process*, 37 A.F. L. REV. 5, 18 (1994) (discussing tailoring the ROE: "[r]ules of engagement must be tailored to take into account the military posture of the forces utilizing them and the various contingencies they might face.").

[67] Martins, *supra* note 39, at 29 n.84 (referring to U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 4 (July 1956), which states that during war, "military necessity" is the principle that "justifies those measures not forbidden by international law which are indispensable for securing the complete surrender of the enemy as soon as possible.").

[68] Phillips, *supra* note 9, at 23.

commanders concerned about subjecting United States troops to the risk of capture,[69] but it is still permitted. However, the offensive use of force should be restricted as the operation shifts toward peace. For example, after the Gulf War ended, the United States and its coalition partners still had troops in Kuwait and Iraq which could have been attacked by Iraqi Republican Guards. At some point, the focus on using offensive force had to be modified, because the military and the political missions had been accomplished. The use of force parameters changed because the United States was trying to get out of the war and not escalate its involvement.

IV. MISSION AND MANDATES OF OPERATION PROVIDE COMFORT

Operation PROVIDE COMFORT was no exception to the general rule that the mission and objectives of OOTW change over time. Following the coalition victory in Operation DESERT STORM, Kurdish factions in northern Iraq and Shiite factions in southern Iraq rebelled against the Iraqi government.[70] The Iraqi army rapidly and violently quelled this insurgency. As a result, more than five hundred thousand Kurds were forced to become refugees; they had no property left, and feared for their lives.[71] They fled into Turkey, Iran, and the mountains of Iraq.[72]

> During the Gulf War, the air forces were controlled strictly for safety reasons. [T]wo independent electronic identifications had to be obtained before an engagement was authorized. [T]he ROE had to take into account the technical disparities between platforms. [T]he concerns for downing a friendly or neutral aircraft restrict[ed] the employment of firepower where two electronic identifications or a visual confirmation had not been made.

Id.

[69] Parks, *supra* note 47, at 90.

[70] Timothy P. McIlmail, *No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq,* 17 LOY. L.A. INT'L & COMP. L.J. 35, 48 (1994). *See also* Commander Mark E. Newcomb, Professor of International and Operational Law, Seminar: United Nations and the Use of Force, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (Fall 1996) (on file with the International & Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia) [hereinafter Newcomb Seminar].

[71] *See* Office of Assistant Secretary of Defense for Public Affairs, Fact Sheet: Operation PROVIDE COMFORT–Background Information (July 13, 1994), in connection with the twenty-two volume Accident Investigation Report, *supra* note 4 (on file with the Center for Law and Military Operations, The Judge Advocate General's School, Charlottesville, Virginia) [hereinafter Fact Sheet].

[72] *Id.*

A. The Beginning of Operation PROVIDE COMFORT

On 5 April 1991, the United Nations Security Council condemned Iraqi repression of the Kurds and Shiites. This was followed by the Security Council's adoption of Resolution 688, which demanded that Iraq cease this repression.[73] President Bush began Operation PROVIDE COMFORT in April by tasking the United States military to provide emergency humanitarian aid to the Kurds.[74] The United States and some of its coalition partners[75] established a "security zone" in northern Iraq. To ensure the safety of the security zone, the United States implemented a no-fly policy for all Iraqi aircraft north of the 36th parallel.[76] The purpose of the no-fly zone was to prevent Iraqi aircraft from getting close enough to threaten or harm the Kurds located within the security zone, and also to protect the coalition aircraft that was delivering humanitarian assistance. As the humanitarian relief effort progressed, the

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[73] S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 1, U.N. Doc. S/RES/688 (1991). states in relevant part:

> The Security Council . . .
> 1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;
> 2. *Demands* that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression . . . ;
> 3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operation . . . ;
> . . .
> 5. *Requests further* the Secretary-General to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population;
> 6. *Appeals* to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts . . . .

[74] *Id. See also* McIlmail, *supra* note 70, at 48; Fact Sheet, *supra* note 71.

[75] The coalition was composed of the United States, Britain, France and Turkey. Fact Sheet, *supra* note 71.

[76] *See* McIlmail, *supra* note 70, at 48-50:

> On April 10, 1991, the United States announced that France and the United Kingdom would join in the imposition of a no-fly zone over Iraqi territory north of the 36th parallel . . . . The coalition claimed that Resolution 688 authorized the imposition of a no-fly zone over northern Iraq in order to force compliance with the Security Council demand that Iraq stop repressing its civilian population. Resolution 688, however, did not itself establish any flight ban. Nor did the Resolution authorize Member States to enforce the demand that Iraq cease its repression of civilians.

Id.

mission changed to protection of the Kurds within the security zone.[77] The military's focus thus became deterrence of Iraqi encroachment into the security zone.

B. History of Operation PROVIDE COMFORT from 1991 to 1994

In the three years of PROVIDE COMFORT operations before the shootdown, coalition aircraft flew daily missions in the tactical area of responsibility (TAOR).[78] During that period:

> Iraqi forces would test coalition resolve by probing the no-fly zone with Iraqi aircraft, illuminating coalition aircraft with 'fire control' radars, and firing on friendly forces. Coalition forces have responded by shooting down an Iraqi MiG-23 and bombing of Iraqi anti-aircraft artillery and surface-to-air missile sites. Kurdish refugees within the security zone have been harassed and UN relief trucks have been sabotaged by Iraqis. On 21 Dec 93, a small contingent of coalition personnel were fired upon as they left their support base in Zakhu, Iraq. In March 1994, Saddam Hussein publicly stated that he would be "forced to take other means" in response to renewed United Nations sanctions. Non-government organization personnel have had bounties placed on their heads. On 3 Apr 94, a female civilian journalist employed by a French news agency was murdered in northern Iraq by unknown assailants. Iraqi forces have maintained a capability to attack coalition personnel and the local Kurdish population. Tensions have remained strong in the area and coalition aircrews have operated at a high state of readiness.[79]

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[77] *See, e.g., id.; see also* Colonel Philip A. Meek, *Operation PROVIDE COMFORT: A Case Study in Humanitarian Relief and Foreign Assistance*, 37 A.F. L. REV. 225, 236 (1994); Christopher M. Tiso, *Safe Haven Refugee Programs: A Method of Combating International Refugee Crisis*, 8 GEO. IMMIGR. L.J. 575, 579 (1994).

[78] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 2.

[79] *Id.*

C. Command and Control Structure

After the NCA authorized Operation PROVIDE COMFORT, the commander-in-chief of Europe (CINCEUR) "directed the creation of a combined task force (CTF) to conduct operations in northern Iraq" with Operation Order (OPORD) 003.[80] In response to OPORD 003, the CTF commanding general (CTF CG) developed Operational Plan (OPLAN) 91-7,[81] which delineated the command structure and organizational responsibilities within the CTF.[82]

The CTF was commanded by an Air Force Brigadier General and headquartered at Incirlik Air Base, Turkey. Operational Plan 91-7 put United States Army assets under the operational control of the CTF CG.[83] This operational plan governed the task force from 20 July 1991 until 14 September 1991.[84] On that date, CINCEUR issued a new operations order, OPORD 004. The new order "directed the withdrawal of the [Operation PROVIDE COMFORT] Battalion Task Force," the deactivation of the Combined Forces Ground Component headquarters, and "an increase in the size of the CTF air forces."[85] The withdrawal of the Battalion Task Force significantly decreased the United States Army assets in Operation PROVIDE COMFORT. The helicopter assets that remained were based with the Military Coordination Center (MCC) at Diyarbakir, Turkey.[86] They were still under the operational control of the CTF CG. The CTF CG was also responsible "for all cross-border operations, both air and ground, into Iraq."[87]

The Combined Forces Air Component Commander (CFACC) was in charge of air operations. He was tasked with tactical control (TACON) over all Operation PROVIDE COMFORT flying missions operating within the

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[80] *Id. at* 3, 4. *See also* OPS LAW HANDBOOK *supra* note 9, at 6-1 for an explanation of OPORDs. Basically, an OPORD directs how to conduct a contingency plan.

[81] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 4. As Heintzelman & Bloom explain, "an OPLAN details the strategy and methods of operation developed by a combatant command to accomplish its assigned objectives. It also identifies the forces and logistics necessary to successfully execute the plan and it includes a strategic movement plan to project those resources into the theater of operations." Heintzelman & Bloom, *supra* note 66, at 9.

[82] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 5 ("[u]nder OPLAN 91-7, CTF PROVIDE COMFORT was organized using a modified joint task force (JTF) structure."). *See also* Fact Sheet, *supra* note 71 ("[T]he task force staff consist[ed] of members from all participating nations, and parallel[ed] a joint command structure.").

[83] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 5 (explaining that operational control (OPCON) is the authority to command subordinate forces, assign tasks, designate objectives, and give authoritative direction necessary to accomplish the mission).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

TAOR.[88] "This included tactical control of the Blackhawk, AWACS, and the F-15 aircraft involved in the accident."[89]

V. 14 APRIL 1994: THE SHOOTDOWN

At 0436 hours on 14 April 1994, an E-3B Airborne Weapons and Control System (AWACS) departed Incirlik Air Base, Turkey, enroute to the area of responsibility. The first of all the coalition missions to take off, it was required to establish a computer data link with the ground, ensure all systems were operational with radar surveillance capability, and fly to its predetermined orbit before any other coalition aircraft could depart.[90] This specific AWACS crew was on its first mission in theater, having arrived in country just three days before.[91]

At 0522 hours, two UH-60 Blackhawk helicopters (call signs "Eagle 01" and "Eagle 02") departed Diyarbakir, Turkey, enroute to the MCC headquarters, located in Zakhu, Iraq. At 0612, the helicopter pilots radioed the AWACS that they were crossing the border into Iraq; they landed at Zakhu six minutes later. Zakhu is in the "no-fly" zone, and well within the security zone established by the coalition. The helicopters were picking up passengers for an administrative flight outside of the security zone and were going deeper into the no-fly area than usual to introduce the new MCC commander to United Nations and Kurdish representatives in the towns of Salah Ad Din and Irbil.[92]

At 0635 hours, two Air Force F-15C fighters (call signs "Tiger 01" and "Tiger 02") took off from Incirlik, after being informed that the E-3B AWACS was in its surveillance orbit. Their mission was defensive counterair; they

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[88] *Id. at* 6. *See also* FM 100-5, *supra* note 8, at 4-2 (defining TACON as "the detailed, and usually local, direction and control of movements and maneuvers necessary to accomplish missions and tasks."); Fact Sheet, *supra* note 71 (stating that "TACON also provides the authority to direct military operations and control designated forces.").

[89] Fact Sheet, *supra* note 71. AWACS is the acronym for Airborne Weapons and Control System.

[90] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 14.

[91] *Id. at* 42. *See also* Article 32, UCMJ, Report, Investigating Officer Exhibit 52 (copy on file with author) [hereinafter ART. 32 REPORT] (testimony of the tactical area of responsibility weapons director to Aircraft Accident Board). The Article 32 investigation was conducted at Tinker Air Force Base, Oklahoma, from 11 Oct. 1994 to 10 Nov. 1994, at the direction of Lieutenant General Stephen Croker, Commander, 8th Air Force. This joint hearing was convened to investigate the criminal charges preferred against the four AWACS crew members and the Airborne Command Element. The investigation was conducted by Colonel William S. Colwell. The TAOR weapons director, a second lieutenant, was on his first mission ever in an operational theater or a combat support area. He had completed his training in February 1994.

[92] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 14. The no-fly area was all of Iraq that extended north of the 36th parallel. The security zone was a small subset of the no-fly area. Geographically, it encompassed Zakhu and the small Kurdish villages located near Zakhu.

"were tasked to perform an initial fighter sweep of the no-fly zone to clear the area of any hostile aircraft prior to the entry of coalition forces."[93] According to their directives, when they performed this "sanitizing sweep," they were supposed to be the first coalition aircraft into the TAOR. After the fighters had ensured that the area was safe, the rest of the coalition "package" from Incirlik would follow them in to begin their missions inside of the no-fly area.[94]

At 0654 hours, the two Blackhawk helicopters took off from Zakhu. They radioed the AWACS, and gave their destinations on the enroute radio frequency.[95] Although directives stated that all aircraft inside the TAOR should be on the area of responsibility (AOR) radio frequency, they did not switch frequencies.[96] Despite the contrary directive, helicopters typically stayed on the enroute frequency, and no one on board the AWACS directed them to change.[97] Because the helicopters remained on the enroute frequency, they were not able to hear subsequent transmissions on the AOR frequency between the F-15 fighters and the AWACS.

Additionally, the Blackhawks did not reset their IFF[98] Mode I transmission on takeoff from Zakhu.[99] Helicopters had a specified Mode I for

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[93] *Id*. vol. 1 at 3.

[94] *Id.* vol. 2 at 7 (stating "OPC [Operation PROVIDE COMFORT] daily flight operations are scheduled as mission packages. A typical package consists of a wide variety of aircraft with specific mission capabilities."). On 14 April 1994, the coalition package was to consist "of 52 OPC aircraft, of which 28 were to be airborne by 0800Z." *Id. at* 10.

[95] *Id. at* 16.

[96] "[T]he [Airspace Control Order] directed the helicopters to monitor the area of responsibility frequency." ART. 32 REPORT, *supra* note 91, vol. 1 at 34.

[97] "Four Eagle Detachment helicopter pilots testified that their standard procedure was to stay on the enroute frequency. These pilots included a commander, standardization instructor pilot, and another flight instructor." *Id.* The majority of their operations only went as far east as Zakhu, and then they would turn around and go back into Turkey. Therefore, they were accustomed to operating only in accordance with the rules applicable outside the TAOR. *Id. See also* AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 16 ("Neither the enroute controller nor the senior director instructed the Blackhawk helicopters to change from the enroute frequency to the TAOR clear frequency that was being monitored by the TAOR controller.").

[98] "IFF" is an acronym for Identification Friend or Foe system. Its complexities are beyond the scope of this article. It has four modes that can be set with different codes so that one friendly aircraft can identify another friendly aircraft electronically via air-to-air interrogation. Mode I is used for identification; coalition fixed wing and rotary wing aircraft had separate Mode I codes they were supposed to "squawk" in Turkey. Once they got inside of Iraq, all coalition aircraft were supposed to change their Mode I to the same squawk. Mode II is a unique signature; it differs for every aircraft. When an individual believes that he has identified a friendly aircraft, he can dial in that aircraft's specific Mode II and interrogate it to confirm his identification. (It is primarily used so aircraft can find the proper tanker for air-to-air refueling.). Mode III was not to be used inside Iraq, so it is not relevant here. Mode IV was encrypted, classified, and loaded during preflight. It should have been the same for all coalition aircraft whether they were in Turkey or Iraq. *See generally* ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143a at 5, 6 (testimony of the F-15 flight lead).

operations in Turkey but all coalition aircraft were supposed to change to a single, designated Mode I while flying in the TAOR.[100] Again, the helicopters did not know to change their Mode I squawk, because they customarily remained on the Mode I for Turkey,[101] and no one on the AWACS directed the helicopters to change.[102]

Further, there is no evidence that anyone on the AWACS interrogated the Blackhawks' IFF Mode IV. The Airborne Weapons and Control System was supposed to check the Mode IV of all aircraft as they entered Iraq, but many AWACS crewmembers did not believe that requirement applied to helicopters.[103] The F-15s would ultimately interrogate the Blackhawks' IFF Modes I and IV, and because they were not set properly, the fighters got no electronic friendly response.

At 0720 hours, the F-15 flight lead reported entering Iraq to the TAOR controller on the TAOR radio frequency.[104] The two F-15s began their sweep of the no-fly zone. No one on the AWACS told the fighters about the helicopters[105] and the helicopters were not on the Air Tasking Order (ATO) nor were they on the fighters' flow sheet.[106] Neither of the F-15 pilots knew that any Army helicopters were operating in the TAOR.[107]

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[99] "The helicopters' transponders were operational and transmitting Mode I, code 42 after departing Zakhu, inside the TAOR." AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 26.

[100] "Mode I, code 52 was specified in the [Air Tasking Order] for all aircraft operating inside the TAOR." *Id.*

[101] "Helicopter pilots assigned to the Blackhawk unit were not aware that the ATO specified separate transponder Mode I codes for operating inside and outside of the [TAOR]. The unit had routinely flown in the TAOR using the Mode I code designated for use outside the TAOR." *Id. at* 25. *See also supra* note 97 and accompanying text.

[102] "The senior director did not know if the helicopters' Mode I was supposed to change upon entering the area of responsibility . . . Numerous other AWACS members did not know of a duty to direct the helicopters to change Mode I squawk." ART. 32 REPORT, *supra* note 91, vol. 1 at 33. The AWACS used Mode I for identification purposes. When the Blackhawks departed Zakhu, AWACS already had identified them and they had no reason to check the Blackhawks' Mode I.

[103] "By standard practice and procedure, there was no duty to provide IFF checks to helicopters . . . . [H]elicopters were not considered as 'aircraft' under the [OPC] package." *Id. at* 58

[104] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 17. Note that the helicopters remained on the enroute frequency. *See also supra* note 97 and accompanying text.

[105] Due to the mountainous terrain, "at this time, the AWACS mission crew did not have radar or IFF contact with the Blackhawk helicopters." AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 17.

[106] The "flow sheet" was the aircrews' "principal planning tool." It is on a kneeboard that the pilots refer to inflight for an abbreviated ATO. It is supposed to contain all relevant mission information along with specific information on all aircraft that are authorized to operate inside the AOR. *Id. at* 11.

[107] *Id. at* 47.

At 0722 hours, the flight lead reported a radar contact of a low, slow moving aircraft.[108] He gave the AWACS TAOR controller the coordinates of the contact. The TAOR controller, unaware of the Blackhawks' earlier transmissions on the enroute frequency, responded with "clean there," meaning that he had nothing on his radarscope at those coordinates.[109] Both F-15 pilots attempted to electronically identify the two helicopters; each was unsuccessful.[110] The flight lead "initiated an intercept to investigate."[111]

Closer now, the flight lead again indicated the position of the unknown aircraft to the AWACS TAOR controller. The controller responded with "hits there,"[112] which meant that the controller had a radar contact at that location. However, evidence indicates that he may actually have had IFF returns at that spot on his scope, and the appropriate response would have been "paints there."[113] The proper call should have indicated to the F-15s that the AWACS was getting a friendly IFF return from the unknown aircraft.[114]

After receiving the impression that the AWACS also had unknown aircraft on its radar, the flight lead continued with the visual identification as indicated in the Aircraft Accident Board Report:

> As the flight lead approached within 5 nautical miles of the unidentified aircraft, he saw a single helicopter flying at a very low altitude. The flight lead began his [visual identification] pass at approximately 450 knots indicated airspeed. The helicopter was flying . . . approximately 120 to 200 feet above the ground [in a valley that had hills on either side that were

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[108] *Id. at* 21.

[109] *Id.* At that time, the scopes of the AWACS mission crew did not indicate any radar or IFF contact. The helicopters would frequently take advantage of the mountainous terrain to mask them from detection on Iraqi radar.

[110] *Id.*

> Using his [Air to Air Interrogator system], with his radar in the search mode, the flight lead again interrogated the radar contact for IFF Mode I and Mode IV codes. No response was received. Simultaneously, the wingman lowered his radar search pattern [onto the radar contact and locked on]. He then interrogated the radar contact for IFF Mode I and Mode IV codes, with no response.

Id.

[111] *Id.* vol. 1 at 3. *But see Id.* at 21 (stating that flight lead's initial Mode IV interrogation received a "momentary Mode IV response." Because the response was so brief, instantly changed to "no response," and was not repeated in either of his two subsequent interrogations, the flight lead thought that the positive response was due to an anomaly in his aircraft's Air-to-Air Interrogation system.).

[112] *Id.* vol. 2 at 22.

[113] *Id. at* 18.

[114] *Id*. *See also* ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143a.21 & 143.32, flight lead's testimony that, "Paints . . . means Friendly IFF response . . . . A Paint is a code word for a friendly interrogation."

> between 1,500 and 3,000 feet elevation]. In an attempt to make a visual identification, the flight lead descended below the tops of the hills and flew to a [reported] position of 1000 feet left and 500 feet above the helicopter's flight path. . . . [As he started to climb and turn right] he saw a second helicopter in trail . . . .[115]

The lead F-15 pilot visually misidentified the lead Blackhawk as an Iraqi Hind helicopter.[116]

As the flight lead pulled up to get back into formation, he noticed the second helicopter.[117] Because of his distance and speed, he did not get a good look at this second helicopter.[118] He reported to his wingman that he had seen two Iraqi Hind helicopters and requested confirmation. Although he requested confirmation, he was positive that he saw Iraqi Hinds. This identification was based on their location within the TAOR, lack of electronic response despite repeated queries, their camouflage paint scheme, and their silhouettes.[119] He never thought that they might be Blackhawks, even though he had had prior experience with Army helicopters and with Blackhawks in particular.[120]

The lead pilot's costly misidentification occurred in spite of critical differences between Iraqi Hind and United States Blackhawk helicopters. United States Blackhawks were painted in a dark green camouflage scheme, while Iraqi Hinds camouflage is desert tan.[121] Blackhawks are a multi-purpose helicopter while the Hind is primarily an attack platform. The silhouettes, however, were misleading as the Blackhawks were equipped that day with external fuel tanks to give them longer range. The flight lead mistook those external tanks, which were mounted on sponsons, for the ordnance sponsons characteristic of the Hind.[122] Finally, the lead pilot properly queried the IFF Mode I for the squawk designating A/C used inside the TAOR, but the

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[115] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 22.
[116] *See generally id.* vol. 1 at 3.
[117] *Id.* vol. 2 at 22.
[118] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143.22 (testimony of flight lead to Accident Board).
[119] *Id. at* 143.21.
[120] *Id. at* 143.43; *see also id.* Investigating Officer Exhibit 143.28. The flight lead had served a tour as a forward air controller, in which he served as a battalion liaison officer for the Army. He had seen numerous Blackhawks, never with sponsons (which are gun turrets or platforms projecting on either side of an aircraft). He had also jumped out of Blackhawk helicopters. Additionally, he had also intercepted a United Nations helicopter in Bosnia, which he had not shot down. *Id. at* 143.54.
[121] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 40.
[122] "Neither pilot had received recent, adequate visual recognition training. The pilots did not recognize the differences between the US Blackhawk helicopters with wing-mounted fuel tanks and Hind helicopters with wing-mounted weapons." *Id. at* 47.

Blackhawks were still transmitting the IFF Mode I for Turkey. Therefore, the F-15 lead received no response.[123]

The wingman then "conducted a [visual identification] pass (approximately 2000 feet right) of the trailing helicopter."[124] He saw two helicopters, but did not see them closely enough to positively identify them himself.[125] He also believed that they were Iraqi Hinds; he saw nothing to make him doubt the flight lead's visual identification.[126] He reported "tally two," to indicate that he had seen two helicopters. At about the same time, the AWACS TAOR controller radioed "copy Hinds," to indicate that he had heard flight lead's transmission.[127] The flight lead took the wingman's response as confirmation, not only of the number, but also of the type of helicopters.[128]

At about 0729 hours, having "positively identified" the "unknown" aircraft as Iraqi military aircraft flying in the no-fly zone, the flight lead maneuvered into position to engage. He radioed the AWACS and notified them that the fighters were "engaged."[129] At the time, the AWACS crew did not know whether the pilots were offensively or defensively engaged. The pilots were not required to obtain clearance from AWACS before engaging, nor were they required to warn the target.[130] The flight lead simultaneously armed his missile in preparation for launch.[131] At 0730, the flight lead

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[123] *Id.* Interrogation of IFF Mode 1 is a single-read test. The F-15 pilot dials in the code that friendly aircraft are supposed to be squawking, and electronically interrogates the unknown contact. A friendly aircraft that is squawking the proper Mode 1 "answers" the interrogation with an electronic signal. An aircraft that does not respond is an "unknown" or "hostile." In this case, the F-15 lead pilot interrogated for the code used inside the TAOR, but got no response because the Blackhawks' Mode 1 was still set for outside the TAOR.

[124] *Id. at* 22.

[125] *Id.*

[126] F-15 wingman's testimony to the Aircraft Accident Investigation Board: "I never came out and [positively identified them as Hinds]. I came in on that ID pass--I saw the high engines, the sloping wings, the camouflaged body, no fin flashes or markings, I pulled off left, I called 'Tally Two.' I did not identify them as hostile--I did not identify them as friendly. I expected to see Hinds based on the call my flight leader had made. I didn't see anything that disputed that." ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 57.25.

[127] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 1 at 4; vol. 2 at 18, 22-23.

[128] Flight lead's testimony to the Aircraft Accident Investigation Board: "Then soon after that, there's this call that says 'affirmative.' I don't know if it was, 'affirmative Hind,' 'affirmative VID'–but the gist of it, yes, they're Hinds. That was from Tiger 2." ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143.22.

[129] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 22-23.

[130] The AWACS crew could not hear the conversation from the flight lead to his wingman over the pilots' auxiliary radio, in which the flight lead gave instructions to "arm hot," told his wingman that he would shoot the trail helicopter, and directed his wingman to shoot the lead helicopter. *See, e.g., id.* vol. 2 at 18, 22. *See also infra* note 212 and accompanying text. AWACS clearance was not required. The pilot's comment was not a request for permission; it was an indication of his intent to fire. *See* AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 22.

[131] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, at 22-23.

attempted one final electronic interrogation of the trail helicopter, and got no response.[132] He then fired an AIM-120 radar-guided missile at the trail helicopter from approximately four nautical miles away. The trail helicopter was destroyed seven seconds later.[133]

The wingman, acting on his lead's direction, maneuvered to two nautical miles behind the lead helicopter. He locked on, and fired an AIM-9 heat-seeking missile from a distance of about 9000 feet.[134] The missile struck the target and destroyed it.[135]

VI. COMMAND DEFICIENCIES THAT CONTRIBUTED TO THE SHOOTDOWN

The Accident Board found that the shootdown "was caused by a chain of events which began with the breakdown of clear guidance from the Combined Task Force to its component organizations [which] resulted in the lack of a clear understanding among the components of their respective responsibilities."[136] To ascertain exactly where and how the breakdown occurred requires an examination of the Combined Task Force's (CTF) guidance.

A. Outdated Guidance from the Combined Task Force

The guidance that the CTF furnished to the squadrons and the helicopter detachment was outdated. The large majority of the coalition forces, and all United States Air Force assets, were based at the CTF headquarters, Incirlik, Turkey.[137] Although CINCEUR had requested a support plan to implement OPORD 004 in September of 1991,

> no evidence could be found to indicate that OPLAN 91-7 was actually updated to reflect the change in command and control relationships and responsibilities that resulted from the departure of the previously designated CTF Ground Component Commander and his forces. OPLAN 91-7 remained in effect at the time of the accident.[138]

It is significant that command and control was based on three-year-old guidance; no one was responsible for integrating the helicopters into the

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[132] *Id. at* 23.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id. at* 46 (statement of Opinion of Major General James G. Andrus, Board President).
[137] Fact Sheet, *supra* note 71.
[138] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 5.

PROVIDE COMFORT mission. No viable communication system was operable between the Military Coordination Center and the F-15 squadrons.[139]

B. Inadequate Communication from the CTF to its Components

1. The air tasking order was deficient

The Combined Forces Air Component Commander's deputy (CFAC DO) was required to publish a daily ATO that listed all Operation PROVIDE COMFORT flights for that day.[140] The ATO contained the order of flying activity within the TAOR, detailing radio frequencies and IFF data for each aircraft.[141] The fighter squadrons used the ATO as the definitive guide for activity within the TAOR.

The Army helicopters were not adequately reflected on the ATO. Operational Plan 91-7 directed the combined forces ground component commander to coordinate rotary wing sorties in Iraq within the flying window.[142] When the ground component commander departed in accordance with OPORD 004, no "individual was assigned to coordinate rotary wing sorties."[143] Consequently, routine helicopter flights were listed on the daily ATO as flying "as required"; no specific information was provided. No take off time, route or destination was provided and, critically, no information on radio frequencies or IFF data was listed.[144] When the ATO information was transferred to the flow sheet that the fighter pilots keep on their knee board while flying, no reference to helicopters appeared; even the "as required" line was deleted, since it provided no useful information.[145] Therefore, although the Army Blackhawk pilots had filed a proper flight plan, the F-15 pilots had no way of knowing from the ATO that helicopters were flying in the TAOR on 14 April 1994.[146]

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[139] *Id. But see* ART. 32 REPORT, *supra* note 91, vol. 1 at 31. The flight lead "testified that the F-16 squadron was briefed about helicopter flight information--but the F-15s were not. He also stated that [the F-15's] intelligence section asked several times of C-2, Intelligence at CTF, for flight information about unknowns, including helicopters, but never got a response." *Id.*, Investigating Officer Exhibit 143a.8.

[140] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 6. *See also id.* vol. 1 at 2 (directing that "All helicopter and fixed-wing aircraft are required to comply with this tasking order.").

[141] *Id.* vol. 2 at 7.

[142] *Id.*

[143] *Id.*

[144] "Information concerning takeoff time and entry time into the TAOR was listed as 'A/R' [as required]." *Id. at* 12.

[145] "Specific helicopter flight information was not included in the daily ATO, and no helicopter data was provided to OPC aircrews on the scheduling flow sheet." *Id. at* 11.

[146] *Id.* at 23 (stating that a flight plan for the two UH-60 Blackhawk helicopters was completed using all the appropriate forms, and filed in a timely manner at the appropriate place. The

2. The flow sheet did not list the Army Blackhawks' IFF codes

The flow sheet was derived from the ATO. It listed "all the fixed wing aircraft, . . . exact times that they took off and entered Iraq, exact times that they refueled, call signs, squawks, everything that we needed to know to do the mission."[147] Each aircraft had a unique Mode II, and each aircraft's Mode II code was listed in the ATO and on the flow sheet–except for helicopters. Because the ATO was incomplete with respect to helicopters, the flow sheet did not even list them. Thus, the F-15 pilots could not interrogate the Blackhawks' Mode II despite the ATO stating that Modes II and IV were to be the primary means of identification.[148]

"departure and return times from Zakhu and the route of flight and destinations within the TAOR were not listed." The flight plan was properly filed.). *Id. See also id*. at 12 (generally stating that, although the Joint Operations and Intelligence Center received the MCC information, it received it "too late to be briefed during [routine C3 and CTF CG] staff meetings. None of the information was passed to the CFAC scheduling shop, the ground-based mission director, or the [Airborne Command Element] on board the AWACS.").

[147] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143.a2 (testimony of flight lead at Article 32 investigation). *See supra* note 105 and accompanying text.

[148] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 11 ("Specific helicopter flight information was not included in the daily ATO, and no helicopter data was provided to OPC aircrews on the scheduling flow sheet, their principle planning tool."). *See also* ROE BRIEFING SLIDE (on file with U.S. Army, CLAMO, The Judge Advocate General's School, Charlottesville, Virginia) (stating that Mode II and Mode IV were the primary identifiers in the TAOR.). The ROE briefing slide was included in a briefing given to the flight crew before the mission. *See also* SAFETY MESSAGE, DTG 012001Z Aug 94, (on file with U.S. Army, CLAMO, The Judge Advocate General's School, Charlottesville, Virginia.) [hereinafter SAFETY MESSAGE] which states that "Mode III was turned off in the TAOR to prevent acquisition by Iraqi air defense radar. Mode I and IV were the primary friend/foe discriminators."

3. The ATO directed the use of certain IFF codes, but the Army did not use them

Specific IFF codes were listed in the ATO. The ATO directed different Mode I codes for rotary wing and fixed wing aircraft while flying in Turkey,[149] but required all coalition aircraft to be on the same Mode I while operating in Iraq.[150] The Army did not follow this requirement.[151] Testimony established that Army helicopters customarily did not change their Mode I squawk while inside the TAOR.[152] The helicopters' failure to comply with the ATO was not a one-time occurrence, but a custom. The command structure should have remedied this situation some time in the three years before 14 April 1994.[153]

4. The Airspace Control Order was outdated

The CFAC DO was also responsible for publishing the Airspace Control Order (ACO).[154] This classified document provided guidance on the conduct of Operation PROVIDE COMFORT missions. The ACO contained the ROE and the special instructions, and it was required reading for all aircrew members. The ACO was dated 12 December 1993, and was "largely based on OPLAN 91-7."[155] It was, therefore, also outdated.

5. The ACO specified that fighters would enter the TAOR first

No aircraft were to enter the TAOR until fighters with defensive air capability had entered and performed a sanitizing sweep to ensure that no Iraqi

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[149] SAFETY MESSAGE, *supra* note 148, at 2. *See supra* note 100 and accompanying text.

[150] SAFETY MESSAGE, *supra* note 148, at 2. All coalition aircraft were supposed to be squawking the same Mode I inside the TAOR. On the day of the accident, both F-15 pilots repeatedly attempted to interrogate the helicopters' Mode I, but their equipment was set to interrogate only the Mode I specified for use inside the TAOR. Neither pilot received a response. *See* AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 47.

[151] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 25. "Helicopter pilots assigned to the Blackhawk unit were not aware that the ATO specified separate transponder Mode I codes for operating inside and outside the TAOR. The unit had routinely flown in the TAOR using the code designated for use outside the TAOR . . . ." *See supra* note 112 and accompanying text. The helicopters routinely flew from Diyarbakir to Zakhu, which is just inside the Iraqi border. Although Zakhu is within the TAOR, the helicopters remained on the Mode I for Turkey on those flights. When their mission called for flights beyond Zakhu, they did not change their Mode I.

[152] *Id. See also* ART. 32 REPORT, *supra* note 91, vol. 1 at 33.

[153] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 47.

[154] *Id.* at 6.

[155] SAFETY MESSAGE, *supra* note 148, at 7.2.1.

aircraft were flying in the no-fly zone.[156] Neither the Army helicopter pilots[157] nor the AWACS crew[158] knew that this requirement applied to helicopters. In fact, helicopter operations were not considered by many of the players to be part of Operation PROVIDE COMFORT.[159]

6. The Army did not know that helicopters were supposed to fly only with fighter coverage

The ACO stated that the fighters would not depart Incirlik enroute to the AOR until the AWACS was in its orbit, was operational, and had established a computer data link with the ground.[160] Other coalition aircraft could not fly unless and until the fighters had performed their sweep and were in their defensive counterair combat patrol. The Army knew that the AWACS had to be operational for them to fly, but did not know that the requirement for fighter coverage applied to helicopters.[161] In the past, they had been permitted

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[156] ART. 32 REPORT, *supra* note 91, vol. 1 at 16 (citing the Airspace Control Order, vol. II, paragraph 16C: "No aircraft will enter the TAOR until fighters with Air Intercept radars have sanitized the AOR.").

[157] ART. 32 REPORT, *supra* note 91, vol. 1 at 36 (describing the testimony of a CW4 from Eagle Flight who believed the helicopters could conduct operations inside the AOR without AWACS coverage as long as the helicopters did not leave the security zone. He did not know about the requirement for a fighter sweep before helicopters entered the TAOR. Further, the testimony of the Eagle Flight Operations Officer, a CW3, was that he was not aware of a requirement to have fighter coverage before the helicopters could operate in or outside the security zone.).

[158] *Id*. (discussing the senior director, enroute weapons controller, and airborne command element's interpretations).

[159] *Id. at* 35-37 (describing the testimony of different individuals who did not believe that a requirement to stay out of the TAOR until after the fighter sweep applied to helicopters).

[160] *Id. at* 15-16 (listing the directives stating that fighters needed AWACS coverage to cross the political border and that no other aircraft could fly in the TAOR until the fighters did). Thus, helicopters needed fighters, and fighters needed AWACS.

[161] *See, e.g*., ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 60.33 (citing the Aircraft Accident Board Report testimony of the CTF CG). In response to the question of whether the Army helicopter pilots knew they were not supposed to operate in the AOR without fighter coverage, the CTF CG replied as follows:

> Not necessarily. The fighter coverage was there primarily to defend the AWACS and the tankers . . . up until about September, based on the threat that was out there, I think that . . . as I remember, helicopters used to fly, apparently, around the TAOR on no-fly days, when no one else here was flying, which would indicate to me that they did fly . . . in the past without AWACS or fighter coverage.

The CTF CG stated further that in September, he told the helicopters that they could not fly outside the security zone without AWACS coverage and in November he told them that they could not fly at all without AWACS coverage. However, the CTF CG stated, "No, I never–I didn't address fighter coverage." *See also* AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 11 ("Helicopter flights had routinely been flown within the TAOR security zone

to fly from Diyarbakir, Turkey, to Zakhu, Iraq, on days that no fighter aircraft were flying.[162]

7. The ACO was not written to include Army Blackhawks

The ACO only mentioned Army helicopters in terms of altitude deconfliction.[163] It contained one brief paragraph that mentioned United Nations helicopter activity in Iraq[164] and apparently no one saw the need to use this section as guidance for Army helicopter activity. The colonel in charge of the Joint Operations Center was also the CTF operations officer. He did not know that this latter position was responsible "for coordinating Army rotary wing flying with available fighter assets."[165]

8. The ACO specified a common TAOR radio frequency, but command never ensured that the Army followed the directive

The ACO further required that all aircraft operating in the TAOR would be on the TAOR radio frequency.[166] This requirement existed so that

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without AWACS or fighter coverage and CTF personnel at various levels were aware of this.").

[162] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 60.33.

[163] "[T]he F-15 lead pilot testified that the . . . Airspace Control Order gave information about altitude deconfliction."). *Id.* vol. I at 30.

[164] The Airspace Control Order stated that the United Nations helicopter information would be published "in the ATO on the last page in plain language" and that if the "flight information was passed too late in the day to be included on the ATO," it would be passed verbally through the C-3/Joint Operations Center to the mission director, to the AWACS, and to the fighters. *Id. at* 29.

[165] *Id.* The Colonel also

> acknowledged that if a helicopter flight was scheduled to fly outside of the security zone (as the 14 April 1994 flight did), he was not aware of any method to pass such information to the CFAC or the frag shop. *Even though the [Joint Operations Center] would get information* from [the Army helicopter detachment], and then pass the changes in gate times to the Turkish CTF staff, *[the Joint Operations Center] would not notify CFAC or AWACS.*

Id. (emphasis added). Furthermore, the CFACC testified that "there was 'no formal requirement for the helicopters to tell CFAC or the CFAC DO or the scheduling shop . . . when they were flying.'" *Id.* (citing testimony from Investigating Officer Exhibit 162).

[166] *Id. at* 16 (citing the Airspace Control Order, Investigating Officer Exhibit 12: "Non Have Quick II radio capable aircraft will use Air Tasking Order frequencies in the TAOR."). *See also* vol. 1 at 34 ("Helicopters did not have [Have Quick II] radios."). Thus, helicopters should have been on the radio frequencies inside the TAOR that were specified in the Air Tasking Order. *See also* AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 24 (explaining that one of the Blackhawks was equipped with a Have Quick II radio and the other

all the "players" could talk to each other if necessary. However, over time, observation of this requirement had lapsed.[167] On 14 April 1994, the helicopters and the fighters were on different frequencies so they could not hear each others' transmissions. The helicopters had talked to the enroute weapons director on the enroute frequency, and they remained on this frequency,[168] while the fighters were talking to the TAOR weapons director on the TAOR frequency.[169] The TAOR weapons director is primarily responsible for monitoring the TAOR frequency, so he did not hear any of the helicopters' transmissions. The enroute weapons director was primarily monitoring the enroute frequency, so he did not hear the fighters' transmissions. The command had done nothing to ensure that the component organizations were aware of and complying with its guidance.

9. Generally, helicopter operations were not considered part of Operation PROVIDE COMFORT

Military Coordination Center aircraft were given a high degree of autonomy in scheduling their operations. Their unique mission and their ability to control their own scheduling led to the misperception by many individuals that the Army helicopters were not part of Operation PROVIDE COMFORT.[170] Accordingly, if they were not part of Operation PROVIDE COMFORT, then the policies and procedures that applied to other PROVIDE COMFORT aircraft did not apply to them. Significantly, it was the command structure that began to exempt the Army from the rules. The Army tried to follow the guidance that it was given but that guidance was faulty at either the CFAC level or the CTF level.[171] The tactical control of Army Blackhawk helicopters was not exercised by any component part of the CTF staff.

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was not. The helicopter that was equipped would not have used the Have Quick II radio on this mission because doing so would have made it very difficult for him to communicate with the other helicopter. Thus, both helicopters should have been on the TAOR radio frequencies specified in the ATO for use in the TAOR.

[167] *See supra* note 97 and accompanying text. Because the helicopters usually just flew to Zakhu, they typically stayed on the enroute frequency, and only talked to the AWACS enroute weapons director. Neither the Army helicopter detachment nor the AWACS crew knew of the requirement for helicopters to change from the enroute frequency to the TAOR frequency when operating in the TAOR. *See, e.g.*, AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 16-17.

[168] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 16.

[169] *Id. at* 17.

[170] "Although written guidance showed the helicopters were supposed to fly under OPC guidelines and control, other written guidance and standard practice created the impression that helicopter operations were autonomous and not part of OPC." ART. 32 REPORT, *supra* note 91, vol. 1 at 26.

[171] *Id.* (noting that the CFACC/DO did not think he had "any responsibility for the helicopters when they were flying in the [TAOR]."). *See* AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 11 ("The CFACC, through the CFAC DO, did not, in fact, exercise TACON

VII. RULES OF ENGAGEMENT IN OPERATION PROVIDE COMFORT

> *"The OPC [Operation PROVIDE COMFORT] ROE [were] the peacetime ROE for the United States European Command, with modifications approved by the National Command Authority for OPC."*[172]

The ROE governing Operation PROVIDE COMFORT were promulgated in OPLAN 91-7. For the next three years, the mission continued to evolve as the political situation continued to change. Command and control guidance should have changed as coalition force composition changed, and as crews cycled through rotations. Some of the important command and control issues dealt with operational control and tactical control of rotary wing assets. Unfortunately, neither the ROE nor the OPLAN were updated again until after–and because of–the fatal events of 14 April 1994.[173]

A. Rules of Engagement in the Tactical Area of Responsibility on 14 April 1994

Rules of Engagement guidance for the TAOR were as follows:

> a. Any unidentified airborne object in or approaching airspace within a U.S. air defense area of responsibility will be identified by any means available, including visual recognition, flight plan correlation, electronic interrogation, and track analysis.
>
> b. When feasible, airborne objects in or approaching the airspace within a U.S. area of responsibility that have not been satisfactorily identified by communications, electronics, or any other means will be intercepted for visual identification purposes.[174]

Any aircraft identified as Iraqi military found north of the thirty-sixth parallel could be destroyed. In this instance, "[t]he ID had said they were

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of MCC helicopter operations with respect to planning and scheduling."). *See also supra* note 88, for an explanation of TACON.

[172] SAFETY MESSAGE, *supra* note 148, at 6.

[173] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 5 (explaining that "OPLAN 91-7 provided comprehensive guidance for the Operation PROVIDE COMFORT mission as it existed in July 1991."). The original CTF ground force changed considerably beginning in September 1991. Operation Order 004 (issued by USCINCEUR on 14 September 1991) directed several changes and requested the CTF provide a supporting plan to implement the provisions of OPORD 004. This update was not accomplished before the accident. *See supra* text accompanying note 138.

[174] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 12 (unclassified guidance on the ROE as found in the Aircrew Read File).

Hinds, so it was an enemy aircraft, in our mind flying north of the thirty-six line and the ROE was pretty straightforward that we were cleared to go in, engage that helicopter, and destroy it."[175]

The above statement, made by the wingman who followed his flight leader's direction, is chilling. It clearly demonstrates that the ROE were status-based; in other words, Iraqi aircraft, whether rotary or fixed wing, could be destroyed based on hostile identification alone. Other aircrew members' perceptions were the same, as the following colloquy from the Accident Investigation Board and crewmembers illustrates:

> Q: Based on your understanding of the ROE, what aircraft could or should be engaged?
> A: *Any Iraqi military aircraft* north of the 36th line can be engaged, with the exception of those with hospital or medical type markings.[176]
> . . . .
> Q: Before exercising the right to use force, according to your understanding, is there any requirement to give any consideration to identification difficulties?
> A: There aren't any provisions in the Rules of Engagement on that. [The] *Rules of Engagement were pretty clear that if it's a hostile*, then you know, *they were clear* on it.[177]

Based upon this testimony, no doubt exists that the perceptions of crewmembers were accurate: the ROE were status-based.[178] All Iraqi military aircraft north of the thirty-sixth parallel were considered "fair game"[179] and no distinction was made between rotary wing and fixed wing targets.[180] The disconnect between the mission and the ROE began at this point. Was a status-based ROE truly necessary to carry out the mission? Could the mission have been accomplished equally well if the ROE had been conduct-based? To answer these questions requires a review of the ROE training and implementation.

B. Rules of Engagement Training was Inadequate

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[175] *Id.* Investigating Officer Exhibit 057.34 (testimony of wingman to the Accident Investigation Board).
[176] *Id.* Investigating Officer Exhibit 054.4 (testimony of AWACS tanker controller to the Accident Investigation Board) (emphasis added).
[177] *Id.* Investigating Officer Exhibit 049.14 (testimony of AWACS senior weapons director to the Accident Investigation Board) (emphasis added).
[178] The actual ROE are classified.
[179] Testimony of the CFACC to the Accident Investigation Board illustrates this: "[Helicopters are] treated the same as others . . . . If there is a helicopter, it's a slow mover, and it's Iraqi, and we can prove it's Iraqi, then it's also fair game if it's north of 36 in the No-Fly Zone." ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 062.21.
[180] *Id.*

One of the weakest links in the chain of events leading to the shootdown was poor ROE training. The Accident Investigation Board president addressed this issue in the report as follows: "OPC personnel did not receive consistent, comprehensive training to ensure they had a thorough understanding of the [United States European Command]-directed ROE. As a result, some aircrews' understanding of how the approved ROE should be applied became oversimplified."[181] Although the Board does not clarify what portions of the training it found lacking, it apparently believes that aircrews were taking shortcuts in training which led to improper application of the ROE.

C. Implementation of the ROE

Before using deadly force, the pilots would have required some authority to do so. That authority could have come from the traditional principles of self-defense, or it could have come from the ROE.

Self-defense was not necessary as the helicopters had committed no hostile act. They were flying southeasterly at about 130 knots away from the security zone. Furthermore, they were not approaching the thirty-sixth parallel from the south; they were heading from the north deeper into Iraq. There was nothing to imply hostile intent and the flight lead testified that he did not feel that the helicopters were a threat.[182] The wingman also testified that Iraqi Hinds would not be a threat to an F-15.[183] Thus, neither of them fired in self-defense or in defense of the other.

Absent the necessity to use force in self-defense, the pilots had to comply with the ROE to use force offensively. The pilots testified that before they could use offensive force, they first had to identify whether a target was friendly or hostile.[184] The wingman testified that under the ROE, four indicators could be used for unidentified aircraft to "come up friendly;"[185] three of these methods were electronic identification, AWACS confirmation, and visual identification. The flight lead testified that: "in order to shoot by the ROE, we have to confirm that they're definitely not friendlies, and they're

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[181] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 46.

[182] Flight lead testimony at the Article 32 investigation on whether he felt an imminent threat from the Hind helicopter: "No, but I felt an immediate ground threat from hostile fire from the ground." ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143a.67.

[183] Wingman's testimony to Accident Investigation Board on the estimation of the air-to-air capabilities of Iraqi Hind helicopters: "[a]gainst the F-15, very limited. The only thing that they could do is possibly shoot the small arms or some type of machine gun coming out the [doors]. But in terms of turning and firing on [an F-15], I think that it would be a Golden BB if they were going to . . . try to turn and shoot you." *Id.* Investigating Officer Exhibit 57.50.

[184] *See, e.g., id*. Investigating Officer Exhibit 57.4.

[185] *Id.*

positively hostile . . . . In this case, we . . . . had to go in for a visual identification to prove that they were hostile."[186]

The requirement for a positive identification was the last link in a long chain designed to prevent shootdown of friendly aircraft. The pilots had to distinguish between friendly and hostile aircraft before engaging. They were cleared to shoot *only* after a positive identification that the helicopters were Iraqi military aircraft. If they failed to make positive identification, visual or otherwise, then they were not acting in accordance with the ROE. The pilots' rationale for calling the Blackhawks hostile was based, in large part, on an incorrect visual identification. The Accident Investigation Board found that the visual identification passes were conducted improperly.[187] If true, the pilots were arguably not acting within the ROE.

VIII. DEFICIENCIES IN THE RULES OF ENGAGEMENT

Assuming, arguendo, that the F-15 pilots were acting in accordance with the ROE, the rules may have been improperly broad. Narrowly tailored, more discriminating ROE could have prevented this accident. Even more unsettling is that under the ROE in place, this tragedy was foreseeable. It may have been foreseen by some individuals in the command structure. At least four major areas in the ROE were questionable and may have been flawed.

A. Status-Based ROE May Have Been Inappropriate

The most serious deficiency was that the rules in place were the equivalent of wartime ROE.[188] Status-based ROE in a joint and combined operation are inherently dangerous given the limitations and difficulties in interoperability and communication. To compound that risk by not routinely listing all of the friendly aircraft on the ATO is indefensible.

The mission should drive the ROE. If the mission was to protect the Kurds from hostile acts, a more conservative ROE would have required a hostile act or evidence of hostile intent prior to authorizing the use of deadly force.

1. The ROE were not appropriately safety-conscious

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[186] *Id.* Investigating Officer Exhibit 143.36 (flight lead testimony to Accident Investigation Board).

[187] Statement of Opinion of Accident Board President: "[T]he identification passes were accomplished at speeds, altitudes and distances where it was unlikely that the pilots would have been able to detect the Blackhawk's markings." AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 47.

[188] "WROE permit United States forces to fire on all identified enemy targets, regardless of whether those targets represent actual, immediate threats." Martins, *supra* note 39, at 27.

The Gulf War experience should have been carefully considered in formulating the ROE. During the air campaign in DESERT STORM, "CENTAF imposed rigid rules of engagement to avoid accidental fighter-on-fighter combat; it was always afraid that a United States airplane would shoot down a coalition fighter of a type also used by Iraq."[189] In DESERT STORM, "American military commanders insisted that allied planes identify unknown aircraft by two separate means before firing on them."[190] If the leadership was worried about this in a combat environment, this concern should have been even more prevalent when the United States' mission was not combat, but one of security enforcement. "Safety is a legitimate rationale for an ROE restriction, particularly when it provides a means to prevent 'blue-on-blue' engagements-that is, shooting at friendly forces."[191]

2. Even if status-based ROE had initially been appropriate, they were not reviewed

To reduce the risk of killing our own forces or those of our allies, status-based ROE should be used only when absolutely necessary, and even then, only for a limited time. At the very least, status-based ROE should be automatically reviewed at certain intervals to determine continued necessity and appropriateness.

The Operation PROVIDE COMFORT mission of protecting the Kurds changed considerably in the three years between 1991 and 1994.[192] Despite changes in political objectives and military involvement, the ROE remained essentially unchanged.[193] This would not be as troublesome if they had not been status-based. However, the broad authority to shoot on sight when a force is declared hostile is reason enough for a periodic review and update. The threat devolved over that three-year period, but the ROE did not.[194] No evidence shows that the ROE were reviewed, much less updated, until after the shootdown.

Because of the reduced air activity north of the 36th parallel, much of the justification for a status-based ROE had disappeared by 14 April 1994.

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[189] Phillips, *supra* note 9, at 17.

[190] *See, e.g.*, Gordon, *supra* note 2.

[191] Phillips, *supra* note 9, at 17.

[192] The political aspects and the military reorganization that affected Operation PROVIDE COMPORT are beyond the scope of this article. Given the volatility of the mideast region, it is reasonable, however, to assume that there were changes in politics and directives as a whole from 1991 to 1994. Further, the military drawdown which began in the mid-1980's undoubtedly had some negative impact.

[193] "The ROE planning process does not end when the OPLAN or OPORD are approved. The ROE Cell should track and review the ROE and respond according to threat or mission changes." JTF PLANNING GUIDE, *supra* note 21, at vii-7.

[194] Lorenz, *supra* note 25, at 74 (stating that a "[c]hanging threat requires a formal change to the ROE.").

"No Iraqi helicopters [had] ventured into the northern zone since a flight ban was established there . . . ."[195] Further, "the last incursion above the 36th parallel" was by an Iraqi jet, fifteen months earlier, in January 1993.[196]

3. Status-based ROE contributed to the "mindset" of the F-15 pilots

The ROE could have contributed to the misidentification.[197] When the fighters entered the TAOR on 14 April 1994, they did not expect to see *any* aircraft. Their defensive counterair mission was to sweep the area to ensure no Iraqi aircraft were flying, and they did not expect friendly helicopters inside of the TAOR. When they saw the helicopters, they were surprised. "The F-15C pilots may have begun the visual intercept with a mindset that the unknown aircraft were probably not friendly."[198] The helicopters appeared to be Hinds. They had external fuel tanks, which the pilots had never seen on Army helicopters. From a distance, the pilots mistook these "wings" to be characteristic of Iraqi Hinds' sponsons.[199] They saw that the helicopters were camouflaged, thus they correctly interpreted the paint scheme to be that of a military aircraft. They did not know–because they had not been properly trained–that Army helicopters were dark green and black camouflage and Iraqi

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[195] *See, e.g.*, Eric Schmitt, *Copter Deaths: Pentagon Finds Human Failures*, N.Y. TIMES, June 30, 1994, at A1.

[196] *See, e.g.*, Auster, *supra* note 1, at 29; Harris, *supra* note 2.

[197] In a question to and answer from the flight lead during testimony at the Article 32 hearing:

> Q: Could you tell me a little bit about your mindset as far as when you entered the AOR since you were conducting the sweep as far as what your expectations were to be in the area?
> A: You shouldn't see any friendlies because it's, specifically, written in the ACO that we'll be the first ones in. I didn't expect to see any enemy aircraft either because there was no picture call [from the AWACS].

ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143a.54.

[198] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 43.

[199] Flight lead's testimony to the Accident Investigation Board in response to a question regarading the misidentification:

> There's a lot of factors. I think the main one is, the sponsons coming out the side was a dead giveaway for me that they were Hinds. We don't carry–In our pilot aid, there's nothing–no silhouettes of Blackhawks. The training that I've done in the past has been very little, with silhouettes of Blackhawks, but the silhouettes we do have do not include sponsons or ordnance or anything of that sort . . . . My previous assignment with working with the Army, I've been on a Blackhawk on numerous occasions. Never have I seen the wings on it.

ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143.43.

Hinds were desert tan.[200] From the distance that the identification passes were made, the pilots were unable to discern any visible markings on the helicopters and no response was received to repeated electronic queries. They expected the aircraft to be hostile, and "pilots who think they have spotted enemy aircraft are likely to try to confirm that theory rather than disprove it."[201] The pilots "saw" exactly what they expected to see: hostile aircraft.[202] Since they were operating under a status-based ROE, and their visual identification training of friendly aircraft was lacking,[203] their mistake may have been reasonable. Using WROE may have made the pilots think like "combatants." Because combatants usually see exactly what they expect to see, this sort of an accident was foreseeable.[204]

B. No Discrimination in the ROE Between Fighter versus Rotary-Wing Threat

The ROE in Operation PROVIDE COMFORT applied across the board, to fixed wing and rotary wing aircraft alike.[205] When queried by the Accident Investigation Board as to his understanding of the ROE, the F-15 wingman stated that his perception of the ROE after the shootdown was that it was not discriminating enough. "[T]here probably ought to be something different to differentiate between [fixed wing fighters and rotary winged aircraft]."[206] Status-based ROE should consider the threat and be narrowly written to address the threat. When the ROE are written too broadly, the result may be either an unintentional escalation of the conflict or the possibility of

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[200] Wingman's testimony to Accident Investigation Board regarding whether he was ever briefed on the camouflage scheme of the Iraqi helicopters:

> No sir. I expected to see some type of camouflage scheme. If it was not an Iraqi helicopter, I expected it to either be configured in a red cross, as I described earlier, or I expected it to be painted white as a U.N. helicopter. Those were the two options briefed to me. That's what I expected to see for a friendly.

Id. Investigating Officer Exhibit 57.38.

[201] Julie Bird, *Friendly Fire*, AIR FORCE TIMES, May 2, 1994, at 2 (quoting Colonel Thomas J. Lyon, director of joint matters for Air Combat Command).

[202] In discussing "scenario fulfillment," Professor Parks explains that "[t]he problem is psychological as well as technical. Combatants frequently experience a self-fulfilling prophecy in that they come to see what they are expecting to see." Parks, *supra* note 47, at 87.

[203] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 43 ("both pilots had received only limited visual recognition training in the previous four months").

[204] "Precisely for reasons such as [the phenomenon of scenario fulfillment], ROE at the operational level commonly include safety and doctrinal characteristics not anticipated by higher authority." Parks, *supra* note 47, at 87.

[205] *See, e.g.*, testimony of CFACC, *supra* note 179 and accompanying text.

[206] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 57.37.

friendly fire.[207] The difference between "any Iraqi military aircraft north of the 36th parallel may be targeted" and "any Iraqi military fixed-wing aircraft north of the 36th parallel may be targeted" is substantial.

The threat assessment should drive the ROE.[208] What was the threat on 14 April 1994? At that time, the United States mission was to protect the Kurds within the security zone by enforcing the no-fly zone. The Blackhawk helicopters were flying away from the security zone, toward the 36th parallel. Their point of origin may have been doubtful, but they were not an immediate threat to any Kurds within the security zone. Further, their speed of 130 knots per hour was so slow that there was no reason to destroy first and ask questions later. Discrimination in the permissible use of force between types of aircraft is critical.

Iraqi helicopters were no longer a significant feature in the threat picture. Although helicopters had been harassing the Kurds on the ground immediately after the Gulf War, that activity had ceased long before 1994. Prior to April 14th, the CTF intelligence section had no indication that Hinds were operating in northern Iraq, nor "any indication of hostile intent to do so."[209] The flight lead testified that he considered the helicopter's intent:

> He's flying over villages in the security zone, which are Kurdish. Hinds carry ordnance, so that did come through my mind. I did not see any ordnance dropped though. I didn't see any hostile acts, but we don't need any of that. Again, the only thing [that I based my decision to fire on] was that I positively identified him as Iraqi.[210]

However, the Blackhawks were not flying over villages in the security zone; they were flying away from the security zone. Given the helicopters' southeasterly heading, the threat posed to the Kurds in the security zone was minimal.

In contrast, a status-based ROE with respect to Iraqi fighters was justifiable. Tensions were high, and intelligence indicated that a threat was

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[207] Lieutenant Commander Phillips, discussing the fear of friendly fire behind the requirement to positively identify aerial targets in the Gulf War, explains that "the legitimate concern for firing on a neutral could be catastrophic even for the successful conduct of the war. The prevention of 'blue-on-white' engagements can be considered as either a safety, or an international law, limitation."). Philips, *supra* note 9, at 18.

[208] As explained by Professor Parks, threat assessment consists of the question: "*What is the threat?* In ROE preparation, one must ask this question in a larger context than the usual numbers and capabilities of any potential threat. The answer may depend largely on the track record of the threat." W. Hays Parks, Righting the Rules of Engagement 94, Address at U.S. NAVAL INSTITUTE PROCEEDINGS (SEPT 1989) (on file with author).

[209] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 65.10 (testimony of C-2, Intelligence, to the Aircraft Accident Investigation Board).

[210] *Id.* Investigating Officer Exhibit 143.43 (flight lead's testimony to the Aircraft Accident Investigation Board).

present.[211] A fast moving Iraqi fighter, however, would be more of a threat to a coalition aircraft than to Kurds in the security zone. Because no Iraqi military aircraft were allowed in the "no-fly" zone, declaring their fighters "hostile" to allow destruction on sight would at least have a valid military purpose. An enemy fighter is always a potential threat to our aircraft.[212] Further, an enemy fighter's crossing the 36th parallel, heading in the direction of the security zone, could be deemed evidence of hostile intent towards the Kurds. There may not be time to ask questions first and shoot later; by then, a fighter could have destroyed its target.

A ROE distinction between fighters and helicopters was nothing new in 1994. Shortly after the Blackhawk shootdown, Secretary Perry assured the public that "allied pilots enforcing [the] no-fly zone over Bosnia already are operating under rules that make the helicopter-fighter jet distinction."[213] Thus, some planners had already seen the need to differentiate between types of aircraft. If the ROE for Operation PROVIDE COMFORT had been reviewed between 1991 and 1994, perhaps this distinction could have been made there as well.

Further, the ROE could have required the pilots either to seek confirmation of enemy status from AWACS, or attempt to warn the helicopters prior to engaging. In Operation SOUTHERN WATCH, for example, the ROE required fighters to obtain clearance from AWACS prior to engaging fixed-wing aircraft.[214] In Operation DENY FLIGHT, "[t]he ROE governing NATO's enforcement of the Bosnian no-fly zone permit[ted] firing upon military aircraft violators only after repeated warnings [were] ignored."[215] Neither of these safeguards was in place in northern Iraq on 14 April 1994.[216]

Perhaps the most compelling reason to distinguish between fixed-wing and rotary-wing targets was best articulated by Secretary Perry. When the ROE were changed immediately after the accident, he explained, "[y]ou have more time to contemplate action against a suspected Iraqi helicopter, because it flies much slower than a jet fighter. Therefore, the rules were changed this

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[211] *See, e.g., supra* note 79 and accompanying text.

[212] *See, e.g.,* McIlmail, *supra* note 70, at 74 ("[D]uring armed conflict, military aircraft are always legitimate targets for attack.").

[213] Robert Burns, *Pilots Ordered to Take Greater Care in Targeting Suspect Helos,* SAN ANTONIO EXPRESS-NEWS, Apr. 18, 1994, at A1.

[214] *Id. See also* McIlmail, *supra* note 70, at 48 (discussing the origins of Operation SOUTHERN WATCH, which began in southern Iraq in August of 1992. United States and British aircraft began enforcing a no-fly zone south of the 32nd parallel. In that operation, the largest threat was from helicopters harassing the Shiites on the ground.).

[215] McIlmail, *supra* note 70, at 81. *See also id*. at 80 (discussing the origins of Operation DENY FLIGHT, which began in Bosnia in April 1993. Aircraft from the United States, France, and the Netherlands were enforcing a United Nations resolution which prohibited fixed-wing and rotary-wing aircraft from flying in an established no-fly zone.).

[216] *See, e.g.,* ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 58.6 and 58.10-11 (testimony of an F-15 pilot answering questions about what the ROE requires 58.6).

week to require greater care, greater checks and balances in identifying helicopter threats."[217] If this was recognized immediately after the shootdown, before the facts were even known, why was it not recognized prior to the shootdown?

C. The Preference to Seek Higher Authority Before Using Force was Not Adequately Reflected in the Rules of Engagement

United States operations have shown a preference for seeking specific approval to use deadly force when time permits. Requiring pilots to coordinate with the commander on the ground before engaging aircraft in no-fly zones has risen almost to the level of "policy." For example, Operation DENY FLIGHT's ROE contained a provision that "pilots on patrol . . . [had to] obtain radio permission from air operations headquarters in Italy before firing on hostile aircraft."[218] Because no immediate threat from the helicopters existed, the extra time that it would have taken for the fighters to "phone home" for approval prior to engaging would have been an extra measure of safety that could possibly have prevented the shootdown.

The national preference for seeking higher authority before using force in peacetime is reflected in the standing rules of engagement (SROE). The SROE, by their emphasis on self-defense and general requirement for specific authorization to use force in support of mission accomplishment, are, in part, "designed to limit the scope and intensity of the conflict; [and designed to] discourage escalation."[219] Further,

> the responsibility for exercising the right and obligation of national self-defense and declaring a force hostile is a matter of the utmost importance, demanding considerable judgment of command. *All available intelligence, the status of international relationships, the requirements of international law, the possible need for a political decision, and the potential consequences for the United States must be carefully weighed.*[220]

The preference to seek approval before using deadly force was not adequately explained at the crew level. When the flight lead was asked why he needed to engage so quickly, and why he did not spend more time gathering

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[217] "U.S. officials have said that the fighter pilots who shot down the helicopters with missiles made no attempt to warn them or contact them by voice radio. Nor were they required to, under the rules in place at that time, Perry has said." Burns, *supra* note 213. *See also id.*

[218] Lacayo, *supra* note 11, at 51. *See also* Michael R. Gordon, *Engagement Rules also Part of Probe*, N.Y. TIMES, Apr. 16, 1994, at A1 ("Under the rules of engagement for Bosnia, planes that intrude into the airspace are routinely warned to land or leave the area."). *See also supra* note 215 and accompanying text.

[219] SROE, *supra* note 30, encl. A ¶ 2(b).

[220] *Id*. ¶ 6 (emphasis added).

information, his response was simple and straightforward: "[O]nce I had no doubt that they were Hinds, I had met all the ROE and the next step was to shoot them down."[221] This response may have been partially the basis for the Accident Board's findings that "some aircrews' understanding of the ROE had become oversimplified."[222] This statement can be construed to reflect the pilot's belief that he had no other options. In fact, ROE are always permissive, and they mandate destruction only in a limited set of circumstances.[223] They tell an individual when he *may* use force, but they do not dictate an obligation that he *must* use force. The preference to seek approval before using force, and then using incremental escalation before destructive force is employed, is not abdicated in peacetime or in an OOTW.

Rules of engagement are supposed to be clear and concise. "Vagueness and imprecision in the ROE can only compound the danger of uncontrolled escalation."[224] However, there appears to be a delicate balance between ROE that are too long and detailed, and those that are too brief and imprecise. The former will be too much for the operator to understand and internalize. The latter, if the policy or security rationale is omitted, will be too superficial to be of any use.[225]

D. The Combined Task Force had Notice of Potential Danger to Helicopters: No Remedial Action Taken

Evidence from the Aircraft Accident Investigation Board and the Article 32 hearing demonstrates that some of individuals operating within the Operation PROVIDE COMFORT theater were aware that helicopters may be in danger. Despite this knowledge, no remedial action was taken.

Testimony from the Military Coordination Center commander indicated that periodically the Blackhawks' radar warning equipment would indicate that the helicopters were being illuminated.[226] In his words,

> [Eagle flight would be flying along] and have the attack warnings system in the helicopter indicate that we were being painted by an aircraft tracking system and [we would] respond to that by popping chaff flares and going for

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[221] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 143a.13.
[222] AIRCRAFT ACCIDENT BOARD REPORT, *supra* note 4, vol. 2 at 46.
[223] Newcomb Lecture, *supra* note 20.
[224] Roach, *supra* note 16, at n.18 (citing D. P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 170 (1975)).
[225] For an example of oversimplification, *see* Phillips, *supra* note 9, at 26 (revealing that during the Gulf War, "the complete ROE package was too comprehensive for the individual fighter pilots. They appreciated the legal officer who distilled the ROE to *two small pages* for their cockpit reference notebooks.") (emphasis added).
[226] "Illuminated" means that the helicopters were being electronically interrogated, presumably by coalition aircraft. However, there was a strict prohibition against interrogating known friendly aircraft. *See, e.g.*, ROE BRIEFING SLIDE, *supra* note 148.

> defilade. In fact, the [Combined Task Force Operations Officer] was with us on one occasion when that occurred.[227]

Additionally, the F-16 squadrons had some incidents with helicopters that resulted in a routine briefing to those squadrons of Operation PROVIDE COMFORT helicopter activity. Their difficulties and concerns were never relayed to the F-15 squadrons. According to the flight lead's testimony,

> The F-16s were briefed, but the F-15s were not. I heard about that after the accident. I believe the reason it happened was two-fold; one is the F-16s, from what I heard, had a fear of having a close pass with a friendly helicopter because they did low-altitude training, something we don't do. They put a request in to get the specific flight plans for the helicopters. I also know from talking to the intelligence officer that he made several requests to get flight plans on any unknown aircraft that were friendly and never got any type of response. His request included helicopters.[228]

Further, the same F-15 squadron involved in the shootdown had a previous problem with a Russian aircraft that was not on their flow sheet. In that case, a visual identification was properly made and tragedy averted, but "[i]t was found out that the people at CTF staff knew about the flight plan for that and didn't pass it down to us below. There was a lot of screaming and yelling again at [various] meetings about-'We should know about this stuff before we shoot someone down.'"[229]

Therefore, evidence exists that the CTF staff knew that some vital information was not being passed to the F-15 fighter squadrons. In fact, the commander of the helicopter detachment testified that the CTF CG briefed "whoever he was flying with" that there "was never a need to shoot at a helicopter because there is no threat."[230]

This assertion is curious indeed. As a subordinate commander to the Commander-in-Chief of Europe, the CTF CG had the authority to make the ROE more restrictive than those that were promulgated.[231] He would have been in the best position to require that pilots "phone home" before using deadly force if the circumstances permitted time for deliberation. At the very least, if he did not want to restrict the rules himself, he may have had an

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[227] ART. 32 REPORT, *supra* note 91, Investigating Officer Exhibit 64.21.

[228] *Id.* Investigating Officer Exhibit 143a.9 (flight lead's testimony at Article 32 Investigation).

[229] *Id.* Investigating Officer Exhibit 143a.82.

[230] *Id*. Investigating Officer Exhibit 104a.26.

[231] SROE, *supra* note 30, encl. A ¶ 4 (detailing circumstances in which Combatant Commanders may augment the SROE "as necessary to reflect changing political and military policies, threats, and missions specific to their AOR," and how to upchannel such changes for review.). *Id.*

obligation to make known his concerns to his superiors. Obviously, if the CTF CG did recognize a significant threat to United States and allied lives, he would take action to eliminate the threat.

IX. LESSONS LEARNED

Due to the myriad of contributing factors involved in the shootdown, it is difficult to identify areas where judge advocates (JAG) input may have helped. In fact, it is doubtful any JAG action or inaction contributed to the event. Likewise, it is doubtful any type of JAG intervention could have prevented the incident.[232] Nonetheless, perhaps in future operations JAGs can use the benefit of hindsight to assist commanders in ensuring that this combination of problems never recurs. With that thought in mind, a brief analysis of the JAG's role in ROE matters may be appropriate.[233]

When a JAG initially becomes involved in an operation, she must review all materials that pertain to it. This includes all of the OPORDS, OPLANS, Warning Orders, Deployment Orders, and Executive Orders about the operation that are available.[234] Certainly this includes the most recent ones, but it also includes all of the past material, because the history and development of an operation are relevant. A broad knowledge base is imperative in understanding the current status of an operation, and it is also helpful in ascertaining the direction that an operation is likely to be headed in the future.

When the JAG focuses on the ROE, he must read the mission directives and the statement of the commander's intent. Then he must analyze whether the supplemental measures that have been approved by the National Command Authority are consistent with the commander's intent, and whether they are sufficient for mission accomplishment. Although ROE are technically the province of the operators rather than the JAG, the JAG must have the ability to ensure the ROE are appropriate for the mission, are in compliance with international law and the laws of armed conflict, and are in accordance with the national policy of the United States.

Next, the JAG can assist the commander in his responsibility to teach and train the ROE. The JAG can develop examples and situational training

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[232] My purpose in writing this article was, in part, to demonstrate that "accountability" begins at the top of the chain of command, and not at the bottom (e.g., with the lower ranking officers that were charged with violating the Uniform Code of Military Justice). Legal input or advice as occurred here cannot rectify a systemic failure such as occurred here.

[233] The ideas incorporated in this section came directly from Colonel Richard Sorenson, Chief of Operational Law, Headquarters, USAFE, and Major Nancy Richards, Chief of Operations, Plans and Exercises, Headquarters USAFE. The author acknowledges with appreciation the input and expertise of these judge advocates.

[234] For a good overview of operational law requirements for Air Force JAGS, *see, e.g.*, *The Master Operations Lawyer's Edition*, 42 A.F. L. REV. (1997).

exercises to ensure the operators thoroughly understand the permutations of permissible actions for both self-defense and mission accomplishment. The operators should be able to answer questions designed to test their knowledge of the concepts of "necessity" and "proportionality," and should be able to correctly articulate what conduct would be appropriate under a given set of circumstances.

Training on ROE necessarily involves review and discussion of other aspects of the operators' responsibilities, such as visual identification of aircraft, in which their knowledge and application of the ROE may be tested. In this vein, the JAG can teach the concepts in the commander's guidance by using flashcards that simulate what a pilot is likely to see. The pilot is asked to discriminate between types of aircraft and asked to say what he would do under a variety of circumstances in which that aircraft was a potential target. For example, the pilots could be shown pictures of Iraqi Hinds and given information that indicates that the pilot of one of the Hinds is trying to defect. Finally, it should be emphasized that ROEs generally specify what *may* be done, rather than what *must* be done. The preference for gradual escalation, time and circumstances permitting, can be explained and reinforced using real world examples.

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?

MAJOR PATRICK E. TOLAN, JR.*

I. OVERVIEW

When the U.S. Supreme Court concluded in *Adarand*[1] that government contracting initiatives to favor small and disadvantaged businesses would have to overcome strict scrutiny, many forecasted that this would bring an end to these types of affirmative action programs. Indeed, legislation proposed last summer would do just that.[2] However, the Clinton administration's policy to "mend not end" affirmative action has brought about global review of the existing regulatory scheme, with an eye toward modifying the preferences for minority businesses, so that the programs will pass strict scrutiny.[3] As the federal contracting regulations are updated and revised, those involved with government procurement will struggle to adapt to the shifting landscape.

Although much has been written about what "could," "should," or "would" change in response to *Adarand*, this article focuses on the practical implications of what will soon change.[4] Contracting officers and base legal

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

[2] H.R. 1909 would eliminate virtually all preferential treatment programs within the federal government and would end racial and gender-based preferences in government contracting. *GOP Legislators Renew Campaign to Ban Racial Preferences in Government Programs*, 67 Fed. Cont. Rep. (BNA) 740 (June 23, 1997). A similar measure (S. 950) was introduced in the Senate. The legislation, entitled the "Civil Rights Act of 1997," is substantially the same as a measure former Senator Dole proposed as a direct assault on President Clinton's endorsement of affirmative action. *Id.* If passed, the President has indicated that he would veto the bill. *Bill to Ban Preferences wins House Judiciary Panel Approval Along Party Lines*, 68 Fed. Cont. Rep. (BNA) 28 (July 14, 1997).

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

[4] At the time this article went to press, the Federal Acquisition Regulation changes proposed in May, 1997 dealing with affirmative action reform were not yet final. *See* discussion *infra* Part V.D., and note 245.

counsel may have to contend with district court actions blocking award of particular contracts which employ race-based presumptions. Furthermore, because the Supreme Court failed to communicate clear precedent in this regard, and because of the deep philosophical differences regarding affirmative action underlying the Court's 5-4 vote, district courts are unlikely to be uniform in their analysis of which government contracting practices violate strict scrutiny. For this reason, contracting officers in Colorado, for instance, may be enjoined from awarding prime contracts with a preference for minority subcontractors, but there might be no problem making similar awards in other jurisdictions. Familiarity with the small business preferences that are being challenged and how the Government is seeking to overcome the challenges will be essential to the practitioner operating in this environment.

II. INTRODUCTION

Contracting Officers (COs) at the base level are required to track and report the dollar amounts and percentages of contracts awarded to small businesses and to small disadvantaged businesses.[5] For years, the Department of Defense (DOD) and the Small Business Administration (SBA) have established goals to increase the percentage of business awarded to small businesses (SBs) and to small and disadvantaged businesses (SDBs).[6] Various statutory and regulatory guidance has been promulgated to tell the base-level COs how to accomplish these goals.[7] Historically, programs developed to foster SB and SDB participation have been honed to a point where they have been relatively successful in assisting government agencies in attaining their goals.[8] Most of these programs involved either "setting aside" contracts solely for competition between qualified small businesses,[9] or contained financial incentives that were provided directly to an SDB or to a prime contractor to encourage the use of SDB subcontractors.[10]

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[5] 15 U.S.C.A. § 639(a) and (d); 15 U.S.C.A. § 644(h) (West 1976 & Supp. 1997).

[6] 15 U.S.C.A. § 644(g)(1) (West 1976 & Supp. 1997); 10 U.S.C.A. § 2323(a) (West Supp. 1997).

[7] *See generally* 10 U.S.C. § 2323; 15 U.S.C. §§ 631-657; Gen. Servs. Admin. et. al., Fed. Acquisition Reg. part 19, 48 C.F.R. § 19.000-19.1007 (Sept. 11, 1997) [hereinafter FAR]; Department of Defense Federal acquisition Regulation Supplement part 219, 48 C.F.R. §§ 219.000-219.7107 (Sept. 11, 1997) [hereinafter DFARS].

[8] *DOD Surpasses 5% Goal on SDB Contracting*, 60 Fed. Cont. Rep. (BNA) 122 (Aug. 9, 1993).

[9] FAR, *supra* note 7, subpart 19.8 (Contracting with the Small Business Administration [The 8(a) Program]; DFARS, *supra* note 7, subpart 219.5 (Set-Asides for Small Business).

[10] FAR, *supra* note 7, subpart 19.7 (Subcontracting with Small Business and Small Disadvantaged Business Concerns); DFARS, *supra* note 7, subpart 219.7 (Subcontracting with Small Business and Small Disadvantaged Business Concerns).

Because there are separate and distinct goals for small disadvantaged businesses, these goals and the regulations designed to achieve them sometimes serve to siphon government business away from small businesses that are not also "disadvantaged." In other words, preferences designed to increase the share of procurement dollars devoted to SDBs removes this subset of awards from non-SDB small businesses. Adarand Constructors Inc., (Adarand) qualifies as a small business because of its size; but does not qualify as a "disadvantaged" business, because the company (although 60 percent woman-owned) is operated by a white male.[11] Mr. Randy M. Pech, president and general manager of Adarand, contends that the aforementioned "goals" are nothing more than a pseudonym for "quotas," considering the way the government has achieved these goals in practice.[12]

In 1989, Adarand was bidding as a subcontractor to provide the guardrails for a federal highway program.[13] Based upon a federal financial incentive to prime contractors to utilize SDBs as subcontractors, Adarand (the low priced bidder) lost the job to Gonzales Construction, a company presumed to be disadvantaged based upon a race-based presumption mandated by the Federal Acquisition Regulation (FAR).[14] Based upon his personal conviction that "discrimination based upon race or gender is immoral, unethical, against the law, and should not be allowed, much less performed by the government,"[15] Mr. Pech brought his constitutional challenge to the federal regulatory scheme to court in the Federal District Court for the State of Colorado. Eight years later, despite victories at the Supreme Court,[16] and later on remand at the district court,[17] the case is still being litigated. For Adarand, as a practical matter, nothing has changed.[18]

The 1995 *Adarand* decision sent shock waves through the federal government and the minority business community.[19] President Clinton

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[11] Interview with Randy M. Pech, General Manager of Adarand Constructors, Inc., (Sept. 23, 1997).

[12] *Id.*

[13] *Id.*

[14] *Id.* FAR § 19.001 provides in its definition of a small disadvantaged business concern: "Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged." FAR, *supra* note 7, § 19.001.

[15] Pech Interview, *supra* note 11.

[16] 515 U.S. 200 (1995).

[17] Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997).

[18] Pech Interview, *supra* note 11.

[19] "Since virtually every significant government procurement contract is subject to some form of affirmative action that is based upon racial classifications, the impact of *Adarand* on Government contract procurement is potentially very broad." Thomas J. Madden and Kevin M. Kordzeil, *Strict Scrutiny and the Future of Federal Procurement Set-Aside Programs in the Wake of Adarand: Does 'Strict in Theory' Mean 'Fatal in Fact'?* 64 Fed. Cont. Rep. (BNA) 133 (Aug. 7, 1995). "Because affirmative action programs have been widely used in federal

demanded a top-down review of government affirmative action programs, causing a temporary freeze on SDB programs while the administration determined how to redraft existing regulations to comply with the strict scrutiny standard.[20] DOD suspended those sections of the Defense Federal Acquisition Regulation Supplement (DFARS) which prescribed the set-aside of acquisitions for SDB concerns while the interagency government-wide review of affirmative action programs was conducted.[21] Despite the turmoil and uncertainty of the day, COs were nevertheless required to continue to monitor and report the amount of small business and small disadvantaged business participation in government contracts.[22] COs also were confronted with the dilemma of keeping the numbers up without some of the tools they had previously enjoyed.[23] Finally, the local "mom and pop" contractors that had secured fairly steady and dependable government contracts based upon the SB and SDB preferences stood to lose the competitive advantage garnered under the former rules. Furthermore, installation commanders interested in maintaining solid relations with the local community risked losing some of the goodwill that the government enjoyed by virtue of the government contract link.

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contracting–often through subcontracting quotas, requirements, and preferences–the *Adarand* decision will have a significant impact on minority preference programs." DONALD P. ARNAVAS AND WILLIAM J. RUBERRY, GOVERNMENT CONTRACT GUIDEBOOK, 1996 SUPPLEMENT 6-5 [hereinafter GUIDEBOOK SUPPLEMENT].

[20] *Clinton Unveils Affirmative Action Plans*, 37 Gov't Contractor 385 (Fed. Pubs. July, 1995).

[21] Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business Utilization Program, 60 Fed. Reg. 54,954 (1995).

[22] Even though the regulations relating to SDB procurement had been suspended, the statutory provisions of the Small Business Act, as amended, applied. Section 639 (d) specifically required:

> For the purpose of aiding in carrying out the national policy to insure that a fair portion of the total purchases and contracts for property and services for the Government be placed with small business enterprises, and to maintain and strengthen the overall economy of the Nation, the Department of Defense shall make an annual report . . . showing the amount of funds appropriated to the Department of Defense which have been expended, obligated, or contracted to be spend [sic] with small business concerns and the amount of such funds expended, obligated or contracted to be spent with firms other than small business . . . .

15 U.S.C.A. § 639(d) (West 1976 & Supp. 1997).

[23] The DOD, for example, suspended indefinitely the "Rule of Two," which had formerly required that whenever two qualified disadvantaged businesses sought to compete on a defense contract, the competition would be restricted exclusive to SDB bidders. Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business Utilization Program, 60 Fed. Reg. at 54,955.

To further complicate matters, The Federal Acquisition Streamlining Act (FASA)[24] was passed by Congress in 1994 to allow the federal government to act more like a commercial enterprise in conducting its procurement efforts. Significantly, for purchases under $100,000, the government was encouraged to use "simplified" techniques and was directed to revise the FAR to accommodate these streamlined procedures.[25] The set-aside programs designed to foster small business growth had always depended on low dollar value contracts as the cornerstone of the SB and SDB programs. Would "streamlining" erode, or reinforce, the strength of the set-aside programs?[26]

The Federal Acquisition Reform Act of 1996 (FARA)[27] took "commercialization" of government acquisition one step further. Section 4101 required that the Federal Acquisition Regulations be amended to qualify that "full and open competition" be tempered by efficiency.[28] Section 4203 of FARA establishes "commercial off-the shelf" (COTS) items as a subset of commercial items which could be offered to the government without modification, just as they are offered in the commercial marketplace.[29]

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[24] The Federal Acquisition Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10, 15, and 41 U.S.C.) [hereinafter FASA].

[25] *Id.* Regulations to foster increased commercialization, which included a new FAR Section 12, regarding commercial procurements, were implemented in 1995. Federal Acquisition Regulation; Acquisition of Commercial Items, 60 Fed. Reg. 48,231 (1995) (codified at various parts of 48 C.F.R.).

[26] Section 8304 of FASA provided: "Nothing in this title shall be construed as modifying or superseding, or is intended to impair or restrict, authorities or responsibilities under--(1) section 2323 of title 10, United States Code . . . ." FASA § 8304. 10 U.S.C. § 2323 imposes goals for contracting with "small disadvantaged businesses" and requires that the FAR contain procedures consistent with the Small Business Act to achieve those goals. 10 U.S.C.A. § 2323 (West Supp. 1997). FASA actually extended the SDB initiatives of 10 U.S.C. § 2323 beyond the DOD, to NASA and the Coast Guard (FASA § 7105) and extended SDB price evaluation preferences and competition restrictions to other federal agencies (FASA § 7102). Pub. L. No. 103-355, 108 Stat. 3243 (1994). Section 7106 of FASA extends preferential treatment in small business procurements to also include women-owned and controlled concerns. FASA § 7106.

[27] The Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (codified in scattered sections of 10, 15, 38, and 41 U.S.C.) [hereinafter FARA].

[28] FARA specifically required the addition of the following subsection to 10 U.S.C. 2304:

> (j) The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.

FARA § 4101.

[29] FARA § 4203, titled "Inapplicability Of Certain Procurement Laws To Commercially Available Off-The-Shelf Items," provides in pertinent part, "nothing in this section shall be construed as modifying or superseding, or as being intended to impair or restrict authorities or

Section 4203 is even more generous in exempting COTS items from federal procurement laws than FASA was in exempting "commercial" acquisitions from the ordinary bureaucracy of the government purchasing system.[30] FARA requires the Office of Federal Procurement Policy (OFPP) to publish a list of federal laws, which are inapplicable to COTS items, including any law "imposing Government-unique policies, procedures, requirements, or restrictions . . . ."[31] Small business programs are obviously "Government-unique." FARA required that implementing regulations be generated which are effective no later than January 1, 1997.[32] How will small business initiatives be impacted by these new regulations?

This article is designed to inform COs, their legal counsel, and their commanders, about DOD and SBA initiatives to promote and preserve SB and SDB programs. It also examines areas of continuing uncertainty as to the constitutionality of the current and proposed regulatory schemes, and discusses the potential for increased courtroom and bid protest activity in this regard.[33] The article begins with a short history of federal contracting with small businesses prior to FARA, FASA, and *Adarand*. Next, the *Adarand* case is discussed in depth, particularly the June 1997 district court decision on remand that the SDB incentives in question violated Adarand's fifth amendment right to equal protection, since the regulations in question were not sufficiently narrowly tailored to accomplish the government's remedial purpose.[34] The business consequences to Adarand itself are examined to put the court's ruling in perspective. Then, the current and proposed regulatory schemes are analyzed with an eye toward whether changes incorporated in the last two years can overcome strict scrutiny as it is being applied in the lower courts. Finally, because "non-disadvantaged" small businesses are in direct competition with small and disadvantaged businesses, potential pitfalls in the form of non-minority contractor court challenges and protests to the latest SDB initiatives will be explored.

III. CONTRACTING WITH SMALL BUSINESSES HISTORICALLY

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responsibilities under . . . section 15 of the Small Business Act . . . . ." *Id. See also* GUIDEBOOK SUPPLEMENT, *supra* note 19, at 6-2.

[30] FARA, Pub. L. No. 104-106, 110 Stat. 186 (1996).

[31] *Id.*

[32] *Id.*

[33] "When implemented, the new procedures will merit attention by procurement attorneys due to the ongoing controversy surrounding the topic they address; the introduction of innovative solutions intended to survive intense judicial scrutiny; and the high-profile, ongoing litigation that prompted the need for revised rules." Major Davis A. Wallace and 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.

[34] 965 F. Supp. 1556.

When the United States entered World War II, Congress perceived a need "to mobilize the productive facilities of small business in the interest of successful prosecution of the war, and for other purposes."[35] Congress created the Smaller War Plants Corporation (SWPC) to enter into contracts with the federal government and to subcontract the performance of these contracts to small businesses.[36] Only 260 contracts were actually let by the SWPC to small businesses.[37] A similar agency, the Small Defense Plants Administration (SDPA) was created by Congress during the Korean War to foster mobilization of small plants to contribute to America's productive strength.[38] After the SDPA also made little use of its authority, Congress created the Small Business Administration (SBA) pursuant to the Small Business Act of 1953.[39]

A. Evolution of the 8(a) Preference Program.

Congress created the SBA to stimulate and encourage "small business enterprises in peacetime as well as in any future war or mobilization period."[40] The Small Business Act of 1958[41] created the statutory authority for the government to afford preferential treatment in the award of government contracts to small businesses.[42] Section 8(a) of the 1958 Act specifically allowed the SBA to contract with other government agencies and to subcontract "to small business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials."[43] As originally promulgated, the legislation was designed to promote all small businesses, not only minority or "disadvantaged" businesses.

The SBA's focus on placing contracts with minority owned businesses did not evolve until the late 1960s and early 1970s.[44] Earlier efforts in the 1960s to set aside contracts under their 8(a) authority for contractors (not restricted to minority-owned businesses) agreeing to locate in or near inner city ghettos and provide jobs for the unemployed, failed to result in projected

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[35] Act of June 11, 1942, Pub. L. No. 603, 56 Stat. 351 (1942). For an excellent historical review of the evolution of small and disadvantaged business programs, *see* Thomas Jefferson Hasty, *Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (is there a) Future?*, 145 MIL. L. REV. 1 (1994).

[36] Act of June 11, 1942 § 4(f)4.

[37] Hasty, *supra* note 35, at 8 n.52.

[38] *Id.* at 8.

[39] *Id.* at 9.

[40] H.R. REP. NO. 494, 83d Cong., 1st Sess. 8 (1953).

[41] Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384 (current version at 15 U.S.C. §§ 631-647 (1958)). Because later SBA set-aside programs stemmed from Section 8(a); they have been dubbed "8(a) set-asides."

[42] Hasty, *supra* note 35, at 10.

[43] Act of July 18, 1958 § 8(a)(1)-(2).

[44] Hasty, *supra* note 35, at 10-15.

plant relocations, hiring and training.[45] In 1969 and 1970, stimulated by a couple of executive orders,[46] the SBA shifted its 8(a) efforts to assisting small concerns owned by disadvantaged persons. In 1971, to further stimulate minority business, President Nixon in 1971 issued Executive Order No. 11,625, which directed the Secretary of Commerce, with participation of other federal departments and agencies, to "develop comprehensive plans and goals for the minority enterprise program; establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of Federal support in achieving the objectives established by this order."[47] To qualify for the minority enterprise program, a business had to be owned and controlled by one or more "socially or economically disadvantaged persons."[48] The definition of a minority business enterprise (MBE) explicitly linked social and economic disadvantage to race.[49]

The statutory conversion of the historic 8(a) program (fostering small business) to the modern 8(a) program (promoting small disadvantaged or minority business) occurred as part of the 1978 "Act to Amend the Small Business Act and the Small Business Investment Act of 1958" (hereinafter 1978 Amendments).[50] The 1978 Amendments required that all 8(a) set-aside

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[45] *Id*. at 12-13 n.86.

[46] In 1969, President Nixon signed an executive order establishing the Office of Minority Business Enterprise in the Department of Commerce. Exec. Order No. 11,458, 3 C.F.R. § 779 (1969). In 1970, he issued a second order calling for increased representation of the interests of small business concerns, particularly minority business enterprises, within federal departments and agencies. Exec. Order No. 11,518, 3 C.F.R. § 907 (1971).

[47] Exec. Order No. 11,625, 3 C.F.R. 616 (1971), *reprinted in* 15 U.S.C.A. § 631 (West 1976).

[48] *Id.*

[49] *Id.* § 6(a) provided:

> "Minority business enterprise" means a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts.

Id.

[50] 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.) [hereinafter 1978 Amendments]. The 1978 Amendment replaced the following sections, which were formerly part of the SBA set aside scheme:

> (a) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary--
> (1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government. In any case in which the Administration

opportunities be subcontracted by the SBA to "socially and economically disadvantaged small business concerns."[51] The SBA was charged with determining which businesses would qualify as "socially and economically disadvantaged."[52] Although SBA regulations have evolved over time, since 1989 the SBA has defined social disadvantage as, "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities."[53] Members of designated minority groups are *presumed* to be socially disadvantaged.[54] An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group, if SBA has reason to question such individual's status as a group member.[55]

> certifies to any officer of the Government having procurement powers that the Administration is competent to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer; and
> (2) to arrange for the performance of such contracts by negotiating or otherwise letting *subcontracts to small-business concerns or others* for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

Id. § 1761 (emphasis added).

[51] *Id.* As codified, the most recent version of the 8(a) program may be found at 15 U.S.C.A. § 637(a) (West 1997).

[52] *Id.*

[53] Social Disadvantage, 13 C.F.R. § 124.105 (1998).

[54] Section 124.105 (b) reads:

> Members of designated groups. (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section.

Id. § 124.105(b).

[55] *Id.* § 124.105(b)(2).

An individual who is not a member of one of the named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence.[56] Those not enjoying the presumption of disadvantaged status based on race must establish "chronic and substantial" disadvantage and personal suffering due to "color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause . . . ."[57] Additionally, these individuals must prove that their social disadvantage negatively impacted on "entry into and/or advancement in the business world."[58]

B. Evolution of the 8(d) Preference Program.

The 1978 Amendments made other significant changes to the Small Business Act, including establishing the requirement to set goals for SB and SDB procurements and the requirement for agencies to report their progress in meeting these goals.[59] The 1978 Amendments also created an "8(d)" preference program for minority subcontractors. Like the 8(a) change, programs previously dedicated to fostering small business were converted to affirmative action programs to stimulate government procurement from "socially and economically disadvantaged" small businesses.[60] The SBA

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[56] *Id.* § 124.105(c)(1).

[57] *Id.* § 124.105(c)(1)(i-iv).

[58] *Id.* § 124.105(c)(1)(v).

[59] *Id. See also* Historical and Statutory Notes accompanying 15 U.S.C.A. § 644 (West 1997).

[60] The 1987 Amendments substituted subsection (d) for one which read:

> (1) Within ninety days after the effective date of this subsection, the Administrator, the Secretary of Defense, and the Administrator of General Services shall cooperatively develop *a small business subcontracting program* which shall contain such provisions as may be appropriate *to (A) enable small business concerns to be considered fairly as subcontractors and suppliers to contractors performing work or rendering services as prime contractors or subcontractors under Government procurement contracts . . . .* Provided further, That such program shall provide that in evaluating bids or selecting contractors for negotiated contracts, the extensive use of subcontractors by a proposed contractor shall be considered a favorable factor . . . .
>
> (2) *Every contract for property or services* (including but not limited to contracts for research and development, maintenance, repair and construction, but excluding contracts to be performed entirely outside of the United States or its territories) *in excess of $ 1,000,000 made by a Government department* or agency, which in the opinion of the procuring agency offers substantial subcontracting possibilities, *shall require the contractor to conform to the small business subcontracting program promulgated under this subsection,* and to insert in all subcontracts and purchase orders in excess of $ 500,000 which offer substantial possibilities

definition of social disadvantage for purposes of the 8(d) program contains the same presumptions as those applicable to the 8(a) program.[61]

Unlike the 8(a) program, however, the mechanism for funneling government business to small and disadvantaged companies in the 8(d) program was through a prime contractor versus a government agency. The current version of the 8(d) program requires that for all procurements over $500,000 ($1,000,000 for construction of public facilities), prime contractors must develop and submit subcontracting plans detailing how they will meet percentage goals for the utilization of small businesses, small businesses owned and controlled by "socially and economically disadvantaged individuals," and (since enactment of FASA in 1994 and FARA in 1996) small businesses "owned and controlled by women."[62] The current statute allows prime contractors to rely on written representations by their subcontractors regarding their status as a small business, a small business owned and controlled by women, or a small business owned and controlled by socially and economically disadvantaged individuals.[63] It further requires that "[t]he contractor *shall* presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act."[64] The 8(d) presumption, therefore, extends to both social and economic disadvantage (in contrast to the 8(a) program, which requires an individualized showing of economic disadvantage).[65] Every federal agency is authorized by this statute to provide incentives to encourage such subcontracting opportunities.[66] The *Adarand* case is based upon a Department of Transportation subcontracting incentive program tied to a similar presumption of social and economic disadvantage.[67] DOD regulations also impose race-based presumptions for qualification as small disadvantaged businesses.

> for further subcontracting a provision requiring the subcontractor or supplier to conform to such small business subcontracting program.

See Historical and Statutory Notes accompanying 15 U.S.C.A. § 637 (West 1997) (emphasis added).

[61] 13 C.F.R. § 124.105.

[62] 15 U.S.C.A. § 637(d) (West 1997). Failure of a contractor to comply in good faith with the goals, "shall be a material breach of such contract." *Id.* § 637(d)(8).

[63] *Id.* § 637(d)(3)(E).

[64] *Id.* § 637(d)(3)(C) (emphasis added).

[65] *Id.* § 637(d)(3)(C) and § 637(a)(6)(A). *See also* 13 C.F.R. § 124.106(a).

[66] *Id*. § 637(d)(4)(E).

[67] "Those regulations say that the certifying authority should presume both social and economic disadvantage (i.e., eligibility to participate) if the applicant belongs to certain racial groups, or is a woman." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 208 (1995) (referring to 49 C.F.R. § 23.62 (1994)).

C. The Department of Defense SDB Preference Program.

The DOD established its SDB preference program primarily under authority of Section 1207 of the National Defense Authorization Act of 1987.[68] The Act established a five percent goal for funds authorized to be spent on fiscal year 1987 defense contracts and subcontracts to be devoted to SDBs.[69] Subsequent defense authorizations extended the five percent goal to each succeeding fiscal year and allowed that awards to historically black colleges and universities and minority institutions could be included within these goals.[70] The National Defense Authorization Act for Fiscal Year 1993 extended the annual five percent goal for DOD contracts to SDBs to the year 2000[71] and codified the five percent goal as part of 10 U.S.C. § 2323.[72]

The authorization acts left to DOD's discretion the promulgation of regulations and procedures necessary to achieve the stated objective of awarding five percent of the dollar value of DOD's contracts to SDB concerns.[73] The DOD general policy is to use the section 8(a) program, small disadvantaged business set-asides and evaluation preferences, advance payments, outreach, and technical assistance to meet its five percent goal for contract and subcontract awards to small disadvantaged businesses.[74] Prior to the *Adarand* case, DOD employed a number of restrictive practices to promote SDB contracts and subcontracts. For example, DOD required that whenever a product or service had been acquired successfully in the past as part of a small disadvantaged business set-aside, absent exigent circumstances, that product or

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[68] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986).

[69] *Id.*

[70] National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1034 (1987); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub L. No. 101-189, 103 Stat. 1352 (1989); National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990); DFARS, *supra* note 7, § 226.7000.

[71] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992). Section 801 of the National Defense Authorization Act for Fiscal Year 1993 codified and amended § 1207 of the earlier authorization act at 10 U.S.C.A. § 2323. *Id.*

[72] *Id.* § 2323 (a) and (k) (West Supp. 1997).

[73] Section 801 created the following requirement:

> The Secretary of Defense shall prescribe regulations that provide procedures or guidelines for contracting officers to set goals which Department of Defense prime contractors that are required to submit subcontracting plans under section 8(d)(4)(B) of the Small Business Act (15 U.S.C.A. § 637(d)(4)(B)) in furtherance of the Department's program to meet the 5 percent goal . . . .

Id. § 2323.

[74] DFARS, *supra* note 7, § 219.201.

service was required to be set aside forever as a small disadvantaged business set-aside procurement.[75] Another provision provided that except for certain circumstances (most notably 8(a), or prior successful small business set-asides), "the contracting officer shall set aside an acquisition for small disadvantaged businesses when there is a reasonable expectation that . . . [o]ffers will be received from at least two responsible small disadvantaged business (SDB) concerns . . . [and] [a]ward will be made at not more than ten percent above fair market price . . . ."[76] This latter set-aside provision has been nicknamed the "Rule of Two."[77]

In addition to these special provisions, DOD also relied heavily upon traditional 8(a) and 8(d) restrictions and preferences.[78] "A concern must qualify as a small disadvantaged business (SDB) on the date of submission of its initial offer including price to be eligible for–(i) Award under a small disadvantaged business set-aside; (ii) Preferential consideration as an SDB under a partial set-aside; or (iii) An evaluation preference for SDBs."[79] Before DOD could consider one of the above set-aside programs, the CO was required to "review the acquisition for offering under the 8(a) Program."[80] When a contract was not to be awarded using 8(a) or DOD SDB set-aside procedures, the SDB contractor was entitled to an evaluation preference, whereby all non-SDB bidders would have the price of their offers inflated by ten percent before they were compared to SDB offers (where award was to be based on price or price-related factors).[81]

Qualifying as an SDB in the DOD scheme is a somewhat amorphous proposition. The DFARS provide, "[t]o be eligible as an SDB subcontractor, a concern must meet the definition in the provision at [DFARS] 252.219-7000, Small Disadvantaged Business Concern Representation (DOD Contracts)."[82] "Small disadvantaged business concern" is defined in DFARS 252.219-7000 as a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business

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[75] DFARS, *supra* note 7, § 219.501(g)(S-70). This section was suspended for an indefinite period of time. *See supra* note 23.

[76] DFARS, *supra* note 7, § 219.502-2-70. This section was suspended for an indefinite period of time. *See supra* note 23.

[77] The demise of the Rule of Two was heralded in an October 1995 Los Angeles Times Article. *See* David G. Savage, *Pentagon Will End Job Pacts Based On Race*, L.A. TIMES, Oct. 22, 1995, at A1.

[78] *See generally*, DFARS, *supra* note 7, subpart 219.7 (Subcontracting with Small Business and Small Disadvantaged Business Concerns), subpart 219.8 (Contracting with the Small Business Administration (The 8(a) Program)), and subpart 219.70 (Evaluation Preference for Small Disadvantaged Business (SDB) Concerns).

[79] *Id.* § 219.301.

[80] *Id.* § 219.803.

[81] *Id.* §§ 219.7000-219.7002.

[82] *Id.* § 219.703.

Administration at 13 CFR part 124"[83] Thus, ultimately, the decision as to which businesses qualify as SDBs relies upon application of the SBA definitions. The contractor must certify that it is an SDB and must indicate the basis of the certification by representing minority status or other SDB qualification of the owner.[84] Parallel requirements apply to SDB subcontracting and SDB evaluation preferences.[85] Although the DOD regulations don't make this distinction, presumably the SBA definitions concerning the 8(a) program would apply to DOD set-asides, and the definitions pertaining to the 8(d) program would govern subcontracting incentives and evaluation preferences.

IV. THE *ADARAND* CASE–ITS HISTORY AND AFTERMATH

A. History

Since 1989, Adarand has tracked the volume of business that it knows it has lost due to SDB incentives.[86] Adarand has lost at least thirty-three contracts in the past eight years where prime contractors have been willing to tell them that the reason they lost an otherwise low bid was because the prime contractor could not enjoy the SDB incentive if they awarded to Adarand.[87] Adarand's general manager suspects that many times the primes may not tell him, even when this is the reason they select an SDB over Adarand, because the primes know how strongly he feels about this issue. He thinks that, on some occasions, primes will simply tell him he wasn't "low" rather than face a possible argument.[88]

The thirty-three contracts that were positively lost as a result of incentives to hire SDBs totaled over $2 million in lost revenues, about eight percent of Adarand's revenues.[89] This adverse impact is based upon the preference programs alone, since it is impossible to know how much business was lost due to set-aside programs.[90]

Adarand doesn't perform much "pentagon work," so it wasn't too significant to Adarand when the DOD did away with the "Rule of Two" for

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[83] *Id.* § 252.219.7000.
[84] *Id.*
[85] *Id.* §§ 252.219.7002, 252.219.7006.
[86] Pech Interview, *supra* note 11.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* Mr. Pech indicated that because Adarand isn't eligible to bid these contracts he doesn't know whether Adarand would have been the low bidder; hence it is impossible to say with any certainty how much set-aside business Adarand lost.

small disadvantaged business set-asides.[91] The Rule of Two had required that whenever a DOD CO reasonably believed that two or more responsible SDBs would submit bids on a defense contract, the CO had to set the contract aside exclusively for SDB participation, effectively closing the door to all other small businesses.[92] Because Adarand's four main competitors are all SDBs, if Adarand had been subjected to this constraint, it would have been precluded from bidding on any DOD contracts if any two or more of its competitors were bidding. When the Rule of Two was abolished, about $1 billion of annual defense contracts were no longer required to be set aside in this fashion.[93] Ironically, because Adarand does virtually no DOD work, it hasn't benefited at all from this significant change in government contracting, brought about by Adarand's Supreme Court victory.

The bulk of Adarand's work involves state and federal highway programs.[94] Most of the projects are not awarded by the federal government, but are federally funded.[95] The states, in order to qualify for federal funding, must implement Department of Transportation (DOT) affirmative action programs and goals.[96] Adarand faced obstacles when trying to overcome SDB preferences on federally funded state projects.

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[91] *Id.*

[92] DFARS, *supra* note 7, § 219.502-2-70 (suspended, effective Oct. 23, 1995. *See* 60 Fed. Reg. 54,954, 54,955 (1995)).

[93] The L.A. Times reported:

> The Pentagon will announce early this week that it is repealing an affirmative-action rule that prevented white-owned firms from competing last year on contracts worth $1 billion, according to White House and Justice Department officials. The announcement, expected Monday or Tuesday, comes four months after the Supreme Court ruled that it is almost always unconstitutional for federal agencies to use "racial classifications" in awarding contracts.

Savage, *supra* note 77.

[94] Pech Interview, *supra* note 11.

[95] *Id.*

[96] Surface Transportation and Uniform Relocation Assistance Act of 1987 [STURRA], Pub. L. No. 100-17, 101 Stat. 132 (1987). "Approximately 98% of STURRA's funding is allocated to the States." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 254 n.9 (1995) (Stevens J., dissenting) (citing Respondent's [DOJ's] brief). STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Pub. L. No. 100-17, 101 Stat. 132, 145 (1987). STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." *Id.*

Since most highway projects involve more than just guardrail work, Adarand is almost always competing at the subcontractor level.[97] As the only non-minority owned guardrail contractor in Colorado, Adarand is victimized by the race-based preferences extended to SDB subcontractors as part of the 8(d) subcontracting program (as applied directly by the Central Federal Lands Highway Division (CFLHD), which is part of DOT, or as applied indirectly by the State of Colorado on federally-funded highway projects).[98] These were the provisions challenged in its 1989 lawsuit.

When Adarand submitted the low bid to a DOT prime contractor, Mountain Gravel, it was informed by Mountain Gravel that it would have received the subcontract, had it not been for the additional payment that Mountain Gravel would receive by selecting an SDB instead.[99] Adarand Constructors filed suit in the federal district court protesting the federally mandated, race-conscious subcontracting compensation clause (SCC) which provided a financial incentive to Mountain Gravel for subcontracting with an SDB instead of Adarand.[100] The federal regulations being contested included a race-based presumption that certain minorities were, "socially and economically disadvantaged."[101] Adarand protested that this presumption, as part of a federal regulation, violated his fifth amendment (versus fourteenth amendment) right to equal protection. The Court of Appeals for the Tenth Circuit, following what appeared to be a dichotomy between Fourteenth Amendment equal protection analysis (where the courts apply strict scrutiny) and Fifth Amendment equal protection analysis (where the courts applied a lesser scrutiny), denied Adarand's appeal, holding that the federal scheme complied with this lesser standard.[102] The United States Supreme Court decided, in June of 1995, that the same judicial standard of review, strict scrutiny, should apply to both Fifth Amendment and Fourteenth Amendment equal protection analysis.[103] Significantly, the Supreme Court left unanswered the ultimate question of whether or not the challenged regulations violated the strict scrutiny standard,[104] and in a 5-4 decision, remanded the case to the Tenth Circuit with directions to apply the correct legal standard.[105]

Ultimately, in June of 1997, the SDB preferences and the statutory provisions upon which they were based were held to be unconstitutional by the

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97 Pech Interview, *supra* note 11.

98 *Id.*

99 *Id.*

100 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205 (1995).

101 *Id.* at 208.

102 Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1547 (10th Cir. 1994).

103 515 U.S. at 237.

104 In the emotionally charged arena of affirmative action, where reasonable minds can differ, the author suspects that the court was unable to arrive at a majority on the merits of this case.

105 515 U.S. at 237.

Federal District Court of Colorado.[106] The government has appealed the judgment to the Tenth Circuit.[107] For Mr. Randy Pech, Adarand's president and general manager, this is a matter of principle which won't be resolved by settlement.[108] "As long as the presumption is in place and the government discriminates against me because of the color of my skin, I'll continue to fight every policy that's in place."[109]

The controversy surrounding this case should not be surprising given the split along political lines regarding affirmative action and the diversity among even the Supreme Court Justices on this very issue. One need only compare the diverse opinions of the Justices deciding this case to appreciate the underlying philosophical chasm.

In his concurrence with the majority, Justice Scalia writes, "In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction . . . . In the eyes of government, we are just one race here. It is American."[110]

Justice Thomas takes this argument one step further. "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[111]

Writing in dissent, Justice Ginsburg states, "The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgement of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects."[112]

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[106] Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1587 (D. Colo. 1997).

[107] Pech Interview, *supra* note 11.

[108] *Id.*

[109] *Id.*

[110] 515 U.S. at 239 (Scalia, J., concurring). "To pursue the concept of racial entitlement–even for the most admirable and benign of purposes–is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." *Id.*

[111] 515 U.S. at 240 (Thomas, J., concurring).

> So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences. *Id.*

[112] 515 U.S. at 273 (Ginsburg, J., dissenting). "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come

Justice Souter writes separately in dissent, "The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination."[113]

Finally, in yet another dissent, Justice Stevens posits, "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression . . . . Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."[114]

On the other hand, Justice O'Connor, writing for the majority, left the door open for certain affirmative action programs to survive strict scrutiny.

> "Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' (citation omitted) The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[115]

Justice O'Connor also provided some (albeit limited) guidance for the lower courts to follow in making their decisions. "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[116] Although not providing any insight as to what the Supreme Court might consider "compelling," she did suggest that in deciding whether the programs are "narrowly tailored," the lower courts should consider

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down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice . . . ." *Id.* at 274. "I would not disturb the programs challenged in this case . . . . " *Id.* at 276.

[113] 515 U.S. at 269 (Souter, J., dissenting). "Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination." *Id.* at 270.

[114] 515 U.S. at 243 (Stevens, J., dissenting).

> I do not believe such action, whether wise or unwise, deserves such an invidious label as 'racial paternalism,' ante, at 1. If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.

Id. at 249. (quoting Justice Thomas' concurring opinion).

[115] 515 U.S. at 237 (1995).

[116] *Id.*

whether "race-neutral" means could be used to increase minority business participation in government contracting, and whether an affirmative action program "will not last longer than the discriminatory effects it is designed to eliminate."[117]

This divergence of opinion suggests that reasonable minds might not only differ, but also passionately disagree. For this reason, district court judges are unlikely to come to consistent conclusions regarding the constitutionality of the SDB preferences as implemented by the various federal agencies. Even so, it is necessary to examine lower court decisions, precisely because of the vacuum left by the Supreme Court's failure to address *whether in fact* these regulations failed to meet the strict scrutiny standard.

[117] *Id.* at 237-38.

B. The Aftermath

Perhaps the best place to begin the analysis of whether the government has a compelling interest in these types of SDB preference programs and, if so, whether the programs are narrowly tailored to accomplishing their remedial purposes, is the *Adarand* case itself on remand. Surprisingly, the Tenth Circuit remanded the case to the district court "for further proceedings" rather than applying the strict scrutiny test to the facts of record.[118] Judge Kane, the Senior District Court Judge, who ultimately decided the case on remand, expressed his concern eloquently. "In light of the lack of a genuine issue as to any material fact, the rationale for the circuit court's remand to this trial court eludes me."[119]

Indeed, the circuit court may have been passing the buck because they were unable to obtain consensus on the issue of whether the statutory and regulatory schemes involved in the SDB preference programs survived strict scrutiny. A similar lack of consensus may have generated the remand from the Supreme Court. Judge Kane expressed his concern in this regard also:

> The prudence of remanding this case to the trial court is difficult to perceive. Both parties have stipulated to the absence of any dispute of material fact (citation omitted), and the unresolved questions posed by Justice O'Connor . . . concern only issues of statutory construction . . . and a number of "apparent discrepancies" the Court found in the application of the statutes and regulations involved . . . . The higher courts are better equipped to decide as a matter of law whether, under the proper interpretation, the statutes involved can be described as in furtherance of a compelling interest and narrowly tailored to meet that interest.[120]

The Supreme Court's determination that these purely legal issues, "should be addressed in the first instance by the lower courts"[121] certainly is not predicated upon the Court's inability to resolve and interpret complex regulatory and statutory schemes. Rather, it suggests either an inability to obtain a majority opinion about the underlying affirmative action program, or it reflects a desire on the part of the Court to use the lower courts as an experimental proving ground, before formalizing its opinion in this regard.[122]

In *Adarand*, Judge Kane concluded, Congress need not make state-to-state nor city-to-city findings of discrimination before it can find a compelling

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[118] Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1587 (D. Colo. 1997).

[119] *Id.* at 1558.

[120] *Id.*

[121] 515 U.S. at 238.

[122] "In remanding the case, the Supreme Court has essentially delegated the difficult responsibility of defining strict scrutiny to a nationwide judiciary. In all likelihood, however, the Court has only taken temporary leave of the case . . . ." Madden and Kordzeil, *supra* note 19, at 134.

interest in eliminating documented discriminatory barriers.[123] This portion of the decision is *dicta*, however, because of the later determination that the subcontracting compensation clause at issue was not tailored narrowly enough to survive strict scrutiny.[124] "Contrary to the Court's pronouncement that strict scrutiny is not 'fatal in fact,' I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such program is both underinclusive and overinclusive."[125]

Judge Kane considered the Supreme Court's direction with regard to narrow tailoring, including whether there was any consideration of the use of race-neutral means to increase minority business participation in government contracting, and whether the program was appropriately limited such that it would not last longer than the discriminatory effect it was designed to eliminate.[126] In addressing the first issue, he concluded that the government's evidence regarding race-neutral programs for at least twenty-five years before the 1978 Amendments to the Small Business Act, coupled with Congressional findings that less than one percent of federal contracts in 1977 were awarded to minority businesses, sufficed to prove that race-neutral measures had been ineffective in increasing minority participation in government contracting.[127]

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[123] 965 F. Supp. at 1577. For reasons to be explained later (*see infra* note 127) it is not clear that the Government will be able to prevail in all courts on the "compelling interest" question.

[124] *Id.*

[125] *Id.* at 1580.

[126] *Id.* at 1582, 1584.

[127] *Id.* at 1583. To say that discriminatory barriers existed in the 1970s is much different from addressing the question of whether those same barriers exist today. Justice Steven's dissent in *Adarand* suggested that some lower level of "compelling" interest might be suggested by the majority:

> I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different–something less strict–when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

515 U.S. at 243 (Stevens, J., dissenting). However, this seems contrary to the express language of the majority, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." 515 U.S. at 224. Furthermore, the underlying purposes of the majority holding were to impose the same standard regardless of the "race of the individual burdened or benefited" (consistency) and whether or not the analysis was conducted according to the Fifth Amendment or the Fourteenth Amendment (congruence). *Id*. If this is the case, based upon the Supreme Court's holding in *Richmond v. J.A. Croson*, 488 U.S. 469 (1989), then to be compelling, the

He further determined that "[w]hen and in what circumstances, the SCC program will end seems unclear. However, because I have not found the SCC program to be narrowly tailored based on other relevant factors, I need not rule on the issue of whether or not the . . . program 'will not last longer than the discriminatory effect it is designed to eliminate.'"[128] Judge Kane's "other relevant factors" related to the issue of narrow tailoring were based on Justice O'Connor's observation that "unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses."[129]

> The subject SCCs were not themselves created by any act of Congress. Rather, they were instituted by the CFLHD as one means by which to comply with the congressional requirements in the SBA, STURAA, and ISTEA. As such, both the SCCs themselves and the authority under which they arise must be examined in determining whether the SCC program is a narrowly tailored measure that furthers the government's proffered interest of reducing discriminatory barriers in federal contracting.[130]

In examining the SCCs themselves, the court concluded, "the record indicates retaining Gonzales, a disadvantaged business enterprise (DBE), did not impose any additional cost upon Mountain Gravel. To the extent an SCC payment acts as a gratuity for a prime contractor who engages a DBE, it cannot be said to be narrowly tailored to the government's interest of eliminating discriminatory barriers."[131]

Adarand proved in its case that its four main competitors in the guardrail business (all of whom are entitled to SDB status and preferences) are established small businesses who have been competing with Adarand for decades.[132] Prime contractors are confident that all of these four SDB contractors will deliver at the price bid without any additional "oversight"

Government must show "a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* Indeed, looking at *Croson* and its progeny, "strict in theory" has almost always been "fatal in fact."

[128] 965 F. Supp. at 1584.

[129] *Id.* at 1581 (citing O'Connor, 515 U.S. at 238).

[130] 965 F. Supp. at 1578.

[131] *Id.* at 1579. "Rather, this aspect of the SCC results in the spending of public funds in a way 'which encourages, entrenches, subsidizes, or results in racial discrimination.'" *Id.* at 1579-1580 (quoting Lau v. Nichols, 414 U.S. 563 (1974)).

[132] Pech Interview, *supra* note 11. It should be noted that both Mr. Pech and his wife have been called upon to testify in regard to the business consequences of these SDB incentive programs on numerous occasions by various committees and subcommittees within Congress. *Senate Hearings on Proposals to Prohibit the Use of Race and Gender Preferences by the Federal Government in Employment, Contracting and Other Programs*, 105th Cong. 143-83 (1997) (testimony of Randy Pech, Adarand Constructor's, Inc.); *Unconstitutional Set-Asides Hearing Before the Senate Committee on the Judiciary, Subcommittee on the Constitution*, 105th Cong. 143-133 (testimony of Mrs. Valery Pech, Adarand Constructor's, Inc.).

costs to the prime.[133] Adarand further pointed out that when it competes with these firms, most of the time its SDB competitors are awarded subcontracts because they are the lowest bidder for the work.[134] Based upon his conversations with them and the prime highway contractors, Adarand's general manager estimates that about ninety-five percent of the SDB's business is a result of ordinary competition.[135] Because these firms are capable of competing on an equal basis, it seems there is no compelling need to give these SDBs an advantage on the other five percent of the contracts.[136] To the extent that the government incentivizes awards to SDBs who don't need the incentives, Adarand contends that the program is over-inclusive.[137]

On the other hand, Adarand contends that the program, as it has been applied to the highway construction business in Colorado, is also under-inclusive, since there is no requirement that the prime contractors utilize SDBs that actually require additional oversight.[138] Over the past twenty-one years, Mr. Pech has seen numerous SDBs try to "break in" to the guardrail business in Colorado.[139] Since the primes have no incentive to hire a truly disadvantaged business, they meet their goals and earn their incentives by using the four SDBs they know they can trust.[140] From a business perspective this makes sense, since the primes can keep the entire incentive where there are no actual "oversight" expenses, plus the prime incurs less risk of problems or failure with the four entrenched SDB contractors.[141] Of course, the four SDB contractors have no business incentive to support or encourage newcomers, since any additional SDB contractor will be competing for the same business and will enjoy the same preferred footing. Despite the subcontracting preferences of the past two decades, of the dozens of new minority contractors who have attempted to enter this niche of the construction market, none have been successful.[142]

Turning from the SCC itself to the entire general regulatory and statutory scheme, the district court noted:

> Congress has clearly mandated that its agencies award a certain percentage of federal contracts to groups certified under the race-based presumptions . . . . Section 637(d) of the SBA states "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans,

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133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*

> Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities . . . ." Section 644(g) of the SBA states: "The President shall annually establish Government-wide goals for procurement contracts . . . at not less than 5 percent . . . ."[143]

Congress' national jurisdiction allows it, where appropriate, to determine that discriminatory barriers exist with reference to specific groups.[144] "The statutes and regulations governing the SCC program are overinclusive in that they presume that all those in the named minority groups are economically and, in some acts and regulations, socially disadvantaged."[145] In other words, even though a minority business might not be socially and economically disadvantaged, the presumptions operate in its favor. The presumption, for instance, would include Bill Cosby and Michael Jordan as "economically disadvantaged" simply because of their race.

"This presumption is flawed, as is its corollary, namely that the majority (Caucasians) as well as members of other (unlisted) minority groups are not socially and/or economically disadvantaged."[146] By excluding certain minority groups whose members are economically and socially disadvantaged due to past and present discrimination, the program is also under-inclusive.[147] Therefore, anyone who actually is socially and economically disadvantaged that doesn't fall into the "presumed disadvantaged" racial categories is compelled to prove their individual disadvantage in accordance with the scheme outlined by the SBA[148] or forgo the benefits that disadvantage is supposed to afford.

> [T]he statutes and regulations implicated in the SCC program, with respect to the races included as presumptively disadvantaged, do not provide a reasonable assurance that the application of racial criteria will be limited to accomplishing the remedial objectives of Congress. (citation omitted) As such, they are not narrowly tailored to serve the interest of eliminating discrimination in the construction industry.[149]

Just as a quota system is not narrowly tailored to achieving its objective (potentially including more or fewer beneficiaries than necessary to achieve a remedial goal), the presumptions at issue in this case and the "mandatory"

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[143] 965 F. Supp. at 1579 (citing 15 U.S.C. §§ 637(d) and 644 (g)).

[144] *Id.*

[145] *Id.* The judge probably transposed "economically" and "socially" and meant to write that "all those in the named minority groups are [presumed] *socially* and, in some acts and regulations, [further presumed] *economically* disadvantaged."

[146] *Id.*

[147] *Id.*

[148] Social Disadvantage, 13 C.F.R. § 124.105 (1998); Economic Disadvantage, 13 C.F.R. § 124.106 (1998).

[149] *Id.*

goals required by the statutory and regulatory scheme miss the constitutional mark.

As Mr. Pech explained, in practice, the prime contractors have to base their bids upon receiving the subcontracting incentives when competing for these awards, because their competitors will be using the same strategy.[150] Just as Adarand is at a disadvantage when competing against SDB subcontractors, primes who don't use SDB subcontractors are at a disadvantage because they can't lower their bids (with the expectation of recovering some incentive money later) to compete on equal footing with primes who can plan to receive the incentives. If Adarand can't make its bid attractive enough (by being sufficiently below his SDB competitors) then they won't seriously be considered for award of the subcontract.[151]

Even when they can bid sufficiently low, they may not get the award where the state refuses to grant a waiver to their "goals."[152] "In reality, the goals are quotas because someone is accountable if a goal isn't met."[153] "The practical impact is much more drastic than reading the letter of the regulations might suggest; the end result is a very rigid program that discriminates against white, male businessmen."[154]

In one situation, Adarand was 18% below his nearest SDB competitor and the prime sought a waiver from the state suggesting that it was not reasonable to obtain the work from an SDB in this situation.[155] The state refused to grant the waiver initially, until one of Adarand's SDB competitor's intervened on its behalf and convinced the state that the SDBs would be unwilling to perform the work for the same amount.[156] Adarand explained that the bureaucracy and delay associated with the waiver procedure means that primes are extremely reluctant not to meet their goals.[157] To award to Adarand, they usually must hire more than the target SDB subcontractor percentage in some other area of the work, to offset the fact that Adarand is not an SDB.[158]

DOD contractors are under similar obligations to work in good faith to meet DOD goals. Where an SDB subcontractor does not belong to the presumed disadvantaged category, and has not been previously certified by the SBA under the 8(a) program, it is difficult to convince a prime that it should win the award, due to the potential delay and inconvenience. All of the inertia

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150 Pech Interview, *supra* note 11.
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*

of the system itself means that white-owned firms are substantially burdened by the existing scheme and that minorities who don't enjoy the presumptive determination of this status face a daunting task if they are attempting to qualify as socially and economically disadvantaged.

The *Adarand* court on remand finally concluded that the mere fact that there were inconsistencies in the various statutory and regulatory provisions precluded a determination that the scheme was narrowly tailored.[159]

> Justice O'Connor drew attention to the issue of whether the differences in the statutes and regulations implicated in the SCC program are relevant to a strict scrutiny analysis . . . . In my opinion, these disparities further indicate a lack of narrow tailoring . . . [because of] the resultant uncertainty as to who may or may not participate in the race-based SCC program.[160]

The court thus struck down not only the particular subcontracting compensation clause at issue in the case, but also the 8(d) subcontracting incentive provision and the goal requirement of the Small Business Act as Amended.[161] However, the judgment only holds these provisions unconstitutional as applied to highway construction in the State of Colorado.[162]

Because the 8(d) provisions are statutory and extend to every federal agency in every state, it is likely that district court judges in other areas of the country may rule the same way. Also, because the DOD regulations contain similar presumptions and goals, DOD contracts are equally vulnerable to challenge. Contracting officers may face district court injunctions commanding them not to award an 8(d) contract or invalidating the entire 8(d) program. Based upon the Supreme Court's ruling that strict scrutiny standard applies, the government's 8(a) program has also come under attack.

In *Dynalantic Corp. v. Department Of Defense*,[163] the District of Columbia Circuit Court overruled the district court to hold that Dynalantic (a non-8(a) firm) had standing to challenge the 8(a) program. "Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to 8(a) firms."[164] In reaching this ruling, the court considered the following facts significant:

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[159] 965 F. Supp. at 1581. Compare, for example, the 8(d) provision [15 U.S.C. § 637(d)] and the FAR presumption [48 C.F.R. § 19.703(a)(2)] for both social and economic disadvantage accruing solely upon minority status in a named group, with the SBA scheme allowing members of the same named groups the presumption of social disadvantage [13 C.F.R. § 124.105], but potentially requiring some individualized showing of economic disadvantage [13 C.F.R. § 124.106(b)].

[160] 965 F. Supp. at 1581.

[161] *Id.* at 1584, striking down 15 U.S.C. §§ 637(d) and 644(g).

[162] *Id.*

[163] Dynalantic Corp. v. Department Of Defense, 115 F.3d 1012 (D.C. Cir. 1997).

[164] *Id.* at 1015.

> Of the approximately 5,700 firms currently in the 8(a) program, only about two dozen–less than one-half of one percent–have qualified by demonstrating to the SBA by "clear and convincing evidence," 13 C.F.R. § 124.105(c)(1), that they are socially disadvantaged; thus, over 99 percent of the firms qualified as a result of race-based presumptions. That means that 99 percent of those companies that have a preferred position to appellant in competing for Defense Department contracts received an allegedly illegal boost to put them in the preferred category. It seems more than likely that without the regulatory presumption there would be considerably fewer 8(a) contractors, for such contractors would have to make by "clear and convincing evidence" the showing required by 13 C.F.R. § 124.105(c)(1), including that the disadvantage has been personally felt and has impacted their entry into the business world. Appellant would thus suffer a considerably lessened injury: a smaller number of 8(a) firms means a smaller number of contracts procured under the 8(a) program.[165]

One notable feature of the court's decision was that the actual contract originally at issue in the case had been withdrawn from the 8(a) program.[166] Although the dissent rigorously agreed with the district court that the issue was now moot, nevertheless, the majority held:

> In sum, the interdependency of various provisions of the Act and the 8(a) regulatory scheme demonstrates that Dynalantic's injury–its inability to compete on equal footing with 8(a) participants–is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional. Dynalantic thus has standing to challenge the constitutionality of the 8(a) program . . . .[167]

Standing to challenge the constitutionality of the preferences is the key to gaining entrance to the courtroom. The government's position on standing is that only those non-preferenced 8(a) businesses have standing to challenge the race-based preference provisions, since only these companies would be eligible for award if the 8(a) race-based presumptions were found unconstitutional. This would be practically impossible, given the *Dynalantic* court's statistics.[168]

Other courts have also rejected the government's position. In *C.S. McCrossan Co. v. Cook*,[169] the district court found that McCrossan, a large business, had standing to challenge the 8(a) scheme. In *Cortez III Service*

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[165] *Id.* at 1016-17.

[166] "We think appellant has demonstrated the likelihood that the government will, sometime in the near future, attempt to procure under the 8(a) program another contract for which Dynalantic is ready, willing, and able to bid." *Id.* at 1018.

[167] *Id.*

[168] *Id*. at 1015-16.

[169] C.S. McCrossan Co. v. Cook, No. 95-1345-HB, 40 Cont. Cas. Fed. (CCH) P76,917, 1996 LEXIS 14721 (D.N.M. Apr. 2, 1996).

Corp v. NASA,[170] Cortez, a former 8(a) contractor argued not that the entire 8(a) scheme was unconstitutional, but only that the application to it was unconstitutional. Cortez was found to have standing.[171] Certainly, the door is open to 8(a) challenges based upon these cases.

That the door is open, however, is no guarantee that these firms are likely to be successful on the merits. In *McCrossan*, the court stated: "Defendants have submitted significant evidence that the 8(a) program may survive strict scrutiny."[172] Unfortunately, the court provided no analysis of the strict scrutiny test when arriving at this conclusion.[173]

In *Cortez*, however, the court held that while the 8(a) program was constitutional on its face, there was no effort whatsoever by NASA or the SBA to address the particularized application of the 8(a) program to this case, so Cortez was granted a preliminary injunction while the case was litigated.[174]

> The fact that Section 8(a) is constitutional on its face, however, does not give the SBA, NASA or any other government agency carte blanche to apply it without reference to the limits of strict scrutiny. Rather, agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue . . . . It is not inconsistent with Congress's mandate to the SBA, to require the SBA to ensure that in each context where an 8(a) set-aside is proposed, such a set-aside is actually required. The defendants have at no time related why they believe it is necessary to pursue the 8(a) route. If NASA wants to proceed in this fashion, it has an obligation to explain what past societal disadvantages it intends to correct.[175]

Because agencies have not made particularized findings regarding discrimination when utilizing 8(a) and 8(d) programs in the past, COs facing court actions in jurisdictions taking a "*Cortez*" type approach might find many of their awards enjoined.

Due to the paucity of decisions on the merits considering the constitutionality of the SDB preferences in the courts, the Government Accounting Office (GAO) has been unwilling to conclude that award of 8(a) or 8(d) contracts should be denied based upon alleged constitutional infirmity of the programs. In the wake of *Adarand*, the GAO received protests from

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[170] Cortez III Service Corp v. NASA, 950 F. Supp 357 (D.D.C. 1996).

[171] *Id.* at 360.

[172] McCrossan, 1996 LEXIS 14721.

[173] *Id.* In fact, the entire ruling regarding likelihood of success on the merits stated only: "At this juncture, Plaintiff has not demonstrated a substantial likelihood of prevailing on the merits. Defendants have submitted significant evidence that the 8(a) program may survive strict scrutiny as articulated in Adarand. Accordingly, Plaintiff's motion for preliminary injunction is denied." *Id.*

[174] 950 F. Supp. at 362-63.

[175] *Id.*

disgruntled bidders complaining that award should not be made to the SDB contractors. The GAO has held uniformly:

> Our position is that *there must be clear judicial precedent on the precise issue presented to us before we will consider a protest based on the asserted unconstitutionality of a procuring agency's action*. Neither the *Adarand* nor the *Croson*[176] decision constitutes clear judicial precedent on the constitutionality or legality of this SDB set-aside program. These decisions addressed the particular set-aside programs that were before the Court, and while they indicate what factors need to be considered to determine the constitutionality of a particular set-aside program, we are unaware of, and the protester does not cite to, any dispositive federal court decisions applying the standards articulated in *Adarand* and *Croson* to a set-aside program which is sufficiently similar to DOD's program so as to warrant regarding those decisions as clear judicial precedent here.[177]

The GAO requirement for clear judicial precedent on the precise issue presented provides tremendous relief to the agencies and their contracting officers. Since COs are powerless to do anything other than to conform to agency regulations, it is at least comforting to know that GAO is not going to intervene until the issue is settled. According to the bid protest expert in the Secretary of the Air Force, General Counsel office, after GAO made it clear that it was too early to handle these cases, and following DODs suspension of set-aside programs (the main point of contention), it's been very quiet in the bid protest arena.[178] "Until we get some kind of Supreme Court precedent, GAO simply won't tackle *Adarand*–type cases."[179] With the changing regulatory landscape, it is unlikely that "there will be clear judicial precedent on the precise issue presented" for quite some time.

V. STATUTORY AND REGULATORY CHANGES SINCE 1994

At the time it was passed, The Federal Acquisition Streamlining Act of 1994 (FASA), generated the broadest and most far-ranging changes to the government procurement system in almost a decade.[180] Not surprisingly,

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[176] The GAO is referring to the Supreme Court's holding in Richmond v. J.A. Croson, 488 U.S. 469 (1989).

[177] G.H. Harlow Co., Inc., B-266144.3, 96-1 CPD ¶ 116 (Feb. 28, 1996) (on reconsideration) (emphasis added). *See also* Seyforth Roofing Co., Inc., B-235703, 89-1 CPD ¶ 574 (June 19, 1989); Schwegman Constructors and Engineers, Inc., B-272223, 96-2 CPD ¶ 90 (Aug. 28, 1996); JWA Security Services, B-253836, 93-2 CPD ¶ 219 (Oct. 12, 1993).

[178] Telephone interview with Greg Petkoff, Secretary of the Air Force General Counsel for Acquisitions (Oct. 1, 1997).

[179] *Id.*

[180] FASA, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10, 15, and 41 U.S.C.) (1994). The author remembers attending a government contract course entitled,

FASA also included statutory changes to certain socio-economic programs, including those procurements related to small, and small and disadvantaged businesses. FASA § 7105 extended the SDB initiatives of 10 U.S.C. § 2323 beyond the Department of Defense, to NASA and the Coast Guard.[181] Section 7102 similarly extended SDB price evaluation preferences and competition restrictions to other federal agencies.[182] Section 7106 of FASA extends preferential treatment to women-owned and controlled concerns and creates a separate five percent procurement goal for women-owned businesses.[183] Most of these changes were to become effective when implemented by the FAR and regulations to be generated by the agencies concerned.[184]

FASA § 4301 created a new "micro-purchase" procedure which became effective upon enactment.[185] Micro-purchases are defined as purchases of under $2500.[186] The new procedures are designed to allow the federal government greatly accelerated and simplified procedures (especially with the use of government credit cards) for its smallest purchases. These micro-purchases are expressly exempt from the small business set-aside provisions of the Small Business Act.[187] Acquisitions above the micro-purchase threshold, however, remained subject to the full gamut of small business and SDB preferences.[188]

"The New Competitive Environment" shortly after passage of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175, where CICA was heralded as a radical change to the fundamental way that the Government buys things. From the time CICA was passed until FASA was passed in 1994, no other procurement legislation created the same type of excitement and promise for change.

[181] FASA § 7105.

[182] *Id*. § 7102.

[183] *Id*. § 7106.

[184] *Id*.

[185] The President signed FASA into law on 13 October 1994. FASA § 4301(c) provided that, "notwithstanding any other provision of law, subsection (b) [excluding micro-purchases from the provisions of the Small Business Act] shall take effect on the date of the enactment of this Act." FASA § 4301(c).

[186] *Id.* § 4301(g).

[187] FASA § 4301 provided: "A purchase by an executive agency with an anticipated value of the micro-purchase threshold or less is not subject to section 15(j) of the Small Business Act, 15 U.S.C. [§] 644(j) . . . ." FASA § 4301, 41 U.S.C.A. 428(b) (1997).

[188] Section 8304 of FASA provided, "Nothing in this title shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under–(1) section 2323 of Title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994." *Id* § 8304. FASA § 4301 explicitly provided:

> The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding . . . the following new section: . . .
> (1) The head of each executive agency shall ensure that procuring activities of that agency, in awarding a contract with a price exceeding the micro-purchase threshold, comply with the requirements of section 8(a) of the

COs also enjoy tremendous flexibility selecting contractors for award of these micro-purchases, so long as the CO distributes the contracts equitably among qualified sources.[189] The CO need not even obtain competitive quotations if they believe that the price obtained is fair and reasonable.[190] Even though micro-purchases are exempt from the formal small business provisions, government needs in this price-range are typically easy to satisfy by award to local small or small and disadvantaged businesses. Thus, there need be no adverse impact on small business due to this change.

Perhaps the notion that small contractors can handle small contracts also explains why Congress required that (other than the micro-purchases previously discussed) all acquisitions below FASA's new "simplified acquisition threshold" be set aside for small businesses.[191] The "simplified acquisition threshold" (initially established as $100,000), replaced the $25,000 "small purchase threshold" then in effect.[192] FASA retained the general preference of the Small Business Act (as amended) that small contracts be reserved for small contractors, but because the threshold was elevated from $25,000 to $100,000, small businesses should enjoy even more business in this regard.[193]

The Small Business Act was further amended at 15 U.S.C. § 644(g) by inserting: "Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than five percent of the total value of all prime contract and subcontract awards for each fiscal year."[194] The 8(d) program was similarly expanded to include women-owned businesses within the scope of preferred subcontractors.[195] In September of 1995, the FAR was modified to accommodate these changes. Specifically, FAR Subpart 19.7 was amended to include "Women-Owned Small Business Concerns" as part of the subcontracting program, and to establish a requirement for prime contractors to prepare subcontracting plans

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> Small Business Act (15 U.S.C. 637(a)), section 2323 of title 10, United States Code, and section 7102 of the Federal Acquisition Streamlining Act of 1994.

FASA § 4301, 41 U.S.C.A. § 428(a) (West 1997).

189 *Id.* § 4301(a), 41 U.S.C.A. § 428(d) (West 1997).

190 *Id.* § 4301(a), 41 U.S.C.A. § 428(c) (West 1997).

191 FASA § 4004 requires that all contracts with an anticipated value of greater than $2500 but less than $100,000 shall be reserved exclusively for small businesses unless the contracting officer is unable to obtain competitive offers from two or more small businesses. *Id.* § 4004, 15 U.S.C.A. § 644(j) (West 1997).

192 FASA § 4001, 41 U.S.C.A. § 403(11) (West Supp. 1997).

193 The amounts have increased from $10,000 at the inception of this provision in 1978. 1997 Amendments § 221, Pub. L. No. 95-507, 92 Stat. 1757 (1978). *See also* Historical and Statutory Notes to 15 U.S.C.A. § 644 (West Supp. 1997).

194 FASA § 7106. 15 U.S.C.A. § 644(g) (West. 1997).

195 *Id.*, 15 U.S.C.A. § 637(d) (West 1997).

with "[s]eparate percentage goals for using small business concerns, small disadvantaged business concerns and women-owned small business concerns as subcontractors."[196] The related FAR clauses and mandated contract clauses were similarly modified.[197]

On September 18, 1995, the FAR provisions concerning acquisition of commercial items, authorized by FASA, were finalized, to become effective 1 October 1995. The new FAR rules benefit small businesses by allowing the contractors to provide their commercial products to the government (as manufactured or provided to the public at large), instead of conforming their products to detailed government specifications, allowing a broader range of products manufactured by small businesses to satisfy government needs.[198] Contracting officers are permitted increased flexibility to use either the streamlined solicitation procedures created in FAR Subpart 12.6 for acquiring commercial items, or the existing procedures (in Parts 13, 14 or 15, as applicable), if they are more beneficial, thereby allowing maximum flexibility for contracting with small businesses.[199] The government relies on the contractor's quality assurance system instead of imposing a government-specified system; and, by significantly limiting the flow down of government-unique terms and conditions to subcontractors at all levels, the government minimizes the burden on a significant number of small businesses that operate primarily at the subcontractor level.[200]

A. The Recent Impact on DOD SDB Programs.

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.*[201] In April, 1996, DOD issued a "final rule

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196 Subcontracting with Small Business and Small Disadvantaged Business Concerns, 60 Fed. Reg. 48,258, 48,262 (1995) (codified at 48 C.F.R. Subpart 19.7).

197 48 C.F.R. §§ 19.702-19.708, 52.219-8, 52.219-9.

198 Federal Acquisition Regulation; Acquisition of Commercial Items, 60 Fed. Reg. 48,231 (1995) (codified at various parts of 48 C.F.R.).

199 *Id.*

200 *Id.* at 48,233.

201 The directive provided, in pertinent part, that:

> Until further notice contracting officers shall not set aside acquisitions for [SDBs]. This suspension is effective immediately. Contracting officers should amend solicitations that have been issued to remove a set-aside that was based on the suspended sections where the amendment of the solicitation will not unduly delay a procurement such that deliveries under the resultant contract would not be received when required.

Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business Utilization Program, 60 Fed. Reg. 54,954 (1995).

to implement initiatives designed to limit the adverse impact [on SDBs] of this suspension [while] [t]he efforts of a government-wide group to reform affirmative action programs in procurement continue."[202] What was the extent of the "adverse impact" that DOD sought to avoid?

In FY 1992, when DOD first achieved its five percent goal, it awarded $5.2 billion in SDB prime contracts and an additional $1.8 billion in subcontracts to SDBs.[203] The $7 billion total amounted to six percent of the total DOD awards of $117.2 billion.[204] Since the inception of DOD's SDB program, the dollar value of the awards to SDBs had grown from $8 million to $7 billion.[205] Revenues to SDBs generated as a result of the "Rule of Two" set-asides (at the time the rule was suspended) totaled $1 billion annually.[206] With the demise of the Rule of Two, DOD needed to implement other programs to meet its SDB goals.

The 1996 DFARS rule implemented, "initiatives designed to facilitate awards to SDBs while taking account of the Supreme Court's decision in *Adarand*."[207] This DFARS rule expanded the ability of COs to consider small, small disadvantaged, and women-owned small business subcontracting as a factor in the evaluation of prime contractor's past performance, and to weigh enforceable commitments to use small businesses, SDBs, and women-owned small businesses more heavily than non-enforceable commitments; required prime contractors to notify the contracting officer of any substitutions of firms that are not small, small disadvantaged, or women-owned small businesses for the firms listed in the subcontracting plan; and established a test program of an SDB evaluation preference that would remove bond cost differentials between SDBs and other businesses as a factor in most source selections for construction acquisitions.[208]

The evaluation factors required to be considered when an award is to be made by negotiated procurements (both for present subcontracting plans and for past performance in subcontracting with small, small and disadvantaged, and women-owned businesses) are designed to satisfy the narrow tailoring requirement of strict scrutiny based upon the notion that, unlike quotas, an evaluation preference is flexible. The CO has the capability to adapt the relative weight of these factors to the specific situation confronted by the CO. Such evaluation factors may by weighed more heavily in favor of

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202 Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business Concerns, 61 Fed. Reg. 18,686, 18,687 (1996), amending DFARS, *supra* note 7 [hereinafter DFARS 1996 Interim Changes].

203 *DOD Surpasses 5% Goal on SDB Contracting*, 60 Fed. Cont. Rep. (BNA) 122 (Aug. 9, 1993).

204 *Id.*

205 *Id.*

206 Savage, *supra* note 77.

207 DFARS 1996 Interim Changes, *supra* note 202 (citation omitted).

208 *Id.*

SDBs in procurements that pertain to locations or industries where SDBs have demonstrated that they continue to need assistance to overcome racial barriers, or to redress individualized discrimination that they have faced. On the other hand, where SDBs face no lingering barriers, have been competing successfully, or where the burden on non-SDB small businesses is inordinately high, the evaluation factor may be weighed more lightly. To the extent COs apply the evaluation factors arbitrarily or inflexibly in award of government contracts, they are vulnerable to a finding that the measures were not narrowly tailored and violate strict scrutiny as applied. However, given the secrecy of source selection proceedings, the deference to CO discretion, and the presumption that the government acts in good faith, it is unlikely that there will be any significant protest activity or litigation in this regard.

A more significant development in the DFARS rules was the restoration (as modified) of the price preference for SDB construction contractors. It is evident in these rules and the clauses created that the government was seeking to constrain the ten-percent price preference to situations where a bidder evidenced actual "economic disadvantage" in terms of higher bonding costs. It's worth examining the test program in more detail to show how the government was seeking to satisfy the narrow tailoring requirement of strict scrutiny as applied to this preference. The evaluation preference must be used in all competitive acquisitions for construction to be performed inside the United States, except: "acquisitions which-(1) Are less than or equal to the simplified acquisition threshold; (2) Are set aside for small businesses; or (3) Are awarded under section 8(a) procedures."[209] "The evaluation preference need not be applied when the head of the contracting activity determines that the evaluation preference is having a disproportionate impact on non-SDB concerns or nondisadvantaged small business concerns."[210] This ability to "opt out" of the preferences where the burden on small, non-SDB contractors is too great allows the program to be more narrowly tailored.

The push toward narrow tailoring is even more evident when you compare the procedures used to implement the test program with the prior scheme.

> 219.7203–Procedures. [The New Construction Test Program]
>
> (a) Solicitations that require bonding shall require offerors to separately state bond costs in the offer. Bond costs include the costs of bid, performance, and payment bonds.
>
> (b) Evaluate total offers. If the apparently successful offeror is an SDB concern, no preference-based evaluation is required under this subpart.
>
> (c) *If the apparently successful offeror is not an SDB concern, evaluate offers excluding bond costs. If, after excluding bond costs, the apparently*

[209] *Id.* § 219.7202.

[210] *Id.*

> *successful offeror is an SDB concern, add bond costs back to all offers, and give offers from SDB concerns a preference in evaluation by adding a factor of 10 percent to the total price of all offers, except-*
>
> *(1) Offers from SDBs* which have not waived the evaluation preference; and
>
> (2) Offers from historically black colleges and universities or minority institutions, which have not waived the evaluation preference.[211]

As seen above, in the new program, where the SDB would have been the low bidder, except that its bonding costs elevated its bid above a non-SDB rival, the SDB is given an evaluation preference by inflating the non-SDB bid by ten percent (because award is made to the low bidder, the preference will likely result in award to the SDB). Since it has long been felt that one of the economic barriers confronting SDBs has been the higher cost of bonding, linking the remedy to the specific hardship (here the preference only applies where the SDB actually would have lost business due to its higher bonding cost) is a much more focused way of redressing the issue than the former scheme. While reducing the problem of over-inclusion, it might be under-inclusive in that women-owned businesses and small minority businesses (not owned and controlled by individuals defined by the SBA as SDBs) are not entitled to the preference, even though they might be equally disadvantaged in obtaining bonding.

Under the former evaluation preference provisions, suspended in October 1995,[212] SDB bidders enjoyed the ten percent evaluation preference any time award was based upon price or price-related factors (all sealed bidding), and at the discretion of the source selection authority in all other competitive procurements.[213] Because the preference was, and continues to be,[214] based upon race-based presumptions as to social and economic disadvantage, the previous scheme was probably overbroad in awarding bonuses to minority contractors who were not actually economically disadvantaged in a given procurement. Other than the test program at DFARS

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[211] *Id.* § 219.7203 (emphasis added to indicate changes).

[212] Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business Utilization Program, 60 Fed. Reg. 54,954 (1995).

[213] DFARS, *supra* note 7, § 219.7002.

[214] "Small disadvantaged business (SDB) concern" means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR Part 124, the majority of earnings of which directly accrue to such individuals. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

DFARS 1996 Interim Changes, *supra* note 202, § 252.219-7008.

Subpart 219.72, to promote SDB concerns through evaluation preferences in construction acquisitions,[215] the evaluation preferences for small disadvantaged business concerns at DFARS Subpart 219.70 shall not be used.[216]

B. Current Status of the DOD Preference Program.

The changed SDB provisions need to be read together with the existing scheme of DFARS provisions to appreciate the nature of the current SDB programs. When desiring to benefit from its SDB status, the contractor must represent to the DOD the nature and source of its SDB status.[217] The definition of SDB status is found in Part (a) of the required representation clause.[218] The definition is unchanged from the way it has been phrased since 1991.[219] Part (b) of the clause contains the actual representations, which must be completed by the offeror describing its status.[220] The definition of SDB status and the determination of eligibility for this status did not change, except to include within the scope of the presumption individuals from additional minority groups.[221] Part (c), which used to contain a certification by the contractor regarding its status, was changed to a section to be "completed by" the contractor.[222] FARA required elimination of certain regulatory certification requirements and directed that the FAR be changed to remove such certifications unless the certification requirement had been specifically imposed by statute.[223] Finally, Part (d) notifies the contractor that false representations can subject it to penalties including contractual consequences such as debarment and criminal penalties for fraud.[224]

As can be seen in the following provision, those not enjoying a categorical race-based presumption must have previously demonstrated their qualification as an SDB or must overcome a protest about their status by the CO.

> The contracting officer shall protest an offeror's representation that it is a small disadvantaged business concern when . . . . The offeror represents its ownership as other than Black American, Hispanic American, Native

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[215] *Id.* § 219.7200.
[216] *Id.* § 219.1006(b)(1)(B).
[217] DFARS, *supra* note 7, § 252.219-7000.
[218] *Id.* Corresponding changes were also made to the FAR. FAR, *supra* note 7, § 19.001.
[219] 56 Fed. Reg. 36,280 (1991).
[220] DFARS, *supra* note 7, § 252.219-7000.
[221] *Id.*
[222] *Id.*
[223] FARA, Pub. L. No. 104-106, 110 Stat. 186 (1996).
[224] DFARS, *supra* note 7, § 252.219-7000.

> American (including Indian tribes and Native Hawaiian organizations), Asian Pacific American, or subcontinent Asian American, unless the offeror represents that–
>
> (A) It currently is in the Section 8(a) program; or
>
> (B) Within the 6 months preceding submission of its offer, the offeror was determined by the Small Business Administration to be socially and economically disadvantaged, and no circumstances have changed to vary that determination.[225]

The above provisions make clear that DOD continues to rely upon race-based presumptions in determining disadvantaged status. Of course, since DOD is involved in the FAR revision of SDB policies, and will be bound by any final rules issued, changes to the FAR are certain to also impact DOD. Because the SBA is ultimately responsible for determining SDB status, any final changes to SBA regulations will by implication change the DOD programs (where, for example, DOD provisions incorporate SBA definitions by reference). Since these changes are sure to impact DOD, COs need to be aware of what looms on the horizon for small business contracting.

C. The SBA's Regulatory Response to *Adarand*

Regulatory changes to the 8(a) program could result in a 50% increase in participants.[226] The key proposed change is a more relaxed standard–preponderance of evidence–for non-minority applicants to claim eligibility for participation in the program.[227] The preponderance standard would replace the existing "clear and convincing evidence" standard that many applicants, especially women, have claimed is unduly onerous.[228] Because the clear and convincing standard is so difficult to prove, according to SBA Administrator Aida Alvarez, all but a handful of 8(a) firms are owned by members of racial and ethnic minorities.[229] The new standard should improve opportunities for persons with disabilities and firms located in poorer geographic areas to qualify more easily.[230] Proposed changes could increase the number of eligible firms from about the current 6,000, to about 9,000.[231] SBA is working to increase the goal from 20% to 23% in order to

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[225] DFARS, *supra* note 7, § 219.301.

[226] *Proposed 8(a) Rules Should Increase Eligible Firms by 50 Percent, SBA Head Predicts*, 68 Fed. Cont. Rep. (BNA) 151 (Aug. 18, 1997) (citing an interview with SBA Administrator Aida Alverez).

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

accommodate the larger pool of participants.[232] The proposed rules also rename the program the "8(a) Business Development" program.[233]

The proposed rules were published in the Federal Register on 14 August 1997 with comments due 14 October 1997.[234] In addition to the change in the standard of proof for social and economic disadvantage, the regulations are proposed to be amended to clarify that the race-based presumption of disadvantage is rebuttable.[235] While reducing the burden on those not presumed to be socially and economically disadvantaged is designed to make inclusion in the preferred group easier (reducing under-inclusion); rebutting a race-based presumption should help prevent over-inclusion by eliminating those presumed to be, but who actually are not, disadvantaged. The presumption may be overcome with "significant, credible evidence to the contrary."[236] Because it is very difficult to prove the negative, it may still be difficult to challenge this presumption. Finally, "economic disadvantage" is clarified to highlight that the focus of the inquiry is on the financial condition of the individual, as opposed to the business.[237]

D. The Proposed FAR Changes in Response to *Adarand*

In May of 1996, the Department of Justice (DOJ) published its "Proposed Reforms to Affirmative Action in Federal Procurement."[238] Given the legal nature of the challenge to comprehensively review and overhaul the federal procurement system so that it could survive strict scrutiny, it made sense that DOJ would take the lead to solve this problem. In addition to detailing the nature and extent of the existing SBD preference programs, DOJ included its analysis regarding the government's compelling interest in

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[232] *Id.* In 1996, 8(a) firms received "$6.3 billion in federal contracts and SDBs about $10.3 billion," representing about five percent of all federal contract dollars spent in 1996. Proposed Rules, Small Business Administration, 62 Fed. Reg. 43,584, 43,596 (1997) [hereinafter Proposed SBA Rules].

[233] Proposed SBA Rules, *supra* note 232, at 43,596. This will be referred to as the "8(a)BD" program.

[234] *Id* at 43,584. No final rules have been published as of the time this article went to press.

[235] "The requirements pertaining to social disadvantage would be moved from present § 124.105 to proposed § 124.103. Paragraph (b) would be amended to clarify that the presumption of social disadvantage for members of designated groups is a rebuttable presumption . . . an individual who is not a member of a designated socially disadvantaged group [may] establish his or her social disadvantage by a preponderance of evidence . . . ." *Id.* at 43,587.

[236] *Id.*

[237] *Id.* at 43,600. The $250,000 net worth ceiling for 8(a)BD eligibility and $750,000 ceiling for SDB eligibility are retained. *Id.*

[238] DOJ Proposed Reforms, *supra* note 3, at 26,050.

perpetuating affirmative action programs in federal procurement.[239] DOJ emphasized in this regard that "[s]even of the nine justices of the Court embraced the principle that it is possible for affirmative action by the federal government to meet strict scrutiny."[240] "Only Justices Scalia and Thomas, both of whom concurred in the result in the case, advocated a position that approaches a near blanket constitutional ban on affirmative action."[241] At the same time, DOJ recognized, "the mere fact that there has been generalized, historical societal discrimination in the country against minorities is an insufficient predicate for race-conscious remedial measures; the discrimination to be remedied must be identified more concretely."[242]

Since DOJ believed in the compelling interest, the only question that remained is: How can the regulations be "narrowly tailored" to achieve this interest? Because race-based preferences are incorporated explicitly in the parts of the Small Business Act (as amended),[243] the executive branch is bound to follow and implement these laws unless the courts find them unconstitutional on their face. So long as there is a potential that the laws can be applied in a constitutional fashion, the executive branch must try to do so. The issue, therefore, was how to implement a preference program which relied, at least in part, on race-based presumptions, and to narrowly tailor that program to achieve the government's remedial objectives.

The solution, according to DOJ, was explained on 9 May 1997, in DOJ's "Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement."[244] The proposed amendments to the FAR–necessary to implement the proposed DOJ reforms–were published the same day.[245] These procedures were proposed to implement § 7102 of the FASA, and to further implement 10 U.S.C. § 2323.[246] As noted by DOJ: "These statutes permit federal agencies to allow competitive advantages, including price and evaluation credits, in awards involving small businesses

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239 *Id.* "[E]vidence indicates that racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets. In short, there is today a compelling interest to take remedial action in federal procurement." *Id.*

240 *Id.*

241 *Id.*

242 *Id.*

243 15 U.S.C.A. § 637(d)(3)(C) (West 1997).

244 Department of Justice, Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,650-25,651 (1997). "These reforms will ensure that the use of affirmative action in federal procurement complies with the strict scrutiny standard discussed in the Supreme Court's decision in *Adarand.*" *Id.* (citation omitted).

245 Proposed Rules, General Services Administration, National Aeronautics and Space Administration, Department of Defense, 62 Fed. Reg. 25,786 (1997) [hereinafter Proposed FAR changes].

246 *Id.*

owned and controlled by socially and economically disadvantaged persons."[247] However, even if the statutes themselves are deemed to be constitutional, the method of implementation must be narrowly tailored or the regulations are unconstitutional. The regulations explaining how consideration of social and economic disadvantage can be determined for firms wishing to be treated as SDBs has not yet been formally proposed, but the essence of the change advanced by DOJ had been to allow the presumption to continue; to make clear that it was a rebuttable presumption; and, to lower the evidentiary standard to a preponderance of the evidence.[248]

DOJ noted that the preponderance of the evidence standard is the preferred burden of proof in civil cases.[249] "The Supreme Court has held that the preponderance of the evidence standard is appropriate for most inquiries made in civil litigation, including questions of discrimination."[250] It remains to be seen whether merely lowering the burden for otherwise qualified applicants meets the strict scrutiny test where the race-based status presumption enjoyed by all members of the designated minority groups, who must only prove their membership in the minority race, continues.

The FAR changes proposed to accommodate the new SDB regime look strikingly similar to the DFARS changes implemented a year earlier, but go farther than the DFARS provisions in creating SDB preferences.[251] Like the DFARS, they create a required evaluation factor for negotiated procurements based upon the extent of the commitment to contract with SDBs.[252] They also require that prior success in attaining SDB subcontracting goals be evaluated any time past performance is required to be considered as an evaluation factor.[253] Proposed FAR § 19.1202-3, like the parallel DFARS clause, allows COs discretion when evaluating competing proposals to attach greater weight to bidders with firm commitments to use SDB subcontractors, as opposed to bidders merely stating explicit goals to use such subcontractors.[254] Beyond the evaluation preference, however, the proposed FAR would allow the CO to award monetary incentives to prime contractors based upon their actual achievement of SDB contracting goals, where the Office of Federal

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[247] *Id.* Note 1 explains, "FASA and 10 U.S.C. § 2323 (which, in language similar to that in FASA, permits the Department of Defense, NASA, and the Coast Guard to use less than full and open competition in order to aid SDBs) incorporate by explicit reference the definition of social and economic disadvantage contained in Section 8(d) of the Small Business Act. Pursuant to Section 8(d), members of designated groups are presumed to be both socially and economically disadvantaged; those presumptions are rebuttable." *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 252-255, 261 (1989)).

[251] Proposed FAR Changes, *supra* note 245, at 25,786-25,787.

[252] *Id.*

[253] *Id.*

[254] *Id.* at 25,790.

Procurement Policy (OFPP) determines that greater SDB subcontracting opportunities need to be afforded for a particular industry, based upon the standard industrial code (SIC) classifications.[255]

Another expanded authority the FAR would allow is the ability to give SDBs a price preference in sealed bidding.[256] Unlike the DFARS Test Program where the price preference is limited to construction contracts, and further limited to bonding costs which made an SDB other than the low bidder, the FAR authorizes a price adjustment (again adjusting non-SDB bids upward, thereby making them less competitive) any time OFPP has authorized the price evaluation factor.[257] While the FAR proposal limits the factor at ten percent (DOD required ten percent), any factor below ten percent might be provided by OFPP depending on the SIC code of the industry affected.[258] The FAR proposal is therefore potentially much broader than the corresponding DFARS test program and, at the same time, allows OFPP a role in deciding which SDB SICs should be entitled to the preference. Presumably, this discretion can be used to afford evaluation preferences where industries have a pattern of discriminatory barriers that SDBs are otherwise unable to overcome. This flexibility may be used to fit the remedy more narrowly to any discriminatory past practice thereby rendering the relief more narrow than some bright line rule.

It is clear that the changes are geared toward trying to tailor the remedies more narrowly so that the SDB program will survive strict scrutiny. However, those judges predisposed to viewing the affirmative action programs in question as satisfying a compelling government need might still have

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[255] *Id.*

[256] *Id.* at 25,789.

[257] *Id.*

[258] *Id.* DOJ has developed a benchmarking approach tied to the SIC codes as a central part of reform of affirmative action programs. It remains to be seen whether this approach will alleviate the "*Cortez*-type" concern about particularized evidence of discrimination as a predicate to agency set-asides.

> The Department of Commerce continues to work to develop a statistical calculation representing the effect discrimination has had on suppressing minority business development and capacity, and that calculation would be factored into benchmarks . . . . Regardless of the outcome of that statistical effort, the effects of discrimination will be considered when utilization exceeds the benchmark and it is necessary to determine whether race-conscious measures in a particular SIC code should be curtailed or eliminated. Before race-conscious action is decreased, consideration will be given to the effects discrimination has had on minority business development in that industrial area, and the need to consider race to address those effects.

Department of Justice, Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,650-25,651 (1997).

trouble concluding that the remedies are tailored narrowly enough to satisfy strict scrutiny. Without a showing that the individual small business effected actually needed the boost from the government to overcome past discrimination, these provisions are still vulnerable.

Because the regulations are derived from statutory raced-based presumptions, however, unless or until the courts are clear that the statutes themselves are invalid on their face, the administration will continue to rely on the presumptions contained therein. It is precisely because of these presumptions, however, that the scheme is likely to remain both over-inclusive and under-inclusive. Moreover, the scheme remains vulnerable to a strict scrutiny attack because it is not clear that a race-neutral program based entirely on economic need would be unable to satisfy the same objectives. Of course, if the statutes themselves are changed or eliminated, the small business environment would be dramatically affected, and so would the accompanying regulatory scheme.

VI. CONCLUSION

Contracting officers and base level attorneys will have little choice but to understand and implement the proposed changes to the disadvantaged preference systems in the FAR when they take effect. A broader understanding of the potential pitfalls will help COs avoid problem areas and apply the new regulations in a manner that is designed to overcome constitutional challenges to their actions. By understanding which cases are most vulnerable to litigation, government counsel and COs can better prepare ahead of time to avoid or defend these cases.

Should the Military Adopt an *Aford*-Type Guilty Plea?

MAJOR STEVEN E. WALBURN*

I am absolutely, positively, 100% not guilty![1]
ORENTHAL JAMES SIMPSON

I. INTRODUCTION

Specialist Jones is married with two small children. He works in a battalion S-1 office with Private First Class Smith, an attractive female soldier who is new to the unit. Smith is happily married and has a two-year-old child. Over time Specialist Jones finds himself increasingly attracted to Private Smith.

Specialist Jones finally confides in Private Smith his feelings and his desire to have an affair. Private Smith rebuffs him, and demands that he leave her alone. His feelings for Private Smith growing every day, Specialist Jones continues to badger her. He is careful, however, to always approach Private Smith when they are "alone." Finally Jones decides he must "have" Smith and begins planning to rape her.

Specialist Jones knows that Private Smith's husband is away on temporary duty in Cuba. His own wife and child have gone out of town to visit her parents. After dark one evening Specialist Jones drives to Private Smith's neighborhood and waits until after midnight. Once confident that Private Smith has gone to bed, Jones carefully climbs through the kitchen window of Private Smith's quarters. Once inside, he dons a ski mask and enters Private Smith's bedroom.

Jones brutally rapes Private Smith. Although she resists the attack, Jones repeatedly beats her until she slips into unconsciousness. After regaining consciousness, Smith is able to call the military police and report the rape. As a result of the assault Smith suffers broken ribs and a severe concussion. Since the attack, Private Smith has frequent nightmares and is often withdrawn. She regularly sees a psychologist and her relationship with her husband has greatly deteriorated.

The subsequent investigation immediately focuses on Jones, eventually leading to his apprehension. The government assembles an impressive amount

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[1] Mr. Simpson's infamous response when asked by Judge Ito, "How do you plead?" The People Of The State Of California v. Orenthal James Simpson, No. BA097211 (1995).

of circumstantial scientific evidence linking Specialist Jones to the crime. He is charged with housebreaking,[2] assault with intent to commit rape,[3] and rape.[4] Private Smith is extremely reluctant to testify against Specialist Jones. Her psychologist indicates Smith is terrified of Jones and suffers memory lapses which makes her potential testimony unreliable.

Specialist Jones has his own demons to deal with. Fearful of receiving substantial confinement[5] he steadfastly maintains his innocence. After careful consultation with his defense attorney, and a review of the government's evidence, Specialist Jones concludes he will almost certainly be convicted of these crimes. Specialist Jones informs his defense attorney he will do anything to avoid the potential of serving extensive confinement except admit his guilt. He informs his attorney that he "didn't do it," but he doesn't want his family to suffer through the stress and uncertainty of a fully contested trial.

As a result of lengthy negotiations, the government indicates a willingness to enter into a pretrial agreement limiting confinement to no more than 20 years if Specialist Jones will plead guilty as charged. Despite the defense counsel's best efforts, Specialist Jones will not agree to admit he committed the offenses. He will agree, however, to enter a plea of guilty in order to take advantage of the government's sentence limitation offer.

Assuming the government agrees, should Specialist Jones be permitted to avoid an express admission of culpability while entering a plea of guilty in order to receive a favorable pretrial agreement?

This type of guilty plea, known as an *Alford* plea (after the case in which it was judicially recognized by the United States Supreme Court, *North Carolina v. Alford),*[6] is now widely recognized in state and federal courts. The *Alford* plea is not presently recognized in the military justice system.[7]

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[2] Uniform Code of Military Justice (1995 ed.) [hereinafter UCMJ], art. 130. Housebreaking carries a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

[3] UCMJ art. 134 (1995). Assault with intent to commit rape carries a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

[4] UCMJ art. 120 (1995). Rape carries a maximum punishment of death or other such punishment as a court-martial may direct.

[5] Pursuant to the MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 210(f)(1)(A)(iii)(b) (1995 ed.) [hereinafter MCM], if the case is not referred capital (permitting consideration of the death penalty as a punishment), the maximum confinement would be for life.

[6] United States v. Alford, 400 U.S. 25 (1970).

[7] Pursuant to R.C.M. 910(a), MCM, the pleas presently available in the military are:

1. Guilty;
2. Not guilty to an offense charged, but guilty of a named lesser included offense;
3. Guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or
4. Not guilty.

Conditional guilty pleas are also permitted. MCM, *supra* note 5, R.C.M. 910(b).

A variety of factors convince civilian defendants to seek plea agreements allowing them to avoid the admission of guilt. They may wish to take advantage of attractive pretrial agreements rather than risk adverse trial results and potentially lengthy prison sentences. Some wish to avoid the publicity of a fully contested trial. Others might lack the necessary factual basis to plead guilty because voluntary alcohol or drug use has rendered them unable to remember committing the crime.[8] Still others may very well be innocent, but the overwhelming strength of the government's case makes going to trial seem fruitless.

For most of our judicial history accuseds in these circumstances had only two choices: take their chances at trial or plead guilty. By admitting guilt, these defendants were able to take advantage of favorable pretrial agreements. Unfortunately, in order to do so, some were forced to lie to their attorneys and the court concerning their true culpability. Both of these alternatives are objectionable to defendants and conflict with society's moral expectations of its criminal justice system.[9] The *Alford* plea attempts to ease the tension these choices generate by offering a third alternative: a guilty plea without an express admission of criminal culpability.

This article investigates the history of the *Alford* plea and its close cousin, the *nolo contendere* plea as authorized under Rule 11(b) of the Federal Rules of Criminal Procedure.[10] It also analyzes the advisability of adding an *Alford*-type guilty plea to the options presently available to accuseds in the military justice system.[11] Section II of this article traces the history of the *nolo contendere* plea and examines present-day guilty plea practice in federal courts which is governed by Federal Rule of Criminal Procedure 11 and several Supreme Court decisions. Section III examines current guilty plea practice in the military, which (but for an *Alford*-type guilty plea) is similar to guilty plea practice in the federal courts.

Section IV examines the Supreme Court's landmark decision in *Alford.* This section also discusses the recognition of the plea, the Court of Military Appeal's rejection of it in *United States v. Epps*,[12] and the present status of the plea. Section V discusses the potential advantages and disadvantages of the *Alford* plea from the perspective of the government and defense.

Section VI examines several issues generated by the military's adoption of an *Alford*-type plea. These include: (1) what preliminary inquiry, if any,

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[8] An accused in the military can be convicted even if he does not personally remember committing the offense(s) if, after reviewing the evidence against him, he is in fact convinced he committed the offense(s). *See* Discussion, MCM, *supra* note 5, R.C.M. 910(e).

[9] Curtis J. Shipley, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063 (1987).

[10] *See infra* notes 34-40 and accompanying text.

[11] Throughout the remainder of this article "*Alford*" and "*Alford-type*" pleas should be considered as synonymous.

[12] United States v. Epps, 25 M.J. 319 (C.M.A. 1987).

should be conducted by the military judge prior to accepting the plea; (2) what standard of proof should be required to establish the factual basis of the plea; (3) how useful will stipulations[13] be in meeting this standard of proof? (4) the extent (during sentencing) an *Alford* plea should be considered as aggravation or mitigation; and (5) what jury instructions, if any, should be developed to properly instruct members concerning the existence and effect of the accused's *Alford* plea?[14] Section VII outlines the author's opinion that the military should adopt an *Alford*-type plea as an additional option available to an accused servicemember.

To properly place *North Carolina v. Alford* in perspective requires a discussion of the judicial development of guilty pleas in the federal courts followed by an in-depth examination of the plea of *nolo contendere* under Federal Rule of Criminal Procedure 11. Our discussion begins with a history of present day federal guilty plea practice.

II. PRESENT GUILTY PLEA PRACTICE IN THE FEDERAL COURTS

A. The Courts

The basis for the present rules pertaining to guilty pleas in our federal courts is derived from several Supreme Court decisions decided between 1968 and 1970. The first of these is *McCarthy v. United States*.[15] In *McCarthy* the defendant pleaded guilty to income tax evasion. At trial the judge failed to personally question McCarthy concerning the factual basis and circumstances of his criminal conduct.[16] During the sentencing phase of the trial, McCarthy's attorney argued that McCarthy's failure to pay the disputed taxes was due to poor health, alcoholism, and poor record keeping.

Rule 11(c) of the Federal Rules of Criminal Procedure directs the trial judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and the consequences of his plea. In *McCarthy* the Court held that Rule 11(c)'s requirement to personally address the defendant must be carefully followed.[17] The Supreme Court was careful to point out that

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[13] There are two types of stipulations: stipulations of fact and stipulations of expected testimony. These are discussed in Section VI.

[14] Two additional areas of court-martial practice could also be affected by adoption of the *Alford* plea: the admissibility of a prior conviction pursuant to Mil. R. Evid. 609 (*see also* Mil. R. Evid. 410), and the effect (if any) the *Alford* plea would have on our present hearsay exceptions (s*ee* Mil. R. Evid. 803(22)). These two areas are not considered a major concern in today's military since the chances of remaining on active duty for any length of time after conviction by a special or general court-martial is remote.

[15] McCarthy v. United States, 394 U.S. 459 (1969).

[16] *Id*. at 464.

[17] *Id*. at 465-67.

its decision was based on its interpretation of Rule 11. The *McCarthy* decision implied that strictly following Rule 11(c) helps to establish the validity of a guilty plea, making it less vulnerable to post-conviction attack.[18] The Court reasoned that the validity of the plea was strengthened by ensuring a defendant clearly understood the charges faced, and the consequences, of his plea of guilt.

In *Boykin v. Alabama*[19] the defendant pleaded guilty to five counts of armed robbery. The trial judge did not make a determination of the knowing and voluntary nature of the defendant's understanding and agreement with the charges. In fact, the defendant did not make any statements concerning the offenses. A jury sentenced Boykin to death.

The Supreme Court held that a knowing waiver of due process rights could not be presumed from a silent record. The Court, citing *McCarthy*, also implied that procedures like Rule 11 may be constitutionally necessary before a court can accept a guilty plea.[20] The Court noted:

> If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.[21]

Three subsequent Supreme Court rulings, decided on the same day,[22] further examined the process constitutionally required to preserve guilty pleas.

The defendant in *Brady v. United States*[23] was prosecuted under the Federal Kidnapping Act, which authorized the death penalty.[24] This Act, however, permitted defendants to automatically avoid a death penalty by pleading guilty.[25] Faced with this choice, Brady pleaded guilty.

Brady's attorney challenged the constitutionality of the Act by asserting that it impermissibly coerced defendants into pleading guilty. The *Brady* Court held two factors were key in determining if the guilty plea was properly accepted by the trial court: (1) whether the defendant understood the nature of his plea; and (2) whether it was made voluntarily. The Court found Brady's decision to plead guilty was both knowing and voluntary. The fact that Brady

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[18] *Id.*
[19] Boykin v. Alabama, 395 U.S. 238 (1969).
[20] *Id.* at 243-44.
[21] *Id.* at 243 n.5, citing Johnson v. Zerbst, 304 U.S. 458 (1938).
[22] 4 May 1970.
[23] Brady v. United States, 397 U.S. 742 (1970).
[24] 18 U.S.C. § 1201 (1956).
[25] This Act was similar to the North Carolina statute in *Alford*.

pleaded guilty in the face of a statute which "encouraged" guilty pleas did not invalidate an otherwise proper plea.[26]

In *McMann v. Richardson*[27] the defendant challenged the propriety of a guilty plea entered after alleging the police had coerced him into confessing. The Supreme Court, while finding that the confession was coerced (and therefore illegally obtained), held the defendant's ability to consult with counsel after the confession, but before his decision to plead guilty, attenuated any taint the prior coerced confession may have had on his decision to plead guilty.

More importantly, Justice White, writing for the Court, held a knowing and voluntary decision to *plead* (as opposed to confess) based upon "reasonably competent" legal advice is not subject to subsequent attack by the defendant. This is true even if the defendant misjudges the strength of the government's case.[28]

Parker v. North Carolina[29] involved an attack upon a North Carolina statute which "rewarded" guilty pleas by eliminating the possibility of receiving the death penalty.[30] On appeal, the defendant argued his attorney had improperly advised him that his confession was admissible.[31] Justice White, again writing for the Court, held that even if the legal advice given Parker was inaccurate,[32] this did not overcome the knowing and voluntary nature of Parker's plea. As shown in the record, the trial judge's inquiries clearly established the fact Parker had admitted his guilt at trial but was now seeking to disavow the admission upon subsequently discovering that his previous confession might have been inadmissible.

One additional case, *Tollett v. Henderson*,[33] played an important role in the development of modern day guilty plea practice. The defendant in *Tollett*, like the defendant in *Parker*, argued he had pleaded guilty only after receiving improper legal advice from his defense attorney. The *Tollett* Court rejected this argument, holding that a guilty plea could not be collaterally attacked unless the advice of counsel rendered to a defendant fell outside the

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[26] A similar argument was used in *Alford*. The Supreme Court distinguished *Brady* from *United States v. Jackson*, 390 U.S. 570 (1968), by observing the Court in *Jackson* had prohibited imposition of the death penalty under § 1201(a); the Court did not hold that all guilty pleas encouraged by the fear of possible death are involuntary, nor did it invalidate such pleas whether involuntary or not.

[27] McMann v. Richardson, 397 U.S. 759 (1970).

[28] *Id*. at 766.

[29] Parker v. North Carolina, 397 U.S. 790 (1970).

[30] *Parker* also involved an attack upon an arguably coerced pretrial confession. *Id*. at 797.

[31] During the trial Parker again admitted he had committed the murder. *Id*. at 798.

[32] The Court held the advice received by Parker was "well within the range of competence required of attorneys representing defendants in criminal cases." *Id*. at 797-98.

[33] Tollett v. Henderson, 411 U.S. 258 (1973).

"reasonably competent" standards set forth in *McMann v. Richardson*.[34] Again, the Court emphasized that the trial judge had conducted an appropriate inquiry prior to accepting the guilty plea.

The following conclusions can be drawn from these decisions: first, the only constitutional requirements of a guilty plea are that it be a voluntary, knowing, and intelligent choice among the options facing a defendant; second, even if the defendant has received erroneous legal advice (either concerning the strength of the government's case or the admissibility of evidence), an otherwise properly accepted guilty plea will not be overturned on appeal; and third, in examining post-trial challenges to guilty pleas, the Supreme Court will rely heavily on the evidence in the record of the accused's guilt. These cases form the backdrop to examine Federal Rule of Criminal Procedure 11, which statutorily governs guilty pleas in federal courts.[35]

B. Federal Rule of Criminal Procedure 11 (Rule 11)

1. Rule 11 Guilty Pleas

Rule 11(a) permits criminal defendants in federal court to plead guilty, not guilty, or *nolo contendere*.[36] Not surprisingly, the development of Rule 11 has closely followed the just-discussed decisions of the Supreme Court.

Under Rule 11(e)(1) the defendant and the government may engage in plea bargaining discussions.[37] The court must ensure that the defendant is voluntarily making the plea.[38] The court should also ensure that any plea agreement is disclosed in open court. The court may accept or reject the plea

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[34] Review of guilty pleas when improper legal advice is alleged are examined under the present standard for determining effectiveness of counsel found in *Strickland v. Washington*, 466 U.S. 668 (1984); *see also* Hill v. Lockhart, 474 U.S. 52 (1985).

[35] Based on these cases Rule 11 was modified in 1975. Although Rule 11 has also been amended several times since 1975, the basic requirements of these cases still control its application. Notably, Rule 11(h) expressly adopted a harmless-error standard when reviewing alleged violations of the procedures contained within the rule. This in effect overruled the part of *McCarthy* which held noncompliance with Rule 11 was per se prejudicial (S*ee* McCarthy v. United States, 394 U.S. 459, 471-72 (1969)).

[36] Fed. R. Crim. P. 11(a).

[37] The government may agree to do any of the following:

(1) move for dismissal of other charges;

(2) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding such recommendation or request shall not be binding upon the court; or

(3) agree that a specific sentence is the appropriate disposition of the case.

The plea agreement may require the defendant to plead guilty to the charged offense or a lesser or related offense. The court may not participate in plea bargaining discussions. Fed. R. Crim. P. 11(e)(1).

[38] *Id*. 11(d).

agreement.[39] If the plea agreement is rejected the defendant may still enter a guilty plea without benefit of a pretrial agreement.[40] Rule 11(f) does not require the factual basis to meet any particular standard (i.e., preponderance, clear and convincing, or beyond a reasonable doubt).[41]

2. Nolo Contendere Pleas

Rule 11(b) allows the plea of *nolo contendere*. *Nolo contendere* is a Latin phrase meaning "I will not contest it." When entering a plea under Rule 11(b), the defendant does not admit or deny the charges he is facing but also does not contest an entry of guilt by the court. A fine or prison sentence may be imposed pursuant to this plea.[42]

The plea of *nolo contendere* was recognized at common law in the United States.[43] In 1926 the United States Supreme Court, in *Hudson v. United States*,[44] was faced with deciding if a federal court had the power to impose a prison sentence after accepting a *nolo contendere* plea.

Justice Stone, writing for the Court, traced the history of the plea of *nolo contendere*.[45] The plea may have originated in an early medieval practice by which defendants wishing to avoid imprisonment would seek to make an end of the matter by offering to pay a sum of money to the king.[46] An early 15th-century case indicated that a defendant did not admit his guilt when he sought such a compromise, but merely "that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine."[47] Justice Stone, noting that federal courts had embraced the *nolo contendere* plea, upheld the propriety of imposing a prison sentence (as permitted by the Probation Act of 1925)[48] after acceptance of the plea.

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[39] *Id*. 11(e)(3) and (4).
[40] *Id.* 11(e)(4). In the military this is known as "cold-pleading."
[41] *Id*. 11(f).
[42] BLACK'S LAW DICTIONARY 1048 (6TH. ED. 1990).
[43] Hudson v. United States, 272 U.S. 451, 453 (1926); *see also* United States v. Norris, 281 U.S. 619 (1929) (holding the plea of *nolo contendere* has the effect of plea of guilty for purposes of the case); and Lott v. United States, 367 U.S. 421, 426 (1961) (plea of *nolo contendere* is equivalent of admitting every essential element of offenses charged and is tantamount to 'an admission of guilt for purposes of the case,' quoting Hudson v. United States).
[44] 272 U.S. 451 at 453.
[45] For additional background on the plea of *nolo contendere, see* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 177 (1982).
[46] *See* 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 517 (2d ed. 1899).
[47] ANON., Y.B. HILL., 9 Hen. 6, f. 59, pl.8 (1431).
[48] Section 1 of that Act provides for the suspension of the sentence and release of the prisoner on probation "after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment . . . ." Probation Act of 1925, 43 Stat. 1259 (1925); 272 U.S. 451 at 452-53.

Throughout its history, the plea of *nolo contendere* has not been viewed as an express admission of guilt, but as consent by the defendant that he may be punished as if he were guilty.[49] It was thought desirable to permit defendants to plead *nolo contendere* without making any inquiry into their actual guilt.[50] Therefore, if the court accepts a *nolo contendere* plea, under Rule 11(f) there is no requirement to make a factual inquiry (of the accused) concerning the accuracy of the plea.[51]

However, there are several other steps federal trial courts must follow prior to accepting a Rule 11(b) plea of *nolo contendere.*[52] The trial judge must address the defendant personally in open court, and pursuant to Rule 11(c), the judge must inform the defendant of, and determine the defendant understands, the following rights:

> (1) the nature of the charges and the mandatory minimum and maximum punishments;
> (2) the right to be represented by an attorney at every stage of the proceeding and, if necessary, the appointment of an attorney to represent him;
> (3) the right to plead not guilty;
> (4) the right to a jury trial;
> (5) the right to the assistance of counsel;
> (6) the right to confront and cross-examine adverse witnesses;
> (7) the right against compelled self-incrimination;
> (8) that by pleading *nolo contendere* the defendant waives the right to trial; and
> (9) that if the defendant is questioned under oath, on the record, the defendant's answers may later be used against him in a prosecution for perjury or false statement.[53]

The plea of *nolo contendere* is an attractive alternative to defendants because a conviction based on this plea cannot subsequently be used against

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[49] Such a plea also included a prayer for leniency. The present view of the true meaning of a *nolo* plea is not clear, *see supra* note 45 and accompanying text. For purposes of this article the view adopted by the Supreme Court and Rule 11 is accepted as accurate.

[50] United States v. Alford, 400 U.S. 25, 35 n.8 (1970).

[51] Fed. R. Crim. P. 11(f). This rule only requires a factual basis for *guilty pleas*, not pleas of *nolo contendere*. The Notes of the [Federal] Advisory Committee on Rules state: "For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of *nolo contendere* without inquiry into the factual basis for the plea. The new third sentence (referring to subparagraph f) is not, therefore, made applicable to pleas of *nolo contendere*." This result is consistent with the common law plea of *nolo contendere* and its development by the courts. When exploring this area of the law one must constantly determine whether the origin of the guilty plea rule being examined is constitutionally required, or set in place by statute or case law. This "inquiry" refers to a question and answer session with the accused.

[52] These steps are also required before accepting a "traditional" guilty plea. Fed. R. Crim. P. 11(a).

[53] Fed. R. Crim. P. 11(c).

them in a later civil or criminal proceeding.[54] This rule of "non-use" is consistent with the lack of a factual inquiry into the actual guilt of the defendant. The prosecution may oppose a *nolo contendere* plea when seeking a definite resolution of the defendant's guilt or innocence for either correctional purposes[55] or for reasons of subsequent litigation.

Although the plea of *nolo contendere* has long existed in federal practice, the desirability of this plea has been a subject of some disagreement.[56] Courts view the desirability of the *nolo contendere* plea from both ends of the spectrum. One view is that the plea should be rejected unless a compelling reason for acceptance is established.[57] On the other hand is the position that the plea should be accepted in the absence of a compelling reason to the contrary.[58] With an understanding of the history, procedures and usage of Rule 11 guilty pleas and the plea of *nolo contendere*, a discussion of guilty plea practice in the military is in order.

III. PRESENT GUILTY PLEA PRACTICE IN THE MILITARY

A. The Acceptance of Guilty Pleas

The procedure for entering and accepting guilty pleas in the military is similar to that practiced in the federal courts. Military guilty plea practice is primarily governed by Article 45, Uniform Code of Military Justice (UCMJ),

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[54] *Id*. 11(e)(6)(B). *See* also 4 WIGMORE ¶ 1066(4) at 58 (3d ed. 1940, Supp. 1970); Rules of Evidence for United States Courts and Magistrates, Rule 803(22) (Nov. 1971); Bruce Lenvin and Michael Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L.J. 1255 (1942); and ABA Standards Relating to Pleas of Guilty § 1.1(a) and (b), Commentary at 15-18 (Approved Draft, 1968). This prohibition concerns the use of the plea to "prove" the accused's guilt in a later proceeding. It does not include the use of the conviction obtained after the accused has entered a plea of *nolo contendere* for impeachment purposes pursuant to Federal Rule of Evidence 609 (as well as Mil. R. Evid. 609).

[55] *See infra* note 174 and accompanying text. Admission of criminal culpability is sometimes important in developing a rehabilitation plan for the defendant.

[56] *See* Edward Lane-Reticker, *Nolo Contendere in North Carolina*, 34 N.C. L. REV. 280 at 290-291 (1956) (criticizing the plea); and Note, *The Nature and Consequences of the Plea of Nolo Contendere*, 33 NEB. L. REV. 428 at 434 (1954) (favoring the plea). The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the nolo plea is not strong enough to justify a minimum standard supporting its use," but because "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe use of a *nolo* plea. ABA, *Standards Relating to Pleas of Guilty* ¶ 1.1(a), Commentary at 16 (Approved Draft, 1968).

[57] United States v. Bagliore, 182 F. Supp. 714, 716 (E.D.N.Y. 1960).

[58] United States v. Jones, 119 F. Supp. 288, 290 (S.D. Cal. 1954). The trial court is empowered to balance the competing interests in determining the desirability of a *nolo contendere* plea. Factors which should be considered include the position of the government and the defendant, as well as the interest of the public in the effective administration of justice (*see* Fed. R. Crim. P. 11(a)(1)(b)).

and Rule for Court Martial (R.C.M.) 910. The principal focus of military guilty plea practice is to ensure there is a factual basis for the plea and that no matter inconsistent with the plea is left unresolved.[59]

In pertinent part Article 45 states:

> If an accused after . . . a plea of guilty sets up any matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.[60]

Like Federal Rule 11(c), R.C.M. 910(c) requires the military judge to address the accused personally prior to accepting a plea of guilty and inform him of the following:

> (1) The nature of the offense and the mandatory minimum and maximum possible penalties;
> (2) The right to counsel;[61]
> (3) The right to plead not guilty;
> (4) The right to be tried by a court-martial;
> (5) The right to confront and cross-examine witnesses;
> (6) The right against self-incrimination;
> (7) If the accused persists in his plea of guilty to certain offenses there will be no trial as to those offenses;
> (8) By pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and
> (9) The accused will be questioned under oath concerning the offenses plead guilty to.[62]

The personal inquiry of the accused conducted by the military judge is often referred to as the *Care* inquiry.[63] Like Rule 11(f), R.C.M. 910(e) doesn't require the factual basis to meet any particular standard, (i.e., preponderance, clear and convincing, or beyond a reasonable doubt).

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[59] MCM, *supra* note 5, R.C.M. 910(d) and (e).
[60] UCMJ art. 45 (1995).
[61] If a general or special court-martial. MCM, *supra* note 5, R.C.M. 501(b).
[62] If the accused answers the questions under oath, on the record, in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement. MCM, *supra* note5, R.C.M. 910(c)(5).
[63] United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969). In *Care* the Court of Military Appeals held that effective thirty days after the date of the opinion, all records of trial involving guilty pleas must contain, in addition to an explanation of the elements of the offense, a personal interrogation of the accused concerning what he did "to make clear the basis for a determination by the military judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." 40 C.M.R. 247 at 253. For a critical analysis of *Care* the reader is directed to a thought-provoking article by Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195 (Fall 1991).

If a plea agreement exists, the military judge must also ensure the accused understands the meaning and effect of the agreement.[64] In the military a pretrial agreement consists of two parts. The first part contains the promises of the accused and the government's agreement to be bound by a particular sentence limitation (which is not disclosed in this document).[65] The second part of the agreement, called the "quantum" portion, contains the actual sentence limitation. The quantum portion of the pretrial agreement is not known by the court-martial panel or the military judge in a judge-alone case until after the sentence has been announced.[66]

Once the sentence has been announced[67] the quantum portion of the pretrial agreement must be explained to the accused.[68] If the accused does not understand (or agree) with this portion of the pretrial agreement, the agreement must be conformed to the accused's understanding (and/or the intent of the accused and government), or the accused may withdraw his guilty plea.[69]

B. Rejection of the *Alford* Plea in the Military

Consistent with the requirements of Article 45, UCMJ and R.C.M. 910, the military has refused to recognize the *Alford* plea. In *United States v. Epps*[70] the Court of Military Appeals[71] rejected the use of an *Alford*-type guilty plea. The COMA ruled that while *Alford* may establish the minimum constitutional requirements for an acceptable guilty plea, the military imposes a higher standard.

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[64] MCM, *supra* note 5, R.C.M. 910(f).

[65] A pretrial agreement does not *always* contain a sentence limitation. For example, the agreement may only require the government refer the case to a particular level court (i.e., special court-martial versus a general court-martial). MCM, *supra* note 5, R.C.M. 705(b)(2)(A). Of course, such a referral does limit the punishment the accused may receive because the maximum punishment available to a special court-martial is substantially less than at a general court-martial. MCM, *supra* note 5, R.C.M. 201(f).

[66] A court-martial panel is similar to a civilian jury.

[67] If the accused has chosen to be sentenced by the military judge, the military judge announces his sentence, then consults the quantum portion of the pretrial agreement. If the judge's sentence is "lighter" than that agreed to by the parties, the accused receives the benefit of the judge's sentence. If a panel sentences the accused, the panel announces the sentence, is dismissed, and the judge then examines the quantum portion of the pretrial agreement. As with the military judge, if the panel's sentence is "lighter" the accused receives the benefit of the more favorable sentence. If the sentence announced is "greater" than the pretrial agreement, then the sentence cap of the pretrial agreement controls. By following this procedure the sentencing authority is not "tainted" by knowledge of the sentence ceiling contained within the pretrial agreement. MCM, *supra* note 5, R.C.M. 705(e).

[68] MCM, *supra* note 5, R.C.M. 910(h)(3).

[69] *Id.*

[70] United States v. Epps, 25 M.J. 319 (C.M.A. 1987).

[71] On October 5, 1994, the United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces [hereinafter CAAF].

Therefore, while federal and military guilty plea procedures are quite similar, neither Rule 11(b) pleas of *nolo contendere* nor *Alford* pleas are presently recognized in the military justice system.[72] We next examine in detail the guilty plea option judicially created by the United States Supreme Court in *Alford*.

IV. NORTH CAROLINA V. ALFORD

A. A Plea is Born

In 1963 Henry Alford was indicted for first-degree murder. In-court testimony revealed that Alford and the murder victim had argued at the victim's house. Alford left, and a short time later the victim answered a knock at his door. Before completely opening the door the victim was fatally shot. There were no eyewitnesses. Additional testimony revealed that earlier Alford had taken his shotgun from his home and threatened to kill the victim. Even more damaging to Alford, after the victim's death, witnesses related that Alford claimed that he had killed him.[73]

Under North Carolina law at the time, the death penalty was automatic upon conviction for first-degree murder if two circumstances were met: (1) the defendant pleaded not guilty; and (2) the jury did not positively recommend a life sentence.[74] Although Alford faced mandatory life imprisonment if he pleaded guilty to first-degree murder, he could avoid the death penalty by his guilty plea.[75]

Alford persisted in his claim of total innocence; but after consultation with his court-appointed attorney, he agreed to plead guilty to second-degree murder. He insisted he was pleading guilty only to avoid the almost certain death penalty he faced if convicted after contesting the charge.[76]

The trial court established that Alford's attorney had adequately explained to his client the difference between first- and second-degree murder, and of his right to a fully-contested trial. Alford's attorney recommended he accept the plea-bargained deal based on the strong evidence in the state's possession of his guilt.[77] Throughout his trial Alford maintained his innocence

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[72] *See supra* note 7 and accompanying text.
[73] United States v. Alford, 400 U.S. 25, 28 (1970).
[74] N.C. GEN. STAT. § 14-17 (1965). The provision of North Carolina law permitting guilty pleas to capital offenses was repealed in 1969.
[75] *Id.* § 14-17.
[76] Alford was a likely candidate for the death penalty based on his impressive criminal resume. Besides the current murder, Alford had served six years of a ten-year sentence for murder, been convicted *nine* times for armed robbery, and also had convictions for forgery, transporting stolen goods, and carrying a concealed weapon. 400 U.S. 25 at 29 n.4.
[77] Almost all of the witnesses interviewed by Alford's attorney supported the prosecution's case against Alford. 400 U.S. at 27.

while steadfastly indicating his desire to plead guilty.[78] The trial judge eventually accepted Alford's plea and sentenced him to the maximum penalty for second-degree murder, thirty years confinement.

On appeal, Alford sought a new trial, arguing he had been coerced into pleading guilty by fear of the death penalty. The Supreme Court of North Carolina held that Alford's plea was knowing and voluntary.[79] Alford next petitioned for a writ of habeas corpus, first in the United States District Court for the Middle District of North Carolina, then in the Court of Appeals for the Fourth Circuit.[80] Both courts, relying on the findings of the state court, denied Alford's writ.[81] Each court found Alford's plea to have been knowingly and intelligently made.

Undeterred, Alford again petitioned for a writ of habeas corpus in federal district court. The district court again denied relief. The trial judge considered an inquiry into the voluntariness of Alford's plea foreclosed by the prior action of the court.[82] Alford appealed, and a divided panel for the Fourth Circuit reversed, holding that Alford's plea was involuntary since it was based on his fear of the death penalty.[83]

In reversing, the Fourth Circuit relied heavily upon the Supreme Court's 1968 decision in *United States v. Jackson.*[84] In *Jackson* the Supreme Court held the death penalty provision of the Federal Kidnapping Act was unconstitutional as it made "the risk of death the price for asserting the right to a jury trial and thereby impaired free exercise of that constitutional right."[85] The Fourth Circuit invalidated North Carolina's statute reasoning that the statute impermissibly "encouraged" Alford to waive his constitutional rights in order to remove the threat of the death penalty.[86]

In a six-to-three decision[87] the Supreme Court vacated the judgment of the Fourth Circuit and remanded the case for further proceedings.[88] Authoring the majority opinion, Justice White, citing *Brady v. United States,*[89] wrote that a guilty plea representing "a voluntary and intelligent choice among the alternative courses of action" is not compelled within the meaning of the Fifth

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[78] During his arraignment he testified he did not kill the victim. Alford told the judge: "Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on -- on the second. You told me to plead guilty, right. I don't -- I'm not guilty but I plead guilty." 400 U.S. 25 at 28 n.2.
[79] 400 U.S. 25 at 29-30.
[80] 405 F.2d at 341, Alford v. North Carolina, No. 10,391 (4th Cir. August 25, 1966) (Mem.).
[81] *Id*.
[82] 405 F.2d at 342.
[83] Alford v. North Carolina, 405 F.2d 340, 341 (4th Cir. 1968).
[84] United States v. Jackson, 390 U.S. 570 (1968).
[85] *Id.* at 570-72 (footnote omitted).
[86] *Id.*
[87] Justices Brennan, Douglas and Marshall dissented.
[88] The final outcome on the remand of Alford's case is apparently unreported.
[89] United States v. Brady, 397 U.S. 742 (1970).

Amendment.[90] This is true even if the accused is unable (or unwilling) to admit his participation in the acts constituting the crime.[91]

Justice White further opined:

> Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. The plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment.[92]

The *Alford* Court established that if a guilty plea is voluntarily made, an express admission of culpability is not constitutionally required for conviction. Justice White compared Alford's plea to a plea of *nolo contendere*:

> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.[93]

The Court, therefore, found little practical difference between pleas of *nolo contendere*, which had long been accepted by courts under common law and Rule 11(b), and the plea entered by Alford. Based on the Court's rationale, the only difference between an *Alford* plea and a plea of *nolo contendere* is the absence of the factual basis for the plea when accepting *nolo contendere* pleas.[94]

Alford establishes that two criteria be met before the trial court can accept an *Alford* plea: (1) the defendant must intelligently conclude it is in his best interest to plead guilty; and (2) there must be evidence in the record of actual guilt.[95] The Court found the testimony presented in Alford's trial established a strong factual basis of his guilt.[96] Additionally, the Court found that Alford had clearly expressed his desire to enter the plea.[97] Based on this analysis, the majority concluded the trial judge had not committed error by accepting Alford's plea.[98]

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[90] United States v. Alford, 400 U.S. 25, 31 (1970).
[91] *Id*. at 37. Such a situation could arise when a defendant is voluntarily under the influence of drugs or alcohol.
[92] *Id*. (citing *Brady*, 400 U.S. 25 at 32 and McCarthy v. United States, 394 U.S. 459 (1969)).
[93] 400 U.S. at 37.
[94] *Id*. at 36 n.8.
[95] *Id*. at 37. The Court's decision left unclear what constitutes "a strong factual basis." This issue is discussed in Section IVB, *infra*.
[96] *Id*. at 37-38.
[97] *Id*. at 38.
[98] *Id*.

Thus, based on *Alford* a trial court should not accept a guilty plea when the defendant claims innocence until, at a minimum, the court has established the factual basis required by Federal Rule of Criminal Procedure 11(f). A Rule 11(f) factual inquiry attempts to resolve the conflict inherent between the waiver of trial and the claim of innocence.[99] Importantly, courts must establish the factual basis for such pleas from evidence outside the statements of the accused.[100] It is this aspect of *Alford* (the quantum of proof required to establish the factual basis of the guilty plea) which has generated the most disagreement among the lower courts.

[99] *Id*. at 36 n.8.

[100] David Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1292n.1 (1975); *see also* State v. Hanson, 344 N.W.2d 725, 728 (Iowa Ct. App. 1983).

B. The Standard of Proof Required to Establish Guilt Before Accepting an *Alford* Plea

Did the *Alford* majority intend to require the lower courts to employ a higher standard of proof than required by Rule 11(f) before accepting *Alford*-type guilty pleas, or was it simply commenting on the quantum of evidence present in the *Alford* case only? The disagreement among lower courts concerning the required standard undoubtedly results from the lack of guidance given by the Supreme Court in *Alford* concerning this issue.

Standards have varied widely, from "evidence merely sufficient to avoid a directed verdict,"[101] to a statutorily required standard of beyond a reasonable doubt.[102] The Federal Courts of Appeals are almost equally split over this issue. The Fourth,[103] Sixth,[104] and Tenth[105] Circuits have held *Alford* requires no higher standard than Rule 11(f), which grants the trial judge wide discretion in determining if a factual basis exists. The Third,[106] Seventh,[107] and Ninth[108] Circuits require "strong evidence" in addition to Rule 11(f)'s establishment of a factual basis. The Fifth Circuit requires a factual basis "precise enough and sufficiently specific to show that the accused's conduct on the occasion involved was within the ambit of that defined as criminal."[109]

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[101] United States v. Webb, 433 F.2d 400, 403 (1st Cir. 1970), *cert. denied*, 401 U.S. 958 (1971).

[102] ALA. CODE § 15-15-23 (1995). Alabama may require this standard because there is no appellate review of guilty pleas except in capital cases. *See* Joan Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants*?, 126 U. PA. L. REV. 88 at 126n.251.

[103] United States v. Morrow, 914 F.2d 608 (4th Cir. 1990).

[104] United States v. Tunning, 69 F.3d 107 (6th Cir. 1995).

[105] United States v. Keiswetter, 860 F.2d 992 (10th Cir. 1988), *modified in part on reh'g en banc*, 866 F.2d 1301 (10th Cir. 1989).

[106] United States v. Hecht, 638 F.2d 651 (3rd Cir. 1981). This issue was not central to the decided issue in *Hecht*.

[107] United States v. Cox, 923 F.2d 519 (7th Cir. 1991). *Cox* involved the rejection by the trial court of an *Alford* plea. While somewhat blurring the distinction between the requirements of Rule 11, and the requirements of *Alford* as understood by the Court, Chief Judge Bauer stated:

> The court had before it the entire body of evidence adduced at the first trial (which resulted in a mistrial); certainly a sufficient factual basis to satisfy Rule 11. Cox himself agreed that the Government's proof was strong, and believed that it would likely result in a conviction. It was that belief that motivated him to knowingly and voluntarily waive his right to trial in return for the assurance of a sentence of only two years. Thus, the requirements of *Alford* were satisfied as well.

[108] United States v. Alber, 56 F.3d 1106 (9th Cir. 1995).

[109] United States v. Johnson, 546 F.2d 1225 (5th Cir. 1977); *see also*, Clicque v. United States, 514 F.2d 923, 931 (5th Cir. 1975) (finding defendant's conduct fell within the ambit of criminal activity).

The Ninth Circuit, in *United States v. Alber*,[110] adopted the requirement of a "strong factual basis" if the defendant enters a guilty plea while continuing to assert his innocence.[111] However, at another point in its opinion, the *Alber* court states, "The court need not be convinced beyond a reasonable doubt than (*sic*) an accused is guilty. It need only be convinced that there is sufficient evidence to justify the reaching of such a conclusion."[112]

In *United States v. Morrow*[113] the Fourth Circuit stated: "because an *Alford* plea is a variation of a guilty plea, a court accepting such a plea must comply with the basic requirements outlined in Fed. R. Crim. P. 11(f)."[114] Morrow charged that the trial court's acceptance of his plea was in error because it lacked a strong factual basis.[115] The Fourth Circuit held a trial court has wide discretion in determining whether a factual basis exists.[116] Although the court held compliance with Rule 11(f) was sufficient to establish the factual basis of Morrow's plea, it also opined that Rule 11 itself required a "strong" factual basis.[117]

Contrast *Morrow* with *United States v. Tunning*.[118] In *Tunning* the Sixth Circuit held there is no "special" factual requirement when accepting an *Alford* plea. After analyzing many of the other Circuit's decisions, including *Alber* and *Morrow*, Judge Ryan, writing for the majority, stated:

> We hold today that there is no difference in the requirements of Fed. R. Crim. P. 11(f) for a defendant who pleads guilty and admits to acts constituting the crime and a defendant who pleads guilty but who either 1) affirmatively protests his innocence or 2) refuses to admit to acts constituting the crime; that is, either of the two possible *Alford*-type guilty pleas. "[S]trong evidence of actual guilt" is not necessary to satisfy Rule 11(f), even where a defendant protests his innocence. Just as for any guilty plea, when a defendant desires to enter an *Alford*-type guilty plea, Fed. R. Crim. P. 11(f) requires only that the district court "satisfy it[self] that there is a factual basis for the plea." *United States v. Tunning*, 69 F. 3d at 111-12.

The Tenth Circuit, in *United States v. Keiswetter*, highlights the lower court's confusion concerning the factual basis requirement of an *Alford*-type guilty plea:

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[110] 546 F.2d at 1226.
[111] *Id*. at 1110.
[112] *Id.* (citing United States v. Neel, 547 F.2d 95, 96 (9th Cir. 1976)).
[113] 914 F.2d 608 at 612.
[114] *Id.* at 611.
[115] *Id*.
[116] *Id*. citing United States v. Lumpkins, 845 F.2d 1444, 1451 (7th Cir. 1988); and United States v. Pinto, 838 F.2d 1566, 1569 (11th Cir. 1988).
[117] United States v. Morrow, 914 F.2d 608 at 612.
[118] United States v. Tunning, 69 F.3d 107 (6th Cir. 1995).

> Contrary to the assertion in the dissent, it is not clear that *Alford* mandated a finding of "strong evidence" in every case. Rather, because the record in that case revealed "strong evidence" of the defendant's guilt, the plea of guilty was not constitutionally infirm. Neither *Alford*, nor any case subsequent to *Alford*, suggest that "strong evidence" is the only constitutionally adequate standard for the acceptance of an *Alford* plea. The outer limits of factual basis sufficiency for an *Alford* plea have yet to be defined.[119]

With this backdrop, courts, while recognizing the validity of the plea, have taken different paths in determining the propriety of accepting *Alford*-type guilty pleas.

C. The Acceptance of *Alford* Pleas

Although the courts have recognized the validity of the *Alford* plea, they have taken different paths in addressing the desirability of accepting such pleas. The Supreme Court in *Alford* held that a trial court does not violate due process when accepting a guilty plea from a defendant claiming innocence.[120] The Court also made clear that criminal defendants do not have a *right* to acceptance of their *Alford* pleas.[121] *Alford* expressly notes that states are free to accept or reject the use of such pleas.[122] Federal judges are likewise free to reject *Alford* pleas (as well as *nolo contendere* pleas entered pursuant to Rule 11).[123] However, the Court did not delineate the scope of the trial judge's discretion in accepting or rejecting *Alford* pleas.

Various circuits have accepted the Supreme Court's invitation in *Alford* to explore the scope of the trial court's discretion to accept or reject a guilty plea.[124] A majority have held that a district court can reject a guilty plea simply because the defendant protests his innocence.[125] One commentator, referring to the wide latitude invited by the Supreme Court's language, has written "the practical effect is to create a system in which defendants have no rights and trial courts can do no wrong."[126] Contrary to this view, trial courts have not been automatically affirmed when rejecting *Alford*-type guilty pleas. An example is *United States v. Gaskins.*[127]

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[119] 860 F.2d 992 at 995 n.6.
[120] United States v. Alford, 400 U.S. 25, 39 (1970).
[121] *Id*. n.11.
[122] *Id*.
[123] *Id*. *See also* United States v. Bednarski, 455 F.2d 364, 365 (1st Cir. 1971) ("We find nothing in *Alford* that obliges the court to accept a guilty plea merely because it was warranted in doing so.").
[124] 400 U.S. at 39 n.11.
[125] *Id.*
[126] Alschuler, *supra* note 100, at 1301.
[127] United States v. Gaskins, 485 F.2d 1046 (D.C. Cir. 1973).

In *Gaskins* the United States Court of Appeals for the D.C. Circuit held the trial judge abused his discretion by rejecting Gaskin's guilty plea solely because he refused to admit guilt. Such an outcome was also suggested in *Farley v. Glanton*[128] where, in a footnote, the Supreme Court of Iowa stated that a policy of uniformly refusing *Alford* pleas might amount to refusal by the judge to exercise his discretion (which would constitute reversible error).

In *United States v. Cox*,[129] a decision by the United States Court of Appeals for the Seventh Circuit, the trial judge's rejection of an *Alford* plea was found proper because it preserved the appearance of fairness of the justice system in the public's eye.[130] Additionally, the Seventh Circuit emphasized the importance of giving the trial judge wide discretion in this area:

> Restricting a district court's discretion to reject *Alford* pleas could produce even more difficulties. We could not support a principle under which, if the [trial] court refused to accept a plea, the defendant after trial and a conviction and a sentence not to his liking could return and freely litigate the correctness of the court's finding that the requirements of Rule 11 had not been fully met.[131]

Perhaps because of this conflict between guilt and innocence inherent in permitting a defendant to enter an *Alford* plea, its acceptance by the lower courts has been "luke-warm."

D. The Present Status of the *Alford* Plea

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[128] Farley v. Glanton, 280 N.W.2d 411, 415 n.2 (Iowa 1979).
[129] United States v. Cox, 923 F.2d 519 (7th Cir. 1991).
[130] *Id*. at 524-25. The trial court in *Cox* rejected the plea agreement stating:

> Without [Cox's admission of guilt of distribution to Vasquez], I do not feel comfortable in finding him guilty, and because as I understand it there has been a denial of guilt of the charges brought against him and the essential elements therein, I cannot accept the guilty plea at this time. Id.

[131] *Id*. (citing United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971)).

Many state and federal courts have embraced the *Alford* plea.[132] A few states, however, have refused to recognize *Alford*-type guilty pleas. These states, like the military, require a defendant who pleads guilty to personally admit they committed the crimes charged.[133] According to at least two commentators, the *Alford* plea has fallen into general disfavor.[134] This position of disfavor is not without support as several courts have commented on the "unusualness" of such a plea. For example, in *United States v. Morrow*[135] the Fourth Circuit stated:

> We agree with the Fifth Circuit's assessment of the plea: Although excellent reasons exist for permitting an *Alford* plea, the logic underlying this type of plea is counter-intuitive. The average defendant may have some difficulty reconciling himself to the notion of pleading guilty while maintaining his innocence.… It is essential that a court accepting an *Alford* plea make every effort to ensure that a defendant recognize precisely what his plea entails.[136]

Alford pleas are clearly disfavored by the Department of Justice. According to the Principles of Federal Prosecution:[137]

> The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his innocence with respect to the charge or charges to which he offers to plead

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[132] Alschuler, *supra* note 100, at 1298-99. *See also* 2 DAVID ROSSMAN, CRIMINAL LAW ADVOCACY ¶ 9.01(3), at 9-7 to 9-8. Some states have statutorily recognized the *Alford* plea:

> A defendant who is unwilling to admit to any element of the offense that would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty to the offense if the defendant considers the plea to be in the defendant's best interest and if a factual basis exists for the plea.
> MONT. CODE ANN. § 46-12-212(2) (1993).

[133] *See* MICH. STAT. ANN. § 6.302 (D)(1) (Law. Co-op. 1995); IND. CODE ANN. § 35-4-1-4(b) (Michie 1985).

[134] Shipley, *supra* note 9, at 1068. In reaching this conclusion Shipley states: "An explanation for the lack of judicial enthusiasm toward *Alford* pleas is the fact that many states have adopted the *Alford* principle in cases affirming trial court decisions to accept equivocal pleas rather than in cases giving defendants a right to have their equivocal pleas accepted" (footnotes omitted).

[135] United States v. Morrow, 914 F.2d 608 (4th Cir. 1990).

[136] *Id*. at 611 n.6 (citing United States v. Punch, 709 F.2d 889 (5th Cir. 1983) (footnote omitted)). The Fifth Circuit continues to express reservations concerning the desirability of *Alford* pleas. *See* United States v. Harlan, 35 F.3d 176, 182 n.7 (5th Cir. 1994).

[137] 6 Fed. Sent. R. 317, Principles of Federal Prosecution, Part D(4) (May/June 1994). The principles of federal prosecution are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government. *See also* 10 DOJ ALERT 21 (October 1992) announcing that the Criminal Division had amended the U.S. Attorney's Manual to require Department of Justice review of all "*Alford* pleas."

> guilty. If the defendant tenders a plea of guilty but denies that he has in fact committed the offense(s), the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty.[138]

The Comment to this section states that despite the constitutional validity of *Alford* pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges.[139] According to the Comment, such pleas are particularly undesirable when entered as part of an agreement with the government.[140] Involvement by the government in the inducement of guilty pleas by defendants who protest their innocence may create the appearance of prosecutorial overreaching.[141]

The Comment further states that it is preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair.[142]

While there may be some uneasiness in handling an *Alford*-type guilty plea, before rejecting its use its potential advantages and disadvantages should be examined.

V. ADVANTAGES AND DISADVANTAGES OF AN *ALFORD*-TYPE GUILTY PLEA

A. Potential Advantages of an *Alford*-Type Guilty Plea

Most attorneys accept plea bargaining as proper and "good," providing advantages to both the defendant and the prosecutor. The value of plea bargaining was acknowledged by the Supreme Court in *Santobello v. New York*,[143] wherein the Court stated: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called

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[138] 6 Fed. Sent. R. 317, Principles of Federal Prosecution, Part D(4) (May/June 1994).
[139] *Id.*
[140] *Id.*
[141] *Id.* The potential threat of lengthy confinement, or additional charges, often gives the government the ability to dictate the terms of any pretrial agreement. This includes not only any sentence limitation but also the charges which the defendant must plead guilty to in order to obtain such an agreement.
[142] *Id.* In spite of a defendant's presumption of innocence one may argue that the government always holds the "upper hand." This conclusion is based on the inherent power and discretion of the prosecutor's office, as well as the investigatory resources not normally available to defendants.
[143] Santobello v. New York, 404 U.S. 257 (1971).

'plea bargaining', is an essential component of the administration of justice. Properly administered, it is to be encouraged." [144]

Plea bargaining is an efficient means of disposing of criminal cases. It provides the government a sure conviction, and the accused a sentence ceiling. Permitting the use of an *Alford* plea expands the options available when negotiating such agreements.

The options currently available in military plea bargaining are more limited. The common practice in military plea bargaining permits the accused to plead guilty either to a lesser included offense, or to less than all charges and specifications. With a pretrial agreement in hand, the government may choose to forego expending the time and effort necessary to prove the greater offense (or the remaining charges and specifications). The government may also choose, unless specifically bargained away in the pretrial agreement, to prove the greater offense (or the remaining charge(s) and specification(s)).

When choosing that option the government must prove beyond a reasonable doubt that the accused is guilty of the greater offense or additional charges.[145] Contrast that with *Alford* where the government carries a lower burden (i.e., strong evidence of guilt or simply a factual basis). In fact, it may have been the potential inability of the government to meet its burden of proof that led to a pretrial agreement which permits the accused to plead not guilty to certain charges.[146]

During pretrial agreement negotiations defense counsel often indicate to the government that the accused cannot plead to the offenses as charged because he is not "provident" to one or more of the charges or specifications. Pursuant to *Care*[147] and R.C.M. 910 the military judge cannot accept a guilty plea if the accused raises matters inconsistent with the plea or refuses to admit criminal culpability to each element of each offense. The government must then choose between permitting the accused to plead to lesser included offenses and/or less than all the charges, or proving its case. The adoption of *Alford*-type guilty pleas makes another option available.

If the government desires conviction of all charged offenses, or insists on a plea of guilty to certain "major" offenses, the accused's inability to be "provident" would no longer be a barrier to conviction. Assuming that an accused desires the benefits gained from such a plea, the accused could enter an *Alford*-type plea thereby eliminating the need for a providency inquiry concerning those charges.

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[144] *Id*. at 260. An in-depth discussion of the merits, necessity, or wisdom of plea bargaining is beyond the scope of this paper.
[145] *See* MCM, *supra* note 5, R.C.M.s 918(c) and 920(e)(5).
[146] As will be discussed, if the military adopts *Alford*-type guilty pleas, the required quantum of proof should be clearly established. *See* discussion of R.C.M. 910(e) in Section VII, *infra*.
[147] United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

This option becomes especially important in sex offense crimes such as rape or carnal knowledge.[148] An accused who has committed rape will often seek to enter a "traditional" guilty plea to indecent assault, a lesser included offense of rape,[149] or if the victim is a minor, indecent acts (or liberties) with a minor.[150] Persons guilty of such offenses are often extremely reluctant to admit committing such offenses. This is partly based on the disdain society has placed on these crimes and those who commit them.

On the other hand, while an accused may be reluctant to admit guilt to the charged offense, he may be willing to enter an *Alford* plea to the charge of rape in order to lessen the potential maximum punishment faced.

To illustrate, the government might be willing to enter a pretrial agreement for 15 years only if the accused enters an *Alford* plea to rape.[151] The maximum punishment for rape is death or such other punishment as a court-martial may direct.[152] The maximum punishments for two of the potential lesser included offenses of rape are: (1) indecent assault-dishonorable discharge, total forfeiture of all pay and allowances, and confinement for 5 years;[153] and (2) indecent acts or liberties with a child-dishonorable discharge, total forfeiture of all pay and allowances, and confinement for 7 years.[154] The government may be unwilling to accept a plea to a lesser included offense based on the facts and the significantly reduced maximum punishments. On the other hand, the government may assess the strength of its case and determine the charge of rape, while appropriate, presents difficulties in proof. In such a case, an *Alford* plea would serve the interests of justice well. Once the *Alford* plea is entered, the government's burden of proof as to the rape is lowered to simply showing a sufficient factual basis of the accused's guilt, making the task of convicting the accused for this charge much easier; and the accused receives a limitation on his sentence while maintaining his innocence. Further, although the accused's sentence is limited, the government has the potential to gain greater confinement than was available under the lesser included offenses (15 years versus 5 or 7 years). Moreover, the government now stands a greater chance of obtaining punishment equal to or greater than

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[148] UCMJ art. 120 (1995).

[149] UCMJ art. 134 (1995). Article 134 covers a variety of crimes not specifically mentioned in the other punitive articles.

[150] *Id*.

[151] The actual pretrial agreement will of course be a product of several factors: the skills of the trial and defense counsel, the strength of the government's case, the desire of the government to protect the victim(s) from the ordeal of a fully contested case, and the degree of willingness on the accused's part to accept culpability.

[152] UCMJ art. 20 (1995).

[153] UCMJ art. 134 (1995).

[154] *Id*. The presence, and number, of lesser included offenses depends on the facts of a particular case (as well as the manner in which a particular case has been charged). *See* United States v. Weymouth, 43 M.J. 329 (1995).

the 15-year deal with a conviction of rape versus one for indecent assault or indecent acts.[155]

Additionally, if the government convicts the accused of additional offenses after an *Alford* plea, it may receive the same "aggravation effect" on sentencing as if the accused had fully contested the charge(s). From a theoretical standpoint, the final outcome is no different: The accused said he didn't do it, but the fact-finder has found that he did. The government may have actually gained additional ammunition for aggravation because arguably the accused has not accepted responsibility for his criminal acts.[156]

The *Alford* plea can also be attractive to the accused and his defense attorney. Military defense counsel often encounter clients who, in the face of overwhelming evidence of guilt, continue to maintain their innocence. This places the defense counsel between the proverbial "rock and a hard place." Defense counsel cannot ethically "force" their clients to plead guilty to a crime they say they didn't commit, yet it appears to be in their clients' best interest to avoid contesting a sure loser.

Assuming there is no lesser included offense(s) to which the client is willing to admit guilt, the present UCMJ pleas of "guilty" or "not guilty"[157] trap the accused and defense counsel into pleading "not guilty." This sometimes forecloses the possibility of a pretrial agreement and requires the client to risk receiving the maximum punishments available to the court-martial.

It is certain that more than one innocent[158] accused has "lied" to the court during the providency inquiry in order to protect his pretrial agreement. A policy that encourages untruthfulness tarnishes the integrity of the system and undermines the very basis of the military guilty plea.

The counter-argument is that that is exactly what an *Alford* plea does in reverse: it permits a guilty accused to "lie" about his guilt to the court, while receiving the benefit of a pretrial agreement. There is, however, one important difference between these two scenarios.

Under the military's present providency inquiry rules the accused is required, under oath, to admit guilt.[159] The accused, if he believes himself innocent, is therefore committing perjury if he or she "admits" guilt.[160] Some

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[155] *See* MCM, *supra* note 67, R.C.M. 705(e), and accompanying text. As that note points out, obtaining a sentence which punishes the accused more seriously than the limitation contained in the pretrial agreement permits the accused to receive the "maximum" punishment authorized by the agreement.

[156] The Federal Sentencing Guidelines do not automatically require this conclusion. These Guidelines, and the mitigation aspect of an *Alford* plea, are discussed in more detail in Section VII, *infra*.

[157] *See supra* note 5 and accompanying text.

[158] At least to some of the charges and specifications.

[159] MCM, *supra* note 5, R.C.M.s 910(c)(5) and 910(e).

[160] MCM, *supra* note 5, R.C.M. 910(c)(5).

observers might feel this is of little consequence. If an individual is willing to send himself or herself to jail for a crime he didn't commit, no one is injured but the accused. This overlooks the "perjury"–which decreases confidence in our system of military justice.[161]

On the other hand, with the adoption of an *Alford*-type plea the accused is saying "I'm innocent but I knowingly and voluntarily want to plead guilty anyway because it is in my best interest." There is no need for a providency inquiry which requires the accused, under oath, to "prove" his guilt. Rather, the government is required, independent of the accused's statements, to establish the factual basis of guilt. The guilty accused is not committing perjury while proclaiming innocence,[162] and the burden is placed back upon the government to produce sufficient evidence of the accused's guilt.

The accused may maintain his innocence while receiving the protection of a pretrial agreement. This alternative should greatly improve the relationship between the client and defense attorney. Once the accused is aware of the *Alford* option, he should have no reason to lie to his attorney (or the military judge) concerning his guilt in order to avail himself of an advantageous pretrial agreement.

While there are many attractive advantages to adopting the *Alford* plea, there are likewise several disadvantages that deserve discussion.

B. Potential Disadvantages of an *Alford*-Type Guilty Plea

Among the potential disadvantages to adopting the *Alford* plea are: (1) the erosion of a basic premise of American justice that only guilty persons are convicted; (2) potential loss of confidence in the military criminal justice system; (3) fear that the plea will be overused; (4) the danger of repeated collateral attacks once the plea is accepted; and (5) the possible harm such pleas may have to accuseds and victims alike.

1. Ensuring Only Guilty Accused Are Convicted.

[161] But this conclusion defies logic and reality. No one can seriously argue that a federal conviction negatively impacts the accused only. Such a conviction is often almost as devastating (both emotionally and financially) on the accused's family, friends and the surrounding community. Many times the accused represents the head of the household and serves as the primary economic provider. If the accused is a servicemember, his conviction often leads to the loss of the important benefits his military service has provided to his family (i.e., government quarters, medical and dental care, commissary and post exchange privileges, etc.).

[162] The author believes many defense attorneys, prosecutors, and for that matter, lay persons, have come to the unofficial conclusion that an accused has an almost "constitutional" right to lie about his or her guilt (false swearing charges to the contrary).

Probably the most troubling aspect of an *Alford* plea is the potential to undermine what is arguably the most fundamental underpinning of our criminal justice system: that only the truly guilty are convicted and punished. The United States, in fashioning its criminal justice system, has taken great pains to reduce the risk of convicting an innocent defendant.[163]

Before *Alford* there were three methods used to determine guilt: (1) admission of guilt by the accused; (2) a plea of *nolo contendere;* or (3) conviction after a contested trial on the merits. Because the conviction of an innocent person is to be avoided, the adoption of a process that not only permits, but potentially encourages innocent people to plead guilty, deserves careful examination.[164] One might argue the plea of *nolo contendere* has permitted this for hundreds of years. However, with a *nolo* plea an accused is not really pleading guilty or not guilty, he is refusing to contest his guilt. With an *Alford* plea. the accused is *affirmatively* asserting his innocence.

2. Loss of Confidence in Military Justice System.

A second pitfall of the *Alford* plea is the potential loss of confidence in our military justice system. It can be problematic for the government to explain to the public how a soldier professing his innocence can be convicted and sentenced pursuant to a guilty plea. The following passage from *United States v. Bednarski*[165] is illustrative of this concern:

> We see at least two reasons why the [trial] court must have discretion whether or not to accept a plea even though a strong case may be made as to its voluntariness. The first is that a conviction affects more than the court and the defendant; the public is involved. However legally sound the *Alford* principle, which we of course do not dispute, the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail . . . .[166]

This concern may be ill-founded. We routinely convict and sentence members of the armed forces (after a contested trial) who continue to profess their innocence. Also, one must not forget that an *Alford* plea is *not* an absolute right. As previously discussed, the Supreme Court vested trial courts with great discretion to determine the appropriateness of accepting any guilty plea based on the accused's waiver of rights *and* the government's evidence

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[163] Rossman, *supra* note 132, ¶ 9.02(2)(c)(i), at 9-20-25. A discussion of the history and scope of such safeguards is well beyond the scope of this paper. To name just a few reinforces this fact: the presumption of innocence, the burden of proof, the right against self-incrimination, the right to a jury trial, and the rules of evidence.

[164] Accused can claim they are innocent but are being "forced" to plead guilty by the "system." *See* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 3.55(c) (2d ed. 1982).

[165] United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971).

[166] *Id*. at 366.

sufficiently showing guilt. If the military judge has valid concerns about the accused's true guilt, an *Alford* plea should not be accepted. It is hard to imagine an appeals court would find that a judge abused his discretion by rejecting an *Alford* plea offer based on a finding that there was *insufficient evidence* of the accused's guilt.

Furthermore, one should not forget that the *Alford* plea is a negotiated plea. The government must agree to the terms of any pretrial agreement, including the type of plea to be entered by the accused. The accused does not have an independent right to an *Alford* plea coupled with a pretrial agreement (or any other combination of guilty plea and pretrial agreement).[167]

3. Fear that the Plea will be Overused.

An accused in the military receives little benefit from an *Alford*-type guilty plea if there is no corresponding pretrial agreement. An accused who pleads guilty without the benefit of a pretrial agreement will normally receive credit from the court during sentencing for accepting responsibility and saving the government the time and expense of a contested trial. An *Alford*-type guilty plea arguably does not accomplish either of these goals.

The absence of a sentence cap would likely dissuade the accused from entering an *Alford*-type plea. Thus, in cases where no pretrial agreement has been reached, accuseds are not likely to seek *Alford*-type pleas. Further, the government in this type of case would gain little from agreeing to this approach. The accused is not accepting responsibility for his criminal acts, and the government, because there is no stipulation of fact, is put to at least the minimal time and expense of presenting a factual basis of the accused's guilt. Finally, since the Alford plea is negotiated, it can't be unilaterally overruled by the defense.

[167] *See supra* notes 103-120 and accompanying text.

4. The Fear of Collateral Attack.

There are always at least two potential avenues of attack upon an *Alford* plea: the voluntariness of the plea, or the adequacy of the evidence as to guilt. The concern over post-trial attacks is lessened by the broad discretion given to the trial court in accepting *Alford* pleas. A successful appeal of an *Alford* plea based solely upon the acceptance by the trial court of the plea is unlikely. This is especially true if Rule 11(f) has been properly followed.[168]

5. Harm to Victims and Accused.

Another area of concern is the impact *Alford*-type guilty pleas may have on victims. At least one author argues that permitting a defendant to enter an *Alford* plea robs the victim of the ability to place the criminal experience behind them. In his article, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*,[169] David Starkweather argues that only a plea process that emphasizes offender responsibility enables a victim to accept what happened and reach a point of "forgiveness."[170] In his opinion, an *Alford* plea is a "green light" to criminals to ignore "guilt" whenever it is expedient to do so.[171] The wrongdoer's refusal to admit guilt stymies victims' ability to "get on with their life."

Additionally, permitting a defendant to make his way through the criminal justice system without admitting responsibility for his actions increases a victim's sense of alienation. It also fails to satisfy an important historical foundation of punishment, that of retribution. In Starkweather's view the ultimate goal of retribution is "to permit the criminal to atone for his crime and then be reconciled to society."[172] In his opinion, an offender permitted to escape recognition of guilt will never reach the point of "atonement" and, therefore, the resulting goal of retribution is never achieved.

These arguments are not persuasive. Undoubtedly, victims of crime desire that the perpetrator be convicted and punished for his crime(s). However, the distinction to a victim between a traditional guilty plea and an *Alford* plea is arguably insignificant. The primary concern of most victims is the conviction (and appropriate punishment) of the perpetrator. The means

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[168] United States v. Carter, 619 F.2d 293 (3rd Cir. 1980). In the military, R.C.M. 1201(a) provides automatic review by a Court of Criminal Appeals for all cases which include a sentence containing any of the following: (1) death; (2) a punitive discharge; or (3) confinement for one year or longer, unless the accused has waived or withdrawn appellate review.

[169] David Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853 (1992).

[170] *Id.* at 865.

[171] *Id*. at 866.

[172] *Id*. at 867.

used to reach these goals are less important after all. Victims are satisfied with results when the accused denies guilt, yet is found guilty after a litigated trial and subsequently punished. To argue that retribution can *only* be exacted by a confession of guilt misses the mark. It is the conviction and the resulting punishment which serve, at least partly, the retributive purpose. To argue otherwise would mean victims are satisfied with an admission of guilt but no consequences to the admission.

The military is presently required to include victims in the plea bargaining process.[173] This would ensure a victim's concerns over a possible *Alford* plea are properly addressed. A wise trial counsel will rarely disregard a victim's wishes in this area. This is especially true if the government has a strong case and there is little risk of acquittal.[174]

The next section assumes that the *Alford* plea has been adopted for use in the military. As discussed in the introduction to this paper, there are several issues which deserve analysis (and resolution) since adoption by the military of an *Alford* plea will require several changes to our present guilty plea practice.

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[173] The Victim/Witness Protection Act of 1982, 18 U.S.C.A. §§ 1501 note, 1503, 1505, 1510, 1512 note, 1512-15, 3146, 3579, 3580 (West 1984 & Supp. 1994); 18 App. Rule 32 (1988); the Victims of Crime Act of 1984, 42 U.S.C.A. §§ 10601-03 (West 1995); and the Victim's Rights and Restitution Act of 1990, 42 U.S.C.A. §§ 10606-07 (West 1995). For a service's implementation of these laws see DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, Chapter 18 (8 August 1994 Update).

[174] It would seem the *Alford* plea is a truly advantageous option for defendants since they gain the ability to plea bargain a limitation on their punishment without ever admitting guilt. The author readily admits the obvious: refusal to admit guilt doesn't equal innocence. Almost every defense counsel has encountered at least one client who steadfastly maintained his innocence until the overwhelming evidence (or the government's charitable deal) allowed him to "see the light" and "confess" his guilt to the defense counsel and others. However, there is at least one area where the *Alford* plea may prove problematic: sex offenses. This problem is ably discussed by Alice J. Hinshaw, *State v. Cameron: Making the Alford Plea an Effective Tool in Sex Offense Cases*, 55 MONT. L. REV. 281 (1994). To successfully enter and complete a sex offender program requires the admission of guilt. *See* DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM, para. 3-28, 4-4 (1 September 1995). An accused's steadfast denial of criminal responsibility in this area may deny him or her the very help he or she so desperately needs. If the military adopts an *Alford*-type plea, defense counsel and military judges must ensure the possible collateral effects of the plea are properly explained to the accused; e.g., denials of culpability after conviction may make the offender ineligible to participate in a sexual offender rehabilitative program. The accused may decide that the benefits of enrollment in a sex offender program outweigh the benefits of entering an *Alford* plea. Only the accused and his family can make such a personal decision. It is crucial that the accused be fully informed of the consequences of his *Alford*-type plea so that the decision can be an informed one.

VI. ISSUES IF AN *ALFORD*-TYPE GUILTY PLEA IS ADOPTED

Issues generated by the military's adoption of an *Alford*-type plea include: (1) what preliminary inquiry, if any, should be conducted by the military judge prior to accepting the plea?; (2) what standard of proof should be required to establish the factual basis of the plea?; (3) how useful will stipulations be in meeting this standard of proof?; (4) to what extent (during sentencing) an *Alford*-type plea should be considered as aggravation or mitigation; and (5) what jury instructions, if any, should be developed to properly instruct members concerning the existence and effect of the accused's *Alford*-type guilty plea?

A. The Guilty Plea Inquiry.

Adoption by the military of the *Alford* plea would require several changes to our present guilty plea practice. As discussed in Section IV, the Manual for Courts-Martial sets forth several requirements before the military judge may accept a guilty plea. Underlying these requirements is the desire to ensure that the accused's plea is knowing, voluntary and factually-based. To accomplish this end the military judge must (among other requirements) ensure the accused understands:

> (1) the legal effect of his plea;[175]
> (2) the rights he foregoes when entering a plea of guilty;[176]
> (3) the minimum mandatory (if any) and maximum punishment authorized by law in the case;[177] and
> (4) if made pursuant to a pretrial agreement, the meaning and effect of the agreement.[178]

If the *Alford* plea is adopted, several aspects of the guilty plea inquiry will require revision. Perhaps the most significant change is that the military judge must determine that a factual basis exists for the plea from sources other than the accused.[179] This will require R.C.M. 910 to be revised.

As we have seen, a major part of the guilty plea inquiry consists of the providency inquiry pursuant to R.C.M. 910. During this stage of the court-martial the accused is placed under oath and questioned by the military judge. The accused is required, by his answers, to establish the factual basis of his

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[175] MCM, *supra* note 5, R.C.M. 910(c)(4).
[176] *Id.* R.C.M. 910(c)(3).
[177] *Id*. R.C.M. 910(c)(1).
[178] *Id.* R.C.M. 910(f).
[179] *Id*. R.C.M. 910(e).

guilty plea.[180] Because the accused in an *Alford* plea is refusing to admit guilt, this inquiry will no longer be required (just as it is omitted in federal courts when accepting a plea of *nolo contendere*). Therefore, R.C.M.s 910(c)(5) and 910(e) should be amended to exclude the requirement that the accused be questioned under oath concerning the factual basis of charges to which an *Alford* plea is being entered.

The basis of the accused's guilt will then be proven by introduction by the government of proof sufficient to meet the factual basis threshold required by the Supreme Court and R.C.M. 910(e) (which is consistent with Rule 11(f))[181] Such evidence could consist of one or more of the following: (1) stipulations of fact; (2) stipulations of expected testimony; (3) live witnesses; or (4) documentary or physical evidence.

In federal courts the factual basis may be established by stipulation, an offer of proof by the government, the presentence report,[182] or the accused's confession. As the court in *United States v. Sweet*[183] observed, "because the accused servicemember may not plead *nolo contendere* or plead guilty while proclaiming innocence, these alternative methods of establishing a factual basis for guilty pleas have not been adopted for military practice."[184]

The adoption of additional methods of proof must also be considered if an *Alford*-type guilty plea is established in the military justice system. While we have no equivalent to the presentence report, the ability of the government to make an offer of proof would be especially helpful to trial counsel, as would the introduction of an accused's pretrial statements without having to meet the formality of proof now required.[185]

B. The Use of Stipulations

Stipulations of fact are written documents, signed by the trial counsel, defense counsel, and the accused, setting forth the undisputed facts surrounding the offenses. The courts encourage the use of stipulations.[186] The

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[180] *Id*. R.C.M.s 910(c)(5), 910(e) and 910(f).

[181] Fed.R.Crim.P. 11(f). *See also* United States v. Morrow, 914 F.2d 608, 612 (4th Cir. 1990).

[182] The military does not presently rely on a presentence report. For an in-depth discussion of sentencing within the military see Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1993).

[183] United States v. Sweet, 38 M.J. 583 (N.M.C.M.R. 1993).

[184] *Id*. at 589 (citations omitted).

[185] *See* Mil. R. Evid 103 and 104.

[186] In *United States v. Sweet*, 38 M.J. 583 (N.M.C.M.R. 1993) (en banc), the court stated:

> "We encourage the use of stipulations to support the factual basis for guilty pleas because they are usually prepared in a more relaxed atmosphere than that at trial, they can be drafted to ensure factual accuracy, and they establish a framework for counsel and the accused to discuss the applicable law." *Id* at 592.

requirement of a stipulation of fact in connection with a negotiated guilty plea is virtually automatic.[187] This is the simplest use of a stipulation of fact. The accused, in return for a sentence cap, agrees that the facts necessary to prove each element of each charged offense are true. Additionally, stipulations of fact often remove the necessity for the government to call witnesses during sentencing.

If the accused has only pleaded guilty to lesser-included offenses, the stipulation may ease the government's burden in proving the greater offense(s). In this type of case the accused agrees to some (but not all) of the facts necessary to prove each element of each charged offense. The government therefore relies on the guilty plea inquiry and the stipulation to obtain conviction on the lesser-included offense(s), and as a basis for going forward on the greater offense(s).[188]

The government, as part of a pretrial agreement, can also require the accused to enter into what is called a confessional stipulation of fact. Such stipulations of fact are authorized by R.C.M. 705(c)(2)(A).[189] The court of Military Appeals first recognized confessional stipulations in the case of *United States v. Bertelson*.[190] Bertelson was convicted of distributing methamphetamine after a plea of not guilty and the introduction of a confessional stipulation. Bertelson had originally attempted to plead guilty,

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[187] In over 10 years of practicing law in the military the author is unaware of a single instance where a negotiated guilty plea was not supported by a stipulation of fact.

[188] An example would be a soldier who, charged with desertion under Article 85, UCMJ, will only plead guilty to AWOL (absence without leave, a violation of Article 86, UCMJ). The accused is willing to enter a confessional stipulation concerning the AWOL. This stipulation would therefore contain all the facts necessary to prove desertion except the intent to remain away permanently (the only real difference between AWOL and desertion). The government would then only be required to offer evidence on this single element. *See* United States v. Wilson, 20 U.S.C.M.A. 71, 42 C.M.R. 263 (1970). In *Wilson*, the only evidence concerning the element of the accused's intent to remain away permanently was a stipulation of fact and the accused's own in-court testimony. The COMA held the stipulation of fact was not confessional (as to desertion) and that inconsistencies within the accused's testimony led to the conviction for desertion.

[189] MCM, *supra* note 5, R.C.M. 705(c)(2) states:

> Subject to subsection (c)(1)(A) of this rule [requiring that any term or condition in a pretrial agreement must be entered freely and voluntarily by an accused], subsection (c)(1)(B) of this rule [dealing with the deprivation of certain rights of an accused] does not prohibit either party from proposing the following additional conditions: (A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered.

[190] United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977).

but the military judge rejected his plea as being improvident[191] based on Bertelson's claim that he lacked predisposition to commit the crime.[192] In order to maintain the sentence limitation contained in the pretrial agreement, Bertelson agreed to every fact needed to prove his guilt in a stipulation of fact.

In *Bertelson* the Court of Military Appeals defined a confessional stipulation as a "stipulation which practically amounts to a confession."[193] While confirming the accused must first knowingly, intelligently, and voluntarily consent to admission of the stipulation,[194] the court also noted that once the accused knowingly consents to the admission of any objectionable evidence, it is irretrievable.[195]

Although the *Bertelson* court affirmed the validity of "confessional stipulations"[196] it set forth two requirements for their use: the accused must knowingly, intelligently, and voluntarily consent to its admission;[197] and the military judge must ascertain from the accused, on the record, that a factual basis exists for the stipulation.[198] The court therefore adopted the necessity of a *Care*-like inquiry.[199] If this inquiry produces inconsistencies the military

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[191] In the military an accused must be "provident" to their guilty plea. In other words, the accused must willingly agree that they committed the offense(s) and that they have no valid legal defense. MCM, *supra* note 5, R.C.M. 910.

[192] 3 M.J. at 315 n.1.

[193] The COMA stated: "We believe that a stipulation can be said to amount 'practically' to a judicial confession when, for all facts and purpose, it constitutes a *de facto* plea of guilty, i.e., it is the equivalent of entering a guilty plea to the charge" *Id*. at 315 n.2.

[194] 3 M.J. at 315.

[195] United States v. Gustafson, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967); United States v. Frederick, 3 M.J. 230 (C.M.A. 1977). Once accepted, the parties are bound by a stipulation of fact unless the stipulation is withdrawn or stricken from the record. United States v. Gerlach, 16 U.S.C.M.A. 383, 385, 37 C.M.R. 3, 5 (1966).

[196] The court in *Bertelson* upheld the potential use of such stipulations although the language of then paragraph 154b(1) of the 1969 Manual for Courts-Martial stated "[W]henever an accused has pleaded not guilty and the plea still stands, a stipulation which practically amounts to a confession should not be received in evidence." 3 M.J. at 316. However, the court cautioned that before permitting the use of a stipulation which the accused himself wants admitted, the military judge must inform him of the provisions of this paragraph to ensure he understands that absent his consent a stipulation of fact is inadmissible. 3 M.J. at 316. This provision is no longer in the Manual for Courts-Martial.

[197] *Id*. at 315.

[198] *Id.* at 316-17. The court set aside Bertelson's conviction because the judge failed to properly conduct these two inquiries. The court was particularly concerned about the existence of an agreement not to raise defenses or motions, which was prohibited.

[199] United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (requiring that prior to accepting a plea the court determine is was voluntarily made and factually sound). *See also* United States v. Terry, 21 U.S.C.M.A. 442, 45 C.M.R. 216 (1972); and United States v. Green, 24 U.S.C.M.A. 299, 52 C.M.R. 10, 1 M.J. 453 (1976). These requirements are now found in R.C.M. 910(d) and (e).

judge must reject the stipulation.[200] The military judge may also, in the interest of justice, decline to accept a stipulation.[201]

Rule for Courts-Martial 811 sets forth the general rules for the acceptance of any stipulation (whether pertaining to a fact, a document, or expected testimony). As a first step, the judge must ensure that the parties consent to its admission.[202] The Discussion to R.C.M. 811(c) capsulizes the *Bertelson* court's holdings.[203] If the stipulation practically amounts to a confession to which a not guilty plea is outstanding,[204] it may not be accepted unless the military judge ascertains from the accused:

> (1) That the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent;
> (2) That the accused understands the contents and effect of the stipulation;
> (3) That a factual basis exists for the stipulation; and
> (4) That the accused, after consulting with counsel, consents to the stipulation.

The court must also ascertain from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation. If there is an agreement, the judge must determine its terms.[205] As previously discussed, the government often uses stipulations of fact in "proving up" one or more of the charges to be litigated. An accused who is unwilling to accept guilt on certain offenses may readily admit to certain inculpating facts concerning these offenses in return for the protection afforded by a pretrial agreement. Once protected by the pretrial agreement the accused no longer fears the consequences of conviction on the additional charges.[206] Such an arrangement may also be attractive to the government.[207]

This method of using stipulations would presumably be employed on a regular basis with *Alford*-type guilty pleas.[208] The accused would maintain his

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[200] 3 M.J. at 316.
[201] MCM, *supra* note 5, R.C.M. 811(a).
[202] MCM, *supra* note 5, R.C.M. 811(c).
[203] *See supra* Section VI.
[204] The Discussion to R.C.M. 811(c) states that a stipulation practically amounts to a confession when it is the equivalent of a guilty plea (ala *Bertelson*) when it establishes, directly or by reasonable inference, every element of a charged offense and when the defense does not present evidence to contest any potential remaining issue of the merits.
[205] *Id*.
[206] Although defense counsel should carefully weigh the sentence potential being arguably gained by the government in convicting the accused of additional charges and specifications.
[207] The government enters pretrial agreements containing "split-pleas" because it is able to gain a conviction on the additional charges with relative ease. This is true because the stipulation has reduced (or eliminated) the need for live testimony (thereby saving the government time, and in many cases, money). The government is also likely to gain ammunition from the stipulation to use on sentencing.
[208] For example, in *Alford*, the defendant could have agreed to stipulate to the following apparently undisputed facts: (1) the victim and Alford had argued the day of the killing; (2)

innocence, accept the benefits of a negotiated pretrial agreement, and provide, in part, the ammunition necessary for the government to prove the factual basis of the desired charge(s).

A second type of stipulation, a stipulation of expected testimony, also deserves brief discussion. A stipulation of expected testimony, as it's name denotes, is a stipulation between the parties that a witness, if called, would testify as to certain matters.[209] Such stipulations are recognized in the military.[210] Importantly, an accused who permits a stipulation of expected testimony to be used is not necessarily agreeing to the *truthfulness* of such testimony.[211] In spite of this limitation the government, in conjunction with an *Alford*-type plea, can make good use of such evidence in order to meet its burden of proof as to guilt, and/or in support of the government's sentencing case.

We have previously discussed the potential usefulness of the *Alford* plea in some of the most difficult cases faced by the government and accuseds: child sex abuse prosecutions. It is these cases which present the most challenging problems of proof, not to mention the reluctance of accuseds to accept responsibility by pleading guilty.[212]

A sex offender unable or unwilling to admit culpability in the face of possible conviction (and substantial confinement) could now maintain his innocence while protecting himself by negotiating a pretrial agreement. The government obtains a sure conviction without requiring the child victim to testify on the merits, or possibly at all.[213] By requiring the accused, as part of the pretrial agreement, to stipulate to as many inculpating facts as possible (short of a "full" confessional stipulation) the government has saved time, effort and expense. The government could then supplement the stipulation with additional evidence, as needed, to satisfy the factual basis requirement of R.C.M. 910(e).[214]

This result is positive for all concerned. The government obtains what could have been a difficult conviction with relative ease. The child victim is spared the ordeal of having to face the abuser and the resulting trauma so often connected with a fully contested trial. The accused maintains his innocence

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Alford had earlier taken his shotgun from his home and threatened to kill the victim; and (3) after the victim's death Alford claimed to have killed the victim.

[209] MCM, supra note 5, R.C.M. 811.

[210] *Id.*

[211] MCM, supra note 5, R.C.M. 811(e). Another potential hurdle is that this rule states that the Military Rules of Evidence apply to the contents of a stipulation. Stipulations of expected testimony, on the other hand, do not face this requirement.

[212] Notwithstanding the potential problems with rehabilitating an accused who refuses to claim culpability, the *Alford* plea offers a viable solution to effectively resolve these cases.

[213] This could be accomplished by requiring the accused to agree (as part of the pretrial agreement) to admission of a stipulation of the victim's expected testimony.

[214] *See supra* Section VI.

while protecting himself from the potentially devastating results of conviction after a contest. The sentencing advantages gained by the government, as previously discussed, are twofold: (1) the potential for negotiating a "higher" confinement ceiling; and (2) a better chance of reaching the sentence ceiling agreed upon by the accused.[215]

C. The Standard of Proof

As discussed in Section II, it is possible that many lower courts have relied on the requirements of Rule 11(f) because they are familiar with its standard, and realize prosecutors required to meet a beyond a reasonable doubt burden would likely be reluctant to accept *Alford* pleas. The standard should not be proof beyond a reasonable doubt. The Supreme Court does not require it, and more importantly, the main attraction to the government of an *Alford* plea is the lessened burden of proof. This becomes important for the government because of the relative ease in proving the charges; the potential savings of time and effort; and the elimination of "live" testimony.

Should an *Alford*-type guilty plea be adopted by the military, the present quantum of proof required to meet the factual basis of R.C.M. 910(e) should be sufficient to firmly establish the accused's guilt. R.C.M. 910(e) states: "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." With adoption of an *Alford*-type plea the government should only be required to provide a factual basis sufficient to satisfy the military judge. Besides being constitutionally adequate, the present standard is one with which military judges and military appellate courts are already competent in evaluating. The potential gain from a higher burden of proof would be the possible prevention of convicting the truly innocent accused. This protection does not outweigh the advantages offered by our present standard.

D. The Extent of Mitigation to be Afforded an *Alford*-Type Guilty Plea

The mitigation normally associated with a guilty plea is divided between credit for acceptance of responsibility and the guilty plea's contribution to judicial economy. The acceptance of responsibility for one's crime(s) is seen as an indicator of one's potential for rehabilitation. In the military, rehabilitative potential is defined as "the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."[216]

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[215] *See supra* note 67 and accompanying text.
[216] MCM, *supra* note 5, R.C.M. 1001(b)(5)(A).

Court members are presently instructed that a guilty plea "may be the first step towards rehabilitation."[217] Should an accused who enters an *Alford*-type guilty plea be entitled to receive such an instruction? It is helpful to examine, by analogy, how federal courts, under the Federal Sentencing Guidelines (hereinafter Guidelines),[218] have answered this question.

These Guidelines assign various point totals for particular crimes and employ an elaborate system of adding and subtracting points based on the circumstances surrounding the crime and the particular characteristics of the defendant. The final point total determines the sentencing range available to the court.[219]

Section 3E1.1 of the Guidelines, entitled "Acceptance of Responsibility," provides:

> (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of responsibility for his criminal conduct, reduce the offense level by 2 levels.
> (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilty by the court or jury or the practical certainty of conviction at trial.
> (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.[220]

The following principles, therefore, govern acceptance of responsibility under federal practice: the defendant bears the burden of "proving" to the court he has accepted responsibility for his criminal conduct; the basis of the conviction is irrelevant to this determination; and the entry of a guilty plea does not automatically entitle the defendant to this "credit."

The Sixth Circuit, in *United States v. Tucker,*[221] held that entry of an *Alford* plea does not, *per se*, preclude a sentence reduction for acceptance of responsibility.[222] The court analyzed this issue as follows:

> At first glance, it may be perfectly logical that a defendant's pleading guilty while maintaining his innocence does not amount to accepting responsibility. A closer look at the Guideline, however, indicates that an *Alford* plea does not bar such a reduction. First, the language of the Guideline states that a court may not consider that a guilty plea is based on "the practical certainty

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[217] DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGE'S BENCHBOOK 101 (Sept. 30, 1996) [hereinafter BENCHBOOK].
[218] U.S. SENTENCING GUIDELINES MANUAL (1995) [hereinafter GUIDELINES].
[219] The court may only depart upwards or downwards from the determined range for good cause. An in-depth discussion of these Guidelines is beyond the scope of this paper.
[220] GUIDELINES, supra note 218, § 3E1.1.
[221] United States v. Tucker, 925 F.2d 990, 993 (6th Cir. 1991). The court did, however, uphold the trial court's denial of the reduction based on other indications that the defendant had failed to meet the burden of proving that she accepted responsibility for her actions.
[222] *See also* United States v. Rodriguez, 905 F.2d 372, 373 (11th Cir. 1990).

> of conviction at trial." This language recognizes the problem addressed by *Alford* pleas and arguably allows a reduction despite such pleas. Second, the factors to be considered by the court in considering requests for an acceptance of responsibility reduction are not inconsistent with *Alford* pleas. For example, a defendant, while pleading guilty and maintaining his innocence may still voluntarily resign from the office or position held during the commission of the offense, Application Note 1(f), or voluntarily assist the authorities in recovering the fruits and instrumentalities of the offense, Application Note 1(e).[223]

While not holding an *Alford* plea to be an automatic disqualifier from receiving acceptance of responsibility credit, several courts, contrary to the Sixth Circuit's decision in *Tucker*, have considered the entry of an *Alford* plea in a negative light when determining acceptance of responsibility.[224]

A defendant's refusal to acknowledge essential elements of an offense is inconsistent with the commentary to the guidelines. The commentary states that truthful admission of the criminal conduct is relevant to determine if the defendant should receive this reduction (referring to acceptance of responsibility).[225] If an unqualified guilty plea can serve as evidence of a defendant's acceptance of responsibility,[226] then logically the qualifications a defendant states in his guilty plea can serve as evidence that he has not fully recognized and accepted personal responsibility for the crime.[227]

In *United States v. Harlan*,[228] the trial judge stated: "Moreover, the court should point out that the defendant's *nolo* plea (mistakenly referring to the defendant's *Alford* plea) is not, in the court's mind, an acknowledgment of guilt nor can it be taken as an acceptance of responsibility as argued by counsel."[229]

Under this approach, an accused is not losing the right nor opportunity to introduce other types of mitigation evidence such as cooperation with the authorities, assistance in recovering stolen property, etc. What the accused forfeits is the positive inference that a "traditional" guilty plea carries. An accused should not receive even the inference, based on his *Alford*-type guilty plea, that he has taken the "first step towards rehabilitation." Therefore, the above instruction should be omitted when an *Alford* plea is entered by the accused. The accused is, however, entitled to receive some mitigation for his *Alford* guilty plea.

By entering an *Alford* plea the accused saves the government time, effort, and expense. This is true even though the government may be forced to

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[223] 925 F.2d at 992 (1991).
[224] United States v. Harlan, 35 F.3d 176 (5th Cir. 1994); 925 F.2d at 20 (1st Cir. 1991).
[225] GUIDELINES, *supra* note 218, § 3E1.1, Commentary.
[226] GUIDELINES, *supra* note 218, § 3E1.1, application note 3.
[227] 905 F.2d 372 (1990).
[228] 35 F.3d 176 (1994).
[229] *Id*. at 180.

expend some effort above that normally associated with "traditional" guilty pleas. The amount of effort required by the government in any particular case depends on several factors. Among these are the complexities of the charges, the detail and scope of the stipulation of fact, and the difficulty and expense of obtaining additional evidence (if required). A closely related issue is the need, if any, for jury instructions to be given prior to the accused taking the stand during sentencing after he has entered an *Alford*-type guilty plea.

E. Jury Instructions

A modified instruction should be given concerning the entry by an accused of an *Alford*-type guilty plea. The present instruction reads as follows: "Time, effort and expense to the government (have been) (usually are) saved by a plea of guilty."[230] The following is a suggested instruction:

> The accused in this case has freely and voluntarily entered what is referred to as an *Alford*-type plea. This plea permits the accused to maintain his innocence while at the same time agreeing to plead guilty and thereby waive his right to a trial as to his guilt or innocence. The accused has determined it is in his best interests to enter such a plea. An *Alford*-type guilty plea is a matter of mitigation which must be considered along with all other facts and circumstances of the case. Although not admitting culpability, time, effort, and expense to the government (usually are) (have been) saved by the accused's plea of guilty.[231]

The use of the *Alford* plea does present one additional issue in this area: The type of mitigation credit, and therefore instruction, which should be given if the accused enters a "split" guilty plea, i.e., an *Alford*-type guilty plea as to some charges or specifications and a "traditional" guilty plea as to others.

Under these circumstances the accused deserves "full" mitigation credit. The military judge should therefore use the present language of the above instruction, including the phrase that the accused's plea "may be the first step towards rehabilitation." Although an accused facing many charges could misuse this inference by only admitting culpability to the least serious offense, accused servicemembers should receive the benefit of the doubt with respect to the instruction. Of course, the amount of mitigation offered by the court is discretionary.[232]

VII. LEGISLATIVE CHANGES REQUIRED IF *ALFORD*-TYPE PLEA ADOPTED

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[230] BENCHBOOK, *supra* note 217, pg. 101.

[231] This is a variation of the instruction presently found in the Benchbook concerning the mitigation of a guilty plea. *See id*.

[232] An accused who chooses to accept responsibility for only one or two of many offenses will arguably receive only minimal mitigation consideration.

Adoption of an *Alford*-type plea by the military would require a statutory change to Article 45, UCMJ, as well as amendments to R.C.M. 910. Article 45 presently requires a guilty plea to be rejected if the court becomes aware of any matter inconsistent with the plea.[233] A suggested amendment to Article 45 is found in the Appendix to this article.

Consistent with a change to Article 45, R.C.M. 910 and its comments would likewise require amendment.[234] Changes to R.C.M. 910 could be accomplished by Executive Order since Congress has delegated to the President the authority to prescribe regulations respecting pretrial and post-trial procedure. These regulations may not conflict with the Code but must, so far as practical, apply principles of law and rules of evidence generally recognized in criminal tribunals in federal district courts.[235] Suggested amendments to R.C.M. 910 and its comments are also found in the Appendix.

[233] MCM, *supra* note 5, R.C.M. 910(d) and (e).
[234] *See supra* note 7 and accompanying text.
[235] UCMJ art. 36(a) (1995).

VIII. CONCLUSION

The military should adopt the *Alford*-type guilty plea as its benefits far outweigh its disadvantages. Accuseds who enter *Alford* pleas really fall into two categories: (1) those who are guilty but refuse for personal or tactical reasons to admit guilt; and (2) those who are innocent but fear the possibility of being wrongly convicted and thereby facing the potential of receiving the maximum punishment available to the court.

We need not be concerned with the first group of accuseds. Conviction of a guilty person pursuant to an *Alford*-type plea is a proper result. The real focus should be on the possibility, or even likelihood, that innocent accuseds will find it advantageous to enter *Alford*-type pleas of guilt, thereby bringing upon themselves a "wrongful" conviction. Should we refuse to offer them, and by necessity all other accuseds, the option of an *Alford*-type plea? The author believes not.

The overwhelming majority of accuseds brought before courts-martial today are guilty even though their guilt may be to a lesser included offense encompassed within the charged offense(s). Therefore, the number of accused who are now entering "traditional" guilty pleas, then lying during the providency inquiry in order to protect themselves from potentially severe punishments, is extremely small.

This conclusion is based on the following: (1) trust and faith in the integrity of the military investigative community; (2) our ability as judge advocates to "screen out" cases when evidence is weak; and (3) perhaps, most importantly, the providence inquiry which an accused must undergo pursuant to *Care*. While not a widespread problem, adoption of the *Alford*-type plea should totally eliminate the need for an innocent person to lie to the court.[236] The chances of a truly innocent person being convicted would further be screened by the requirement that the government establish an adequate factual basis for the plea. The government must satisfy the military judge that the accused, contrary to his protestations of innocence, is in fact guilty.

In fairness to an accused, if, after consultation with his defense counsel, he knowingly and intelligently determines that his best interest is served by an *Alford*-type guilty plea, he should be free to choose this path. The system should not force him to lie under oath, nor to go to trial with no promise of the ultimate outcome concerning guilt or punishment. We must trust the accused to make such an important decision for himself. The military provides an accused facing court-martial with a qualified defense attorney. Together, they are in the best position to properly weigh the impact his decision, and the resulting conviction, will have upon himself and his family.

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[236] The conviction of an innocent person pursuant to any guilty plea should be rare because of the requirement that a factual basis for the plea be established prior to acceptance by court. Unfortunately, no system is perfect.

The concern over the public's perception of *Alford* pleas, while arguably valid, should not prevent the adoption of this type of plea for the military. Trial counsel should take full advantage of the opportunity afforded by our present military practice, as well as any additional methods of proof instituted as part of the adoption of the *Alford*-type plea, to thwart the accused's efforts to project a public image of innocence. To minimize the adverse effects of *Alford*-type pleas on the public's perception of the administration of justice within the military, trial counsel should establish as strong a factual basis as possible for every *Alford*-type guilty plea.[237]

[237] Comment to PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 137.

APPENDIX

The changes recommended to the Uniform Code of Military Justice, and the Manual for Courts-Martial, are set forth below. Changes are denoted by italics.

I. ARTICLE 45, UCMJ

(a) No change. If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) No change. A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

(c) *Notwithstanding the provisions of subparagraph (a), nothing in this Article prevents an accused from entering the type of plea authorized by the United States Supreme Court in North Carolina v. Alford, 400 U.S. 25 (1970), commonly known as an Alford plea.*

II. RULE 910. PLEAS

(a) Alternatives.

(1) In general. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or not guilty. *The accused may enter an Alford-type guilty plea to any of the above guilty plea options.* A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

Discussion

See paragraph 2, Part IV, concerning lesser included offenses. When the plea is to a named lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit. A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. See also subsection (g) of this rule. *Pleas pursuant to North Carolina v. Alford are now authorized in the military. See 400 U.S. 25 (1970).*

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. See R.C.M. 1001(b)(4).

(2) Conditional pleas (No change). With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) Refusal to plead; irregular plea (No change). If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

Discussion

An irregular plea includes pleas such as guilty [without criminality or][*] guilty to a charge but not guilty to all specifications thereunder. When a plea is ambiguous, the military judge should have it clarified before proceeding further. *An Alford-type plea is not considered an irregular plea*.

(c) Advice to accused (No change). Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) (No change). The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law.

[*] These words should be omitted.

Discussion

The elements of each offense to which the accused has pleaded guilty should be described to the accused. See also subsection (e) of this rule.

(2) (No change). In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings.

Discussion

In a general or special court-martial, if the accused is not represented by counsel, a plea of guilty should not be accepted.

(3) (No change). That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) (No change). That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and

(5) *Inquiry of Accused*.

(a) New subparagraph (Present paragraph 5). That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(b) New subparagraph. *If the accused has entered an Alford-type plea to one or more of the charges, the inquiry set forth in subparagraph (a) will not be conducted as to those charges.*

Discussion

The advice in subsection (5) is inapplicable in a court-martial in which the accused is not represented by counsel. *An accused who enters an Alford-type plea to one or more charges does not accept full and complete responsibility concerning the charge(s). Therefore, it is inappropriate for the military judge to question the accused concerning these offenses.*

(d) Ensuring that the plea is voluntary (No change). Ensuring that the plea is voluntary. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) Determining accuracy of plea.

(1) New subparagraph (Present paragraph e). Determining accuracy of plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(2) New subparagraph. If the accused has entered an Alford-type guilty plea to one or more of the charges, the inquiry set forth in subparagraph (e)(1) will not be conducted as to those charges. The Government shall have the burden of satisfying the military judge that there is a factual basis for the plea.

Discussion

(1) New subparagraph (Present Discussion). A plea of guilty must be in accord with the truth. Before the plea is accepted, the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused. If any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. If the statute of limitations would otherwise bar trial for the offense, the military judge should not accept a plea of guilty to it without an affirmative waiver by the accused. See R.C.M. 907(b)(2)(B).

The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt. For example, an accused may be unable to recall certain events in an offense, but may still be able to adequately describe the offense based on witness statements or similar sources which the accused believes to be true. The accused should remain at the counsel table during questioning by the military judge.

(2) New subparagraph. *An accused who enters an Alford-type plea to one or more charges is denying guilt as to those charges. Therefore, it is inappropriate for the military judge to question the accused concerning these offenses. The government may meet its burden of proving the factual basis by introducing the following: stipulations of fact, stipulations of expected*

testimony, witness testimony, documentary evidence, or physical evidence. These examples are not to be considered the only methods potentially available to the government to establish the factual basis of the plea.

(f) Plea agreement inquiry (No change).

(1) In general. A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) Notice. The parties shall inform the military judge if a plea agreement exists.

Discussion

The military judge should ask whether a plea agreement exists. See subsection (d) of this rule. Even if the military judge fails to so inquire or the accused answers incorrectly, counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge.

(3) Disclosure. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) Inquiry. The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

Discussion

If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused's understanding of any terms in the agreement, the military judge should explain those terms to the accused.

(g) Findings (No change). Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

Discussion

If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered. See R.C.M. 913(a), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

(h) Later action.

(1) Withdrawal by the accused (No change). Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea (No change). Statements by accused inconsistent with plea. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

Discussion

When the accused withdraws a previously accepted plea for guilty or a plea of guilty is set aside, counsel should be given a reasonable time to prepare to proceed. In a trial by military judge alone, recusal of the military judge or disapproval of the request for trial by military judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings; in trial with members, a mistrial will ordinarily be necessary.

(3) New subparagraph. *Alford-type guilty pleas. The requirements of subparagraph (h)(2) are not applicable to Alford-type pleas. However, if the military judge determines that the accused has entered an Alford-type plea to one or more charges or specifications through a lack of understanding of its meaning and effect, a plea of not guilty shall be entered as to the affected charge(s) and specification(s).*

(4) New subparagraph (Present subparagraph (3)). Pretrial agreement inquiry. After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

Discussion

See subsection (f)(3) of this rule. *An inquiry pursuant to R.C.M. 910(e)(1) is not conducted when an accused enters an Alford-type guilty plea. Therefore, the accused is not likely to make statements considered to be "inconsistent" with the Alford-type plea. It is still appropriate, however, for the military judge to ensure that the accused understands the meaning and effect of his Alford-type guilty plea.*

The Regulation of Lead-Based Paint in Air Force Housing

MAJOR THOMAS F. ZIMMERMAN*

I. INTRODUCTION

Childhood lead poisoning has been referred to as the "silent epidemic"[1] and characterized as "the most common environmental disease of young children . . . eclipsing all other environmental health hazards found in the residential environment."[2] Approximately 8.9 percent of all children in America under the age of six have blood lead levels in excess of toxic levels (10 μg/dL).[3] Lead in the bloodstream at low levels has been associated with decreased intelligence, impaired neurobehavioral development, decreased growth, decreased hearing acuity, and reduced weight at birth.[4] Part II of this article discusses lead poisoning in-depth. The most common cause of elevated blood lead levels in children is lead-based paint.[5] As with many other environmental hazards, lead-based paint falls within the regulatory scope of a number of environmental statutes, including the Lead-Based Paint Poisoning Prevention Act,[6] the Residential Lead-Based Paint Hazard Reduction Act of 1992,[7] the Resource Conservation and Recovery Act (RCRA),[8] the Comprehensive Environmental Response, Compensation, and Liability Act

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[1] Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J., 46, 46 (1990).

[2] 61 Fed. Reg. 29170, 29170 (1996) (citing Centers for Disease Control, *Strategic Plan for the Elimination of Lead Poisoning* (1991) and Agency for Toxic Substances and Disease Registry, *The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress* (1988)).

[3] For an explanation of exactly how lead levels are measured and the prevalence of unacceptable levels, *see* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, GUIDELINES FOR THE EVALUATION AND CONTROL OF LEAD-BASED PAINT HAZARDS IN HOUSING (1995) [hereinafter HUD GUIDELINES].

[4] Herbert L. Needleman, *Low Level Lead Exposure: A Continuing Problem*, 19:3 PEDIATRIC ANNUALS 208, 209-10 (Mar. 1990) [hereinafter *Low Level Exposure*].

[5] CENTERS FOR DISEASE CONTROL, PREVENTING LEAD POISONING IN YOUNG CHILDREN, A STATEMENT BY THE CENTERS FOR DISEASE CONTROL 18 (1991) [hereinafter PREVENTING LEAD POISONING].

[6] 42 U.S.C. §§ 4821-46 (1994).

[7] Pub. L. No. 102-550 §§ 1001-1061, 106 Stat. 3672, 3897-3927 (1992).

[8] 42 U.S.C. §§ 6901-6992k (1994).

(CERCLA),[9] and state environmental statutes. This article analyzes the regulation of lead-based paint in Air Force housing.

The current Air Force lead-based paint program[10] was initiated in 1993 and requires installations to identify, evaluate, control and eliminate lead-based paint hazards. These requirements presently exceed all federal statutory and regulatory requirements. Part III of this article identifies federal lead-based paint requirements which are applicable to Air Force housing. In addition, Part III recommends that the implementation of the current Air Force lead-based paint program be modified in the forthcoming Air Force Instruction and Air Force Manual. In essence, the Air Force Instruction and Air Force Manual should clearly distinguish between lead-based paint requirements (imposed by federal law or Air Force policy) and information which is merely provided for guidance. After clarifying the distinction between requirements and guidance, the Instruction and Manual should allow each installation the discretion to determine how to best identify, evaluate, control and eliminate lead-based paint hazards in Air Force housing. Part IV looks at the relationship between lead-based paint activities and RCRA. Part V discusses the applicability of CERCLA to residential lead-based paint hazards and concludes that CERCLA is broad enough to encompass such hazards. However, the Environmental Protection Agency's (EPA) failure to apply CERCLA to private residential lead-based paint hazards precludes the statute's application to federal lead-based paint hazards. Finally, Part VI examines the lead-based paint waiver of sovereign immunity, the tort implications of the waiver, as well as the lead-based paint programs of Massachusetts, Illinois and California.

II. LEAD POISONING

A. Physiological Effect

"Lead is a poison that affects virtually every system in the body."[11] Lead primarily affects the body by binding to numerous enzymes and preventing them from functioning properly.[12] Lead also affects the translation of DNA codes in certain protein structures.[13] Symptoms of lead poisoning in adults may include lethargy, nausea and vomiting, abdominal colic, and peripheral neuropathy.[14] While lead poisoning may affect all ages, young and unborn children are the most susceptible portion of the population because lead

[9] 42 U.S.C. §§ 9601-9675 (1994).
[10] Letter from Air Force Chief of Staff, Air Force Policy and Guidance on Lead-Based Paint in Facilities (May 24, 1993) [hereinafter A.F. Lead Paint Policy].
[11] PREVENTING LEAD POISONING, *supra* note 5, at 7.
[12] *Low Level Exposure*, *supra* note 4, at 209-10.
[13] *Id*. at 210.
[14] Anil Minocha, *NUTRITION: Lowering the Risks of Lead Toxicity*, 3 FOR KIDS' SAKE 2, 2 (Summer 1985).

has a particularly harmful effect on a child's developing brain and nervous system.[15] In children, high blood lead levels (greater than 80 μg/dL) may cause convulsions, comas, or even death.[16] At levels as low as 10 μg/dL, lead poisoning has been associated with decreased intelligence, impaired neurobehavioral development, decreased growth, decreased hearing acuity, and reduced weight at birth.[17] Although blood lead levels may be reduced through treatment, the neurological damage is permanent.[18]

Lead plays no normal physiological role in the human body.[19] Therefore, the optimum blood lead level is zero.[20] However, in an industrial society, exposure to lead is inevitable. Faced with this reality, the medical profession has continually tried to determine an acceptable blood lead level. "Until 1943, it was widely believed that if a child did not die of lead toxicity, there were no lasting [effects]."[21] However, in 1943, a study established that children who had recovered from lead poisoning had a higher incidence of learning disorders and behavior problems.[22] The study demonstrated that non-fatal blood lead levels may result in permanent adverse health effects. By the mid-1960s, physicians recognized a blood lead level of 60 μg/dL as sufficiently hazardous to require treatment.[23] In 1975, the Centers for Disease Control (CDC) recommended 30 μg/dL as the threshold for intervention.[24] The CDC subsequently reduced the intervention threshold level to 25 μg/dL in 1985 and then to 10 μg/dL in 1991.[25] Although no safe level of blood lead has been identified, harmful effects below 10 μg/dL have not been definitively established.[26]

B. Lead Poisoning and Lead-Based Paint

The toxic effects of lead have been known for centuries. "A report by Hippocrates in approximately 600 B.C. is believed to be the first clinical description of lead toxicity. The Romans were also aware of the toxic effects of lead on the human system. Pliny, Paulus Aegineta and Vitruvius all

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[15] PREVENTING LEAD POISONING, *supra* note 5, at 7.
[16] *Id*. at 9.
[17] *Low Level Exposure*, *supra* note 4, at 210.
[18] Lorne Garrettson, *SILENT MENACE: Lead as a Cause of Retardation and Learning Disabilities*, 3 FOR KIDS' SAKE 1, 1 (Summer 1985).
[19] HERBERT L. NEEDLEMAN, HUMAN LEAD EXPOSURE 36 (1992) [hereinafter HUMAN LEAD EXPOSURE].
[20] *Statement on Childhood Lead Poisoning*, 79 PEDIATRICS 457, 457 (1987).
[21] *Low Level Exposure*, *supra* note 4, at 208.
[22] *Id*.
[23] PREVENTING LEAD POISONING, *supra* note 5, at 7.
[24] *Id*. at 8.
[25] *Id*.
[26] *Id*. at 2.

comment on the clinical syndrome of lead poisoning."[27] Even Benjamin Franklin described the pernicious effects of lead in tinkers, typesetters and painters.[28] However, it was not until the turn of the century that childhood lead poisoning was first described and linked to lead-based paint.[29] In 1908, A.J. Turner, a pioneer in lead poisoning research, wrote that millions of houses are still "poison traps for children's fingers, and every year furnished its quota of ill-health and suffering, crippling and hopelessness."[30]

Even though the risks associated with lead-based paint were well documented early in the century, lead-based paint still remains the major source of lead poisoning in the United States.[31] In the United States, it is estimated that 3.8 million homes occupied by young children contain lead-based paint in poor or deteriorated condition.[32] Young children ingest lead-based paint primarily through normal hand-to-mouth activity.[33] Children may either ingest the lead-based paint chips directly or ingest dust or soil that has been contaminated by lead-based paint.[34] As such, the dangers associated with lead-based paint are not limited to the paint itself. Instead, lead-based paint hazards also include lead-contaminated dust and lead-contaminated soil.

C. Lead Poisoning in Air Force Housing

While, as noted earlier, it is estimated that 8.9 percent of American children under the age of six have blood lead levels greater than 10 μg/dL, the incidence of elevated blood lead levels for children residing in Air Force housing is drastically less. In fiscal years 93-95, the Air Force tested 30,560 children who lived on Air Force installations for elevated blood lead levels.[35] Of the children tested, 219 (0.7 percent) had elevated blood lead levels traceable to lead-based paint in housing. Of the 219 children with elevated blood lead levels, 197 children had blood lead levels from 10-19 μg/dL. Twenty-two children had blood lead levels from 20-44 μg/dL. No child had a blood lead level higher than 45 μg/dL. While lead-based paint is a significant hazard nationwide, this does not seem to be the case for the Air Force.

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[27] Sim S. Galazka, *Lead Poisoning in Children: A Multidimensional Hazard*, 36 PEDIATRIC BASICS (March 1984).
[28] *Low Level Exposure*, *supra* note 4, at 208.
[29] *Id*. In Australia, A.J. Turner and J.L. Gibson established that the cause of lead poisoning in children was white lead-based paint on the porches and railings of the children's homes. *Low Level Exposure*, *supra* note 4 at 209.
[30] HUMAN LEAD EXPOSURE, *supra* note 19, at 39.
[31] PREVENTING LEAD POISONING, *supra* note 5, at 17.
[32] *Id.* at 18.
[33] *Statement on Childhood Lead Poisoning*, 79 PEDIATRICS 457, 460 (1987).
[34] PREVENTING LEAD POISONING, *supra* note 5, at 18 (Soil and dust may also be contaminated by leaded gas emissions or industrial sources, *e.g*., smelters.).
[35] All Air Force statistics cited in this section were provided by HQ AFCESA/CESE, 139 Barnes Drive, Suite 1, Tyndall Air Force Base, Florida, 32403-5319.

III. LEAD-BASED PAINT LEGISLATION

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act to overhaul and "expand significantly the commitment of the federal government to reduce and eliminate lead-based paint hazards in older housing."[36] In response to the new statute, the Air Force developed an extensive, lead-based paint program to protect residents of Air Force installations from lead-based paint hazards.[37] The Air Force program has been remarkably successful, as noted earlier, with a 0.7 percent incidence rate in children as compared to the national average of 8.9 percent. The purpose of this section is to identify the legal requirements related to lead-based paint in military housing so that the Air Force can take advantage of the flexibility it has been afforded and make informed decisions about how to best manage its residential lead-based paint program.[38]

The Residential Lead-Based Paint Hazard Reduction Act made a number of sweeping changes to the nation's lead-based paint laws. However, the statute added only two new requirements applicable to Air Force housing: the disclosure rule,[39] and the requirement to use certified personnel for lead-based paint activities.[40] The requirements concerning the sale of federally owned housing[41] are not new as the 1973 amendments to the Lead-Based Paint Poisoning Prevention Act required "procedures to eliminate the hazards of lead based paint poisoning in all federally owed properties prior to the sale of such properties."[42]

A. Statutory Review

The first federal statute to address residential lead-based paint was the Lead-Based Paint Poisoning Prevention Act of 1971.[43] The Act has been amended numerous times. The most recent amendments were included in the

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[36] S. REP. NO. 332, 102d Cong.(1992).
[37] A.F. Lead Paint Policy, *supra* note 10.
[38] This is important as the Air Force is currently developing an Air Force Instruction and an Air Force Manual to clarify its lead-based paint policy. Letter from the Office of The Civil Engineer, Director of Environment, Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule (Aug. 19, 1996).
[39] Disclosure of Information Concerning Lead Upon Transfer of Residential Property, 42 U.S.C. § 4852d (1994).
[40] Lead-Based Paint Activities Training and Certification, 15 U.S.C. § 2682 (1994).
[41] Requirements for Housing Receiving Federal Assistance, 42 U.S.C. § 4822(a)(3) (1994).
[42] Lead-Based Paint Poisoning Act of 1971, Pub. L. No. 93-151 § 4(a)(1), 87 Stat. 566 (1973). The author does not consider the lead-based paint waiver of sovereign immunity a new requirement. Although the waiver of sovereign immunity, 15 U.S.C. § 2688 (1996), is a significant new provision in the statute and is discussed in Part VI, it does not add any new requirements because it merely subjects the Air Force to sanctions for failing to abide by applicable federal, state and local laws.
[43] Pub. L. No. 91-695 § 301, 84 Stat. 2078 (1971).

Residential Lead-Based Paint Hazard Reduction Act of 1992.[44] The Residential Lead-Based Paint Hazard Reduction Act of 1992 is commonly referred to as "Title X" because it is Title X of the Housing and Community Development Act of 1992. Title X consists of five subtitles:

> Subtitle A: The primary purpose of Subtitle A (§ 1011 to § 1018) is the reduction of residential lead-based paint hazards by establishing a grant program for state and local governments, by mandating various new lead-based paint requirements, and by creating a lead-based paint task force. Only § 1012, *Evaluation and Reduction of Lead-Based Paint Hazards in Federally Assisted Housing*, and §1013, *Disposition of Federally Owned Housing*, amend the Lead-Based Paint Poisoning Prevention Act of 1971.
>
> Subtitle B: Subtitle B consists of one section (§ 1021) and amends the Toxic Substances Control Act (TSCA).[45] Section 1021 primarily adds twelve sections to TSCA (§ 401 through § 412).[46] These sections are known as TSCA, subchapter IV, or as the Lead-Based Paint Exposure Reduction Act.[47]
>
> Subtitle C: Subtitle C (§ 1031 to § 1033) addresses worker safety and primarily amends the Occupational Safety and Health Act of 1970.[48] The requirements of Subtitle C are beyond the intended scope of this article.
>
> Subtitle D: Subtitle D (§1051 to §1053, §1056) requires continuing HUD research on lead-based paint hazards and also requires two reports from the General Accounting Office.
>
> Subtitle E: Subtitle E (§1061) requires HUD to submit an annual report to Congress concerning its lead-based paint program.

For the purposes of this article, the Lead-Based Paint Hazard Reduction Act of 1992 will be referred to as "Title X."

B. History of Lead-Based Paint Legislation

1. Lead-Based Paint Poisoning Prevention Act of 1971

Even though the scientific community was aware of the hazards of residential lead-based paint since the turn of the century,[49] Congress did not address the nation's residential lead-based paint problem until 1971. The Lead-Based Paint Poisoning Prevention Act was a very modest first step

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[44] Pub. L. No. 102-550, 106 Stat. 3672 (1992).
[45] Pub. L. No. 104-66 § 1061, 109 Stat.719, 728 (1995).
[46] 15 U.S.C. §§ 2681-92 (1994).
[47] Pub. L. No. 102-550 §1021(c), 106 Stat. 3672, 3924 (1992).
[48] Pub. L. No. 91-596 § 2, 84 Stat.1590 (1970).
[49] Australia had passed a law in the 1920s which restricted the use of lead-based paint in dwellings. *Low Level Exposure*, *supra* note 4, at 208.

toward reducing the hazards posed by residential lead-based paint. The most noteworthy portion of the statute prohibited the use of lead-based paint in residential structures constructed or rehabilitated by the federal government.[50] The Consumer Product Safety Commission's ban on the manufacture of lead-based paint for residential use did not take effect until February 27, 1978.[51] The Lead-Based Paint Poisoning Prevention Act also contained grant provisions for states to "detect and treat incidents of lead-based paint poisoning"[52] and "to develop and carry out programs to eliminate the hazards of lead-based paint poisoning."[53] In addition, the Secretary of Housing and Urban Development (HUD) was required to investigate the "nature and extent of the problem of lead-based paint in the United States."[54]

2. Amendments of 1973, 1976 and 1978

The 1973 Amendments[55] to the Lead-Based Paint Poisoning Prevention Act required, *inter alia*, the Secretary of HUD to "implement procedures to eliminate the hazards of lead-based paint poisoning in all federally owned properties prior to the sale of such properties when their use is intended for residential habitation."[56] In addition, the 1973 Amendments required the Secretary of HUD "to eliminate as far as practicable the hazards of lead based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary."[57] As such, Congress intended to eliminate (as far as practicable) lead-based paint hazards in housing covered by mortgage insurance and in housing receiving assistance payments, but did not intend to eliminate lead-based paint hazards in housing owned by federal agencies (unless it was to be sold). Congress' practice of imposing different lead-based paint requirements

[50] Pub. L. No. 91-695 § 401, 84 Stat. 2078, 2079 (1971) (Lead-based paint was defined as paint containing 1 percent lead by weight in the non-volatile content of the paint or in the dried film of the paint. Pub. L. No. 91-695, § 501(3), 84 Stat. 2078, 2080 (1971). The definition of lead-based paint is currently 0.5 percent lead by weight. 42 U.S.C. § 4851b(14) (1994); 15 U.S.C. § 2681(9) (1994)).
[51] 16 C.F.R. § 1303.4 (1996) (For the purpose of the ban on the manufacture of lead-based paint, CPSC defines lead-based paint as paint containing lead or lead compounds in excess of .06 percent of the total non-volatile content of the paint or the weight of the dry paint film. Thus, Title X's definition and CPSC's definition of lead-based paint are significantly different.).
[52] Pub. L. No. 91-695 § 101, 84 Stat. 2078, 2078 (1971).
[53] *Id.* § 201.
[54] *Id.* § 301.
[55] Pub. L. No. 93-151, 87 Stat. 565 (1973).
[56] *Id.*
[57] *Id.*

on federally owned housing and on federally assisted housing began in 1973 and continues to the present.[58]

The 1976[59] and 1978[60] Amendments to the Lead-Based Paint Poisoning Prevention Act mainly concerned grant programs and did not impact federally owned housing.

3. *The Amendments of 1988*

The Lead-Based Paint Poisoning Prevention Act was amended twice in 1988. The first amendment[61] is significant because it is a source of possible confusion regarding the requirements applicable to federally owned property. That amendment adds a new subsection (c) to 42 U.S.C. § 4822 entitled "Inspection Requirements" which states: "[t]he Secretary shall require the inspection of all intact and nonintact interior and exterior painted surfaces of *housing subject to this section* for lead-based paint using an approved x-ray fluorescence analyzer or comparable approved sampling or testing technique."[62] The amendment also required the results of the inspection be "provided to any potential purchaser or tenant of the housing."[63] The possible confusion arises because § 4822(c) applies to "housing subject to this section" and § 4822 establishes requirements for both federally assisted housing (*e.g.*, eliminate as far as practicable lead based paint hazards in federally assisted housing) and federally owned housing (*i.e.*, abate lead-based paint hazards in federally owned housing prior to sale).[64] Arguably, since both federally assisted and federally owned housing are subject to § 4822 requirements, both types of housing are subject to the inspection and disclosure requirements of § 4822(c). The House of Representatives Report[65] and the

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[58] In 1988, Congress directed HUD to provide tenants and purchasers of federally assisted housing with a brochure describing the hazards associated with lead-based paint. Tenants of federally owned housing were not required to receive the same brochure. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 566, 101 Stat. 1815, 1945 (1988). In 1992, under Title X, Congress required that lead-based paint risk assessments be performed on federally assisted housing. 42 U.S.C. § 4822(a) (1996). In addition, Congress required interim lead-based paint controls be implemented at federally assisted housing. *Id.* Interim controls are "a set of measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards." 42 U.S.C. § 4851b(13) (1996). Congress has not required risk assessments or interim controls for all federally owned housing.

[59] National Consumer Health Information and Health Promotion Act of 1976, Pub. L. No. 94-317 § 204, 90 Stat. 695, 705 (1976).

[60] Health Services and Centers Amendments of 1978, Pub. L. No. 95-626 § 316(b), 92 Stat. 3551, 3588 (1978).

[61] Housing and Community Development Act of 1987, Pub. L. No. 100-242 § 566, 101 Stat. 1815, 1945 (1988).

[62] 42 U.S.C. § 4822(c) (1994) (emphasis added).

[63] *Id.*

[64] *Id.* § 4822(a) (1994).

[65] H.R. REP. NO. 122, 100th Cong., 1st Sess. 92-3 (1987).

Conference Report[66] on the amendment do not clarify the "subject to this section" portion of the statute. However, the implementing regulation interprets § 4822(c) as only referring to HUD associated housing.[67] As a result, housing owned by other federal agencies is not affected by § 4822(c)'s inspection and reporting requirements.

Title X did not appreciably change § 4822(c). The only changes that were made were substituting the word "certified" for "qualified" and inserting the phrase "or 0.5 percent by weight."[68] As a result, the inspection and reporting requirements of 42 U.S.C. § 4822(c) are essentially unchanged since 1988 and not applicable to Air Force owned housing.

The second 1988 amendment[69] to the Lead-Based Paint Poisoning Prevention Act mainly clarifies the first 1988 amendment.[70] However, the clarifications concern a provision which explicitly refers only to public housing and does not affect Air Force owned housing. However, the second amendment also adds subsection (g) to 42 U.S.C. § 4822 which states that "[t]his section may not be construed to affect the responsibilities of the Environmental Protection Agency with respect to the protection of the public health from hazards posed by lead-based paint."[71] The purpose of the provision was to clarify that "[s]ection 302 of the Lead-Based Paint Poisoning Prevention Act may not be construed to affect the responsibilities of the Environmental Protection Agency with respect to [lead-based paint hazards]."[72] 42 U.S.C. § 4822(g) is an important provision relating to the issue of whether the EPA can regulate residential lead-based paint under CERCLA. This issue is discussed in Part V of this article.

C. Applicable Requirements of Title X

1. Disclosure Rule

Section 1018 of Title X requires HUD and EPA to jointly "promulgate regulations under this section for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease."[73] The final regulations were promulgated on March 6, 1996,[74] and require sellers and lessors to:

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[66] H.R. CONF. REP. NO. 426, 100th Cong., 1st Sess. 243-4 (1987).
[67] 53 Fed. Reg. 20790, 20798 (1988).
[68] The two changes to 42 U.S.C. § 4822(c) made by Title X are found in Pub. L. No. 102-550, § 1012, 106 Stat. 3672, 3905 (1992).
[69] Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. No. 100-628 § 1088, 102 Stat. 3224, 3280 (1988).
[70] H.R. CONF. REP. NO. 1089, 100th Cong., 2d Sess. 108 (1988).
[71] Stewart B. McKinney Homeless Assistance Amendments Act of 1988 § 1088(h).
[72] H.R. CONF. REP. NO. 1089, 100th Cong., 2d Sess. 110 (1988).
[73] 42 U.S.C. § 4851d (1994). Target housing means "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6

(a) Provide purchasers and lessees with an EPA-approved lead hazard information pamphlet;
(b) Disclose to purchasers and lessees (and their agents) known lead-based paint and lead-based paint hazards. In addition, any available information concerning known lead-based paint or lead-based paint hazards (*e.g.*, basis for determinations, location of lead-based paint, the condition of the painted surface) must be disclosed;
(c) Provide purchasers and lessees all available records or reports pertaining to lead-based paint or lead-based paint hazards;
(d) Provide purchasers with an opportunity to conduct a risk assessment or an inspection for the presence of lead-based paint; and,
(e) Provide purchasers and lessees with a lead warning statement.[75]

The disclosure rule applies anytime the Air Force sells or leases target housing.[76] A seller is defined as any entity, including government agencies, that transfers legal title to target housing.[77] The Air Force is most likely to sell housing in the context of base realignment and closure. A lessor is defined as any entity, including government agencies, which leases, rents or subleases target housing.[78]

Although assigning military family housing to an Air Force member is not commonly thought of as a "lease," it has all the trappings of a lease. When an Air Force member accepts housing, he or she is entering into a binding agreement with the Air Force which is governed by an established set of terms, including the forfeiture of the member's housing allowance. The agreement to provide military family housing is currently treated by the Air Force as a lease for the purposes of Title X.[79]

One significant aspect of the disclosure rule is that it does not require the evaluation, inspection, or abatement of lead-based paint.[80] The Air Force is only required to provide known information concerning lead-based paint and lead-based paint hazards. Although this may be a daunting and onerous task for large housing areas, it is purely an administrative task and does not require any on-site investigation.

Another aspect of the disclosure rule is that it requires disclosure of both lead-based paint and lead-based paint hazards. In other words, if the Air Force were to abate by permanent containment or encapsulation every lead-

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years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling." 42 U.S.C. § 4851b (27) (1994).
[74] 61 Fed. Reg. 9064 (1996).
[75] 24 C.F.R. §§ 35.88, 35.90, 35.92 (1996); 40 C.F.R. §§ 745.107, 745.110, 745.113 (1996).
[76] 42 U.S.C. § 4851d (1994).
[77] 24 C.F.R. §35.86 (1996); 40 C.F.R. §745.103 (1996).
[78] *Id.*
[79] Letter from the Office of The Civil Engineer, Director of Environment, Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule (Aug. 19, 1996).
[80] 24 C.F.R. § 35.88(a) (1996); 40 C.F.R. § 745.107(a) (1996). Both sections state: "[n]othing in this section implies a positive obligation on the seller or lessor to conduct any evaluation or reduction activities."

based paint hazard in Air Force housing, the housing would still be subject to the disclosure rule because lead-based paint is still present in the home. The only way to avoid the disclosure rule when leasing target housing is to have the property declared lead-free by a certified inspector.[81] This exemption makes sense because lead-based paint, even if not a current hazard, could become a hazard through deterioration or through renovation activities and, therefore, it would be prudent to warn tenants. However, the rationale offered by HUD and EPA is inadequate. HUD and EPA "believe that the exemption will provide a valuable incentive to building owners to conduct inspections and remove lead-based paint where present."[82] In essence, HUD and EPA are hoping that the disclosure rule is so burdensome that it will force lessors to remove lead-based paint regardless of whether it presents a health hazard. [83]

Unlike lessors, sellers may not escape the disclosure rule by being declared lead-free by a certified inspector.[84]

2. Lead-based Paint Activities - Training and Certification

Toxic Control Substance Act (TSCA) § 402, added by § 1021 of Title X, requires EPA to "promulgate regulations governing lead-based paint activities to ensure that individuals engaged in such activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified."[85] The regulations implementing TSCA § 402

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[81] 24 C.F.R. § 5.82(b) (1996); 40 C.F.R. § 745.101(b) (1996).

[82] 61 Fed. Reg. 9064, 9067 (1996).

[83] This rationale is contrary to the focus of Title X which emphasizes efficiency and cost-effectiveness when reducing the hazards associated with lead-based paint. S. REP. NO. 332, 102d Cong., 2d Sess. 111 (1992). The choice is to comply with burdensome regulations or abate lead-based paint which does not pose a health hazard (*i.e.* eliminate a non-existent health risk).

[84] 61 Fed. Reg. 9064, 9067 (1996). This restriction makes little sense. The rationale offered by HUD and EPA for not allowing sellers the opportunity to avoid the disclosure rule is that a purchaser might be denied the opportunity to conduct a lead-based paint risk assessment or inspection, a statutory right established by Title X. This rationale is weak at best. A better approach would be to only require the seller to allow purchasers the opportunity to conduct a risk assessment or inspection if the housing is declared lead-free by a certified inspector. It is senseless to impose a laundry list of requirements to protect one statutory inspection right. This is especially true if the laundry list of requirements being imposed pertains to lead-based paint and the house has been declared lead-free.

[85] 15 U.S.C. § 2682(a) (1994). To become a certified lead-based paint abatement worker, a person must complete an accredited training program. 61 Fed. Reg. 45778, 45820 (1996) (to be codified at 40 C.F.R. § 745.226(c)).. An accredited training program for abatement workers "shall last a minimum of 16 training hours, with a minimum of 8 hours devoted to hands-on training activities." *Id*. at 45816 (to be codified at 40 C.F.R. § 745.225(c)(6)(v)). The curriculum for the training program shall include information regarding: the role and responsibilities of the abatement worker; the adverse health affects of lead; federal, state and local lead-based paint regulations; lead-based paint recognition and control; and, methods to

will be codified at 40 C.F.R. Subpart L[86] and require, *inter alia*, all lead-based paint activities (*i.e.*, inspection, risk assessment and abatement) in target housing and child-occupied facilities be conducted by certified individuals or firms, with a limited exception for individuals performing work on their own dwellings.[87]

The lead-based paint waiver of sovereign immunity codified in TSCA § 408[88] and discussed in Part V, subjects federal agencies to federal requirements regarding lead-based paint activities. As such, Air Force personnel and contractors must be trained and certified under the provisions of 40 C.F.R. Subpart L if they engage in "lead-based paint activities." However, the phrase "lead-based paint activities" is somewhat limited in scope and only includes lead-based paint inspections,[89] risk assessments[90] and abatement activities.[91] 40 C.F.R. Subpart L is "not intended to regulate all activities that involve or disturb lead-based paint . . . [and] would not regulate a renovation contractor that incidentally disturbs lead-based paint or an individual who samples paint on a kitchen cabinet to determine if the paint contains lead."[92] The regulation primarily limits the applicability of the training and certification requirements by restricting the definition of abatement. The definition of abatement specifically excludes "renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling, even though these activities may incidentally result in a reduction or elimination of lead-based paint hazards."[93] In addition, "interim controls, operations and maintenance activities, or other measures and activities designed to temporarily, but not permanently, reduce lead-based paint hazards"[94] are not included in the definition of abatement. As such, the

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abate and reduce lead-based paint hazards. *Id*. at 45817 (to be codified at 40 C.F.R. § 745.225(d)(5)).

[86] 61 Fed. Reg. 45778, 45813-45825 (1996) (to be codified at 40 C.F.R. §§ 745.220-745.239).

[87] 61 Fed. Reg. 45778, 45813-5 (1996) (to be codified at 40 C.F.R. § 745.220 & § 745.223). Persons performing lead-based paint activities in their own home need not be trained or certified. Also, individuals performing lead-based paint activities in a home where a child has been identified with elevated blood lead levels need not be trained or certified.

[88] 15 U.S.C. § 2688 (1994).

[89] Inspection is defined as "a surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation." 61 Fed. Reg. 45778, 45815 (1996) (to be codified at 40 C.F.R. § 745.223).

[90] Risk assessment is defined as: "(1) an on-site investigation to determine the existence, nature, severity, and location of lead-based paint hazards, and (2) the provision of a report by the individual or the firm conducting the risk assessment, explaining the results of the investigation and options for reducing lead-based paint hazards." 61 Fed. Reg. 45778, 45815 (1996) (to be codified at 40 C.F.R. § 745.223).

[91] 61 Fed. Reg. 45778, 45813-4 (1996) (to be codified at 40 C.F.R. § 745.223).

[92] *Id.*

[93] *Id.*

[94] *Id.*

lead-based paint training and certification requirements do not affect normal day-to-day repair and maintenance activities in Air Force housing. The Air Force should not require contractors or personnel to be certified before performing actions involving lead-based paint unless those actions are included within the narrow definitions of inspection, risk assessment or abatement.[95]

Although the EPA is responsible for the lead-based paint training and certification program, TSCA § 404 allows states to administer and enforce the requirements of the program.[96] The regulations authorizing state-run training and certification programs will be codified at 40 C.F.R. Subpart Q.[97] Because state programs may be more stringent than the federal program,[98] Air Force installations must be cognizant of local requirements prior to proceeding with any work that may disturb lead-based paint.

As with the disclosure rule, nothing in the lead-based paint training and certification program "requires that the owner or occupant undertake any particular lead-based paint activity."[99]

3. Disposition of Federally Owned Housing

Section 1013 (which applies only to federally owned housing that is being sold) is the only provision in Title X that requires the Air Force to inspect or abate the lead-based paint hazards in housing.[100] However, even these requirements are not absolute because "[i]n the absence of appropriations sufficient to cover the costs [of § 1013], these requirements shall not apply to the affected agency or agencies."[101]

Section 1013 requires the inspection and abatement of lead-based paint hazards in federally owned target housing if the housing was constructed prior to 1960 and the housing is being disposed of by the federal agency.[102] The proposed regulation implementing § 1013 explains that the term "disposal" means "sale."[103] Federally owned housing constructed from 1960 to 1978 need only be inspected for lead-based paint and lead-based paint hazards. The results of the inspection must be made available to prospective purchasers.[104] Thus, under federal law, the Air Force is only required to abate lead-based

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[95] As a cautionary note, the Air Force must be careful that performance of the contract will not require a certified lead-based paint contractor. If a non-certified contractor subsequently discovers that a lead-based paint certification is required to perform the contract, the Air Force may incur substantial cost to modify or terminate the contract.
[96] 15 U.S.C. § 2684(a) (1994).
[97] 61 Fed. Reg. 45778, 45825-30 (1996) (to be codified at 40 C.F.R. §§ 745.320-745.339).
[98] 15 U.S.C. § 2684(e) (1994).
[99] 61 Fed. Reg. 45778, 45813 (1996) (to be codified at 40 C.F.R. § 745.220).
[100] 15 U.S.C. § 4822(a)(3) (1994).
[101] *Id.*§ 4822(a)(3)(C).
[102] *Id.* § 4822(a)(3)(A).
[103] 61 Fed. Reg. 29170, 29179 & 29209 (1996).
[104] 42 U.S.C. § 4822(a)(3)(B) (1994).

paint hazards if it is selling housing constructed prior to 1960. The Air Force is only required to inspect for lead-based paint if it is selling housing constructed prior to 1978.

These requirements are not altogether new. The 1973 Amendments to the Lead-Based Paint Poisoning Prevention Act required the Secretary of HUD to "establish and implement procedures to eliminate the hazards of lead based paint poisoning in all federally owned property prior to the sale of such properties when their use is intended for residential habitation."[105] Section 1013 was intended "to clarify the responsibility of federal agencies with regard to lead-based paint hazards in housing sold or transferred to private owners."[106] In fact, Title X decreases the requirements imposed on federal agencies when selling housing. Under Title X, federal agencies are only required to abate lead-base paint hazards in housing constructed prior to 1960. Under the 1973 Amendments, federal agencies were required to abate such hazards in all residential housing constructed prior to 1978.[107] Another difference between Title X and the 1973 Amendments is that Title X applies to "target housing" and the 1973 Amendments applied to "properties intended for residential habitation". The scope of the 1973 Amendments was broader than Title X because the 1973 Amendments not only applied to housing, but also applied to non-dwelling facilities commonly used by children under seven years of age, such as a child care centers.[108] Although the main purpose of § 1013 was to clarify federal responsibilities with regard to lead-based paint hazards in housing, it also reduced those responsibilities.

In implementing the abatement provisions of § 1013, the Air Force commonly tries to transfer the abatement requirement to the purchaser as a condition of sale.[109] Title X is silent as to which party should conduct abatement activities. The statute merely states that the implementing regulations "shall require the inspection and abatement of lead-based paint hazards in all federally owned target housing constructed prior to 1960."[110] The legislative history is also silent as to which party should conduct abatement activities.[111] However, the proposed implementing regulation requires the federal agency to "conduct abatement of all identified lead-based

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[105] Pub. L. No. 93-151, 87 Stat. 566 (1973).
[106] S. REP. NO. 332, 102d Cong., 2d Sess. 195 (1992).
[107] 24 C.F.R. § 35.56(a) (1991).
[108] 24 C.F.R. § 35.3 (1991).
[109] Interview with Major John W. Coho, Environmental Program Manager, Installations and Logistics, Headquarters United States Air Force (May 15, 1997).
[110] 15 U.S.C. § 4822(a)(3)(A) (1994).
[111] S. REP. NO. 332, 102d Cong., 2d Sess. 118-9 (1992). However, the legislative history is clear that the abatement must be performed. "While the Committee is aware that agencies including HUD have been known to require purchasers to waive their rights under this provision, the Committee views waivers and other tactics to avoid enforcement of the provision as contrary to the intent of the LPPPA as written." *Id*. at 118.

paint hazards."[112] However, this proposed regulation lists one exception: "In the case of a sale to a [non-occupant purchaser],[113] abatement may be made a condition of sale with sufficient funds escrowed."[114] Provided the proposed rule is not drastically changed when it is promulgated as a final rule, the Air Force should be able to transfer the § 1013 abatement requirement to the purchaser so long as the escrow requirement is fulfilled and the Air Force is not selling directly to the ultimate occupant of the home.

4. Lead-based Paint Guidance from the House Appropriations Committee

In 1991, the House of Representatives' Committee on Appropriations became concerned that lead-based paint in military housing posed a health threat to children.[115] The Appropriations Committee directed the Department of Defense (DOD) to screen children of military personnel for elevated blood lead levels and to form a task force on lead-based paint hazards in military housing.[116] The task force was to "develop a comprehensive plan for identifying lead-based hazards in military housing, designate a representative to participate in the Federal interagency task force, and coordinate DOD funding of $1,000,000 to help support the government-wide interagency effort to develop safe, effective, and economical cleanup methods."[117] The Appropriations Committee did not direct DOD to inspect or abate lead-based paint in military housing, but rather directed DOD to study the potential hazard via a task force. It is interesting to note that two years later, the Committee on Appropriations criticized DOD for not coordinating with EPA and HUD and for hiring consultants to "reinvent the same wheel."[118] The Appropriations Committee subsequently directed "DOD to follow EPA regulations and HUD guidelines related to lead-based paint in housing."[119]

Although the Appropriations Committee's recommendations do not have the effect of law, the recommendations are given great deference by DOD. The *Air Force Policy and Guidance on Lead-Based Paint in Facilities* lists the Report from the Committee on Appropriations as its first reference (ahead of binding laws and regulations) and acknowledges that "Congress directed the . . . DOD to take a more active role in ensuring military dependent

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[112] 61 Fed. Reg. 29170, 29209 (1996).
[113] In the original text, the phrase was "non-owner occupant purchaser." However, this makes no sense as a "purchaser" cannot be a "non-owner." The phrase should read "non-occupant purchaser" to be consistent with language used earlier in the proposed rule. 61 Fed. Reg. 29170, 29179 (1996).
[114] 61 Fed. Reg. 29170, 29209 (1996).
[115] H.R. REP. NO. 95, 102d Cong., 1st Sess. 86 (1991).
[116] *Id*.
[117] *Id*.
[118] H.R. REP. NO. 129, 103d Cong., 1st Sess. 288 (1993).
[119] *Id*.

children are not affected by [lead-based paint] health hazards."[120] Even though the Appropriations Committee's directions do not establish any legally binding requirements, they merit mentioning because they appear to have had a significant influence on the Air Force's lead-based paint policy.

D. HUD Guidelines for Lead-Based Paint Activities

Section 1017 of Title X requires HUD, after consultation with EPA, the Department of Labor, and the Centers for Disease Control, to issue guidelines for the conduct of federally supported work involving lead-based paint hazards.[121] Federally supported work includes "any lead hazard evaluation or reduction activities conducted in federally owned or assisted housing."[122] As such, the HUD guidelines,[123] which were issued in June, 1995, are applicable to lead-based paint activities conducted in Air Force housing. However, the guidelines do not impose any mandatory requirements on federal agencies. The guidelines "are not enforceable by law unless a Federal, State, or local statute or regulation requires adherence to [them]."[124] Title X and the proposed implementing regulations do not require federal agencies to comply with the HUD guidelines when conducting lead-based paint activities in federally owned housing.[125] As such, the HUD guidelines merely provide more complete guidance "on *how* activities related to lead-based paint should be carried out and *why* certain measures are recommended."[126]

Although the HUD guidelines are not mandatory, they should not be ignored. The forthcoming Air Force Instruction and Air Force Manual should use the guidelines as a baseline because they "are based on the most current scientific research"[127] and provide detailed, technical information for identifying and controlling lead-based paint hazards. However, the Air Force Instruction and Manual should allow installations the flexibility to deviate from the guidelines if such deviations are consistent with sound engineering principles and practice.

E. The Air Force Lead-Based Paint Program

Although federal requirements for the Air Force's lead-based paint program are limited to the disclosure rule, the use of trained and certified personnel for lead-based paint activities, and various requirements associated

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[120] A.F. Lead Paint Policy, *supra* note 10, Attach. 1, ¶ 4.
[121] 42 U.S.C. § 4852(c) (1994).
[122] 42 U.S.C. § 4851b(9) (1994).
[123] HUD GUIDELINES, *supra* note 3.
[124] *Id*. at xix.
[125] 61 Fed. Reg. 29170, 29209 (1996).
[126] HUD GUIDELINES, *supra* note 3, at xix.
[127] *Id* at preface.

with the sale of Air Force housing, the Air Force lead-based paint program is much more comprehensive. Air Force policy requires that each installation develop a lead-based paint management plan that identifies, evaluates, controls and eliminates lead-based paint hazards.[128] Lead-based paint hazards are typically identified through lead-based paint inspections, routine facility inspections, fire and safety inspections, and occupant reports.[129] The condition of the paint and the age of housing occupants are used to evaluated the health risk posed by the lead-based paint.[130] Based on the degree of risk presented, an appropriate response is taken, such as "closing off the area, occupant relocation, in-place management, abatement and/or cleanup."[131] In-place management is emphasized to control lead-based paint hazards.[132] Installations are to "[c]onsider abatement of lead-based paint as part of the normal facility renovation and upgrade program when it is cost effective."[133] The Air Force approach to lead-based paint hazards also includes testing of children for elevated blood lead levels,[134] guidance on the disclosure rule[135] and guidance on closing facilities.[136]

While the Air Force policy of identifying, evaluating, controlling and eliminating lead-based paint hazards has proven to be effective, this policy could be improved in the forthcoming Air Force Instruction and Air Force Manual by clearly distinguishing between applicable requirements and information provided for guidance. The Air Force lead-based paint policy lists 13 references but fails to indicate which portions of those references are legally applicable to Air Force housing.[137] For example, the policy lists Title X as a reference but fails to indicate that a vast majority of Title X's provisions are not applicable to the Air Force. This lack of clarity leads to confusion and is a disservice to those trying to comply with federal and Air Force requirements. A better approach would be to specifically list applicable provisions and

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[128] A.F. Lead Paint Policy, *supra* note 10, Attach. 1, ¶ 6.a.

[129] *Id.* Attach. 2, ¶ 7.

[130] *Id*. Attach. 2, ¶ 8.c.

[131] *Id*.

[132] *Id.* Attach. 2, ¶ 6.e. In-place management is defined as "[i]nterim measures which reduce an LBP hazard to acceptable levels. They include monitoring the condition of painted surfaces and reducing dust by high-phosphate detergent washing or top coating by painting or wall coverings, repairing deteriorating by painting, and performing cleanup activities." *Id.*

[133] *Id*. Attach. 2, ¶ 6.f. Abatement is defined as "[l]ong-term or permanent measures which eliminate the possibility of hazardous exposure by replacement of building components (doors, cabinets, molding, etc.), encapsulation with drywall or siding, and removal." *Id.*

[134] Letter from Air Force Medical Operations Agency, Child Blood Lead Screening Program (Apr. 2, 1993).

[135] Letter from the Office of The Civil Engineer, Director of Environment, Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule (Aug. 19, 1996).

[136] Letter from Principal Assistant Deputy Under Secretary of Defense (Environmental Security), Asbestos, Lead Paint and Radon Policies at BRAC Properties (Oct. 31, 1994).

[137] A.F. Lead Paint Policy, *supra* note 10, Attach. 1, ¶ 1.

clearly indicate whether those provisions are requirements or merely guidance. For example, the Air Force should specifically state whether it wants installations to abide by HUD's *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*. If the Air Force wants all installations to follow the HUD guidelines, the Air Force Instruction or Air Force Manual should so state. If the Air Force wants base-level engineers to have flexibility in addressing lead-based paint hazards, the Air Force Instruction or the Air Force Manual should make that clear as well. Not clarifying issues (such as the applicability of HUD guidelines) sows seeds for future confusion.

When developing the new Air Force Instruction and Air Force Manual, the Air Force should take advantage of the flexibility that it has been afforded under federal law. Congress has chosen not to impose many restrictions on Air Force housing regarding the management of lead-based paint hazards. This flexibility should be passed on to Air Force installations. The forthcoming Air Force Instruction and Air Force Manual should clearly state the policy of identifying, evaluating, controlling and eliminating lead-based paint in Air Force housing. These publications should allow installations the flexibility to develop prudent, cost-effective methods of implementing that policy.

IV. RCRA AND THE REGULATION OF LEAD-BASED PAINT

A. Waste from Lead-Based Paint Abatement

Title X requires the Air Force to abate lead-based paint hazards in housing constructed prior to 1960 that is being sold.[138] In addition, the Air Force may abate lead-based paint hazards in base housing due to public health concerns, a waiver of sovereign immunity, or the threat of tort liability.[139] Depending on the process selected, the abatement of lead-base paint hazards may generate a variety of wastes, including lead-based paint residues (paint chips and dust), paint-covered debris (woodwork, plaster, bulky components, etc.), and soil contaminated by lead-based paint (sludge from stripping paint, wash water, rags, High Efficiency Particle Air (HEPA) vacuum filters, respirator filters, and plastic sheeting to cover floors).[140] Each of these types

[138] 42 U.S.C. § 4822(a)(3) (1994). Abatement is defined as the removal, containment or encapsulation of lead-based paint and the removal or covering of lead contaminated soil. 42 U.S.C. § 4851b(1) (1994).

[139] *See, e.g.*, Pierre v. United States, 741 F.Supp. 306 (D. Mass. 1990) (holding HUD liable for negligently repainting house which contained lead-based paint that was sold to plaintiff); Brooks v. United States, 712 F.Supp. 667 (N.D. Ill. 1989) (explaining although judgment entered in favor of United States, court acknowledged that United States could be liable under the Federal Tort Claims Act for injuries caused by lead-based paint).

[140] Suzette Brooks, *Legal Considerations of Disposal of Lead-Contaminated Construction Debris*, N.Y.L.J., Jul. 19, 1993, at 1.

of wastes must be properly handled in accordance with the provisions of the Resource Conservation and Recovery Act (RCRA).[141]

Congress enacted RCRA to provide a comprehensive program to manage the nation's solid and hazardous wastes. Solid wastes are subject to the requirements of RCRA Subtitle D.[142] Hazardous wastes are managed from "cradle to grave" pursuant to RCRA Subtitle C.[143] Under RCRA Subtitle C, those who generate, transport, treat, store or dispose of hazardous waste, are stringently regulated. If lead-based paint abatement wastes are merely solid waste, regulatory oversight is limited. However, if these wastes are considered hazardous, the panoply of RCRA Subtitle C regulations will drastically increase the complexity and the cost of lead-based paint abatement.

Although the focus of RCRA is primarily prospective, various provisions regulate the remediation of past releases of hazardous wastes and hazardous constituents. These provisions encompass the RCRA corrective action program.[144] Although the RCRA corrective action program principally uses permit conditions for the remediation of past releases, EPA does have the authority to respond to past releases from solid wastes that pose an imminent and substantial threat to human health or the environment. Because of RCRA's corrective action provisions, Air Force installations may be required to remediate past releases of lead-based paint wastes if such releases have not been properly controlled.

1. Solid Waste

To be regulated under RCRA, lead-based paint wastes must fall within the statutory definition of "solid waste."[145] Under RCRA, solid waste is defined as "any garbage, refuse . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities."[146] RCRA's definition of solid waste is extremely broad[147] and would encompass the wastes generated by lead-based paint

[141] 42 U.S.C. §§ 6901-6992k (1994). Lead-based paint wastes must also be handled in accordance with state law. State hazardous waste programs vary from state to state because states may administer and enforce their own hazardous waste programs subject to EPA approval. *Id.* § 6926(a).
[142] *Id.* §§ 6941-49a.
[143] *Id.* §§ 6921-39e.
[144] OSWER Directive No. 9502.1995(02), Corrective Action Authorities (1995). The RCRA corrective action program includes 42 U.S.C. § 6924(u) (permitted treatment, storage and disposal (TSD) facilities), § 6924(v) (action beyond the boundary of the facility), § 6928(h) (interim status facilities), § 6925(c)(3) (omnibus permitting authority), and § 6973 (imminent and substantial endangerment).
[145] 42 U.S.C. § 6903(27) (1994).
[146] *Id.*
[147] "Solid Waste is a very broad term covering all solid and liquid forms, and some gaseous forms, of household trash, discarded industrial materials, sludge from mining operations, etc.

abatement. Although there are a few exclusions from the definition of solid waste (*e.g.*, domestic sewage, irrigation return flows, and special nuclear or by-product material),[148] none of the exclusions are likely applicable to lead-based paint wastes. As a result, the Air Force must ensure that the land disposal of lead-based paint wastes at a minimum complies with the provisions of RCRA Subtitle D.[149] The Subtitle D implementing regulations, known as "Subtitle D Criteria," regulate solid waste disposal facilities[150] and municipal solid waste landfills.[151] The Subtitle D Criteria are designed to reduce, *inter alia*, dangers at landfills associated with flooding,[152] disease,[153] surface and groundwater contamination,[154] and air pollution.[155]

2. Hazardous Waste

Although RCRA addresses both solid and hazardous waste, its primary focus is the management of hazardous waste. Hazardous wastes are solid wastes[156] that: "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."[157] Hazardous wastes are either specifically listed[158] by the EPA or are solid wastes which exhibit a specified regulatory hazardous characteristic.[159]

With the exception of wastes regulated under other laws (e.g., nuclear materials), RCRA's definition of solid waste covers just about everything encompassed by a 'common sense' definition of waste." 55 Fed. Reg. 14556, 14604 (1990).

[148] 42 U.S.C. § 6903(27) (1994); 40 C.F.R. § 261.4(a) (1996).

[149] As will be discussed below, the wastes may also have to comply with the more rigorous requirements of RCRA Subtitle C, 42 U.S.C. § 6921-39e (1994).

[150] 40 C.F.R. Part 257 (1996).

[151] 40 C.F.R. Part 258 (1996).

[152] 40 C.F.R. §§ 257.3-1, 258.11 (1996).

[153] 40 C.F.R. §§ 257.3-6, 258.22 (1996).

[154] 40 C.F.R. §§ 257.3-3, 257.3-4, 258.26, 258.27, 258.50-59 (1996).

[155] 40 C.F.R. §§ 257.3-7, 258.24 (1996).

[156] 40 C.F.R. § 261.2 (1996). Hazardous wastes must be solid wastes under the regulatory definition of solid waste. Solid waste is defined in 40 C.F.R. § 261.2 as discarded material that is not excluded or granted a variance. A discarded material is any material which is abandoned, recycled or inherently waste-like.

[157] 42 U.S.C. § 6903(5) (1994).

[158] "Listed" hazardous wastes are set out in 40 C.F.R. §§ 261.30-35 (1996). There are four lists of hazardous waste: F listed waste (from non-specific sources), K listed waste (from specific sources, usually manufacturing and processing), and P and U listed waste (off-specification or discarded commercial chemical products).

[159] To be considered a "characteristic" hazardous waste, a solid waste must be ignitable (for a liquid, it must have a flash point less than 140 degrees Fahrenheit; for a solid, it is capable of causing a fire through friction, absorption of moisture or spontaneous chemical change. 40 C.F.R. § 261.21 (1996)); corrosive (ph less than or equal to 2, or ph greater than or equal to

Under RCRA, a "generator" is defined as "any person, by site, whose act or process produces hazardous waste identified or listed in [40 C.F.R. § 261] or whose act first causes a hazardous waste to become subject to regulation."[160] One of the initial obligations of a generator is determining whether his waste is considered hazardous waste.[161] A generator may make the hazardous waste determination by using either an EPA approved testing method[162] or by "applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used."[163] At Air Force housing, lead-based paint abatement would most likely be conducted by in-house personnel or contractors. In either case, if the waste is hazardous, the Air Force would be considered a generator because it caused, either directly or indirectly, the hazardous waste to be generated. If a contractor is involved in the abatement work, the Air Force and the abatement contractor would be considered co-generators as both parties contribute to the generation of the waste.[164]

a. Classifying Waste from Lead-Based Paint Abatement

Depending on how lead-based paint is abated, either listed or characteristic hazardous waste may be generated. If a solvent is used to remove lead-based paint, the spent solvent may be a F listed (non-specific source) hazardous waste or the unused, discarded solvent may be a P listed (off-specification or discarded commercial products) hazardous waste. In addition, under RCRA's mixture rule, if any solid waste is mixed with one or more listed hazardous wastes, the resulting mixture will be considered a hazardous waste as well.[165] As a result, any rags or other material contaminated with a listed hazardous waste during the lead-based paint abatement process may be considered hazardous. As such, the mixture rule

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12.5. 40 C.F.R. § 261.22 (1996)); reactive (unstable and readily undergoes violent change without detonating, reacts violently with water, or when mixed with water, generates toxic gases. 40 C.F.R. § 261.23 (1996)); or toxic (40 C.F.R. § 261.24 (1996)).

[160] 40 C.F.R. § 260.10 (1996). There are three classes of generators based on the quantity of hazardous waste generated in a calendar month: Conditionally exempt small quantity generators (generate no more than 100 kg of hazardous waste per month, 40 C.F.R. § 261.5 (1996)); Small quantity generators (generate more than 100 kg but less than 1000 kg, 40 C.F.R. § 262.44 (1996)); and, Large quantity generators (generates 1000 kg or more). A typical Air Force installation is a large quantity generator.

[161] 40 C.F.R. § 262.11 (1996).

[162] 40 C.F.R. § 262.11(c)(1) (1996).

[163] 40 C.F.R. § 262.11(c)(2) (1996).

[164] 61 Fed. Reg. 45778, 45798 (1996).

[165] 40 C.F.R. § 261.3(a)(2)(ii), (iii) (1996). However, if a solid waste is mixed with a listed waste that is listed only because it exhibits a hazardous characteristic, the resulting mixture is not considered hazardous waste if the resulting mixture no longer exhibits the hazardous characteristic. Mixed wastes (except wash water) are still subject to the Land Ban (40 C.F.R. subpart 268) even if they no longer exhibit a hazardous characteristic at the point of land disposal.

has the potential to drastically expand the amount of waste subject to RCRA Subtitle C regulation.

A solid waste may also be considered hazardous waste if it exhibits a hazardous characteristic.[166] For wastes associated with lead-based paint abatement, the hazardous characteristic of concern is toxicity for lead. A solid waste is considered toxic for lead if the lead content of the leachate from a representative sample of the waste exceeds 5 mg/L using the Toxicity Characteristic Leaching Procedure (TCLP) test.[167] According to HUDs *Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing*, test data from a HUD lead-based paint demonstration project indicated that it is unlikely that large debris, such as doors, will be classified as hazardous.[168] The interim guidelines however also state that "paint chips, HEPA vacuum filters, and certain wash waters are likely to fail the toxicity test."[169] EPA conducted similar tests on waste from lead-based paint abatement and concluded:

> (i) Filtered wash-water, disposable work clothes and respirator filters, and rugs and carpets are non-hazardous and may be disposed of as solid waste.
> (ii) Paint chips, HEPA vacuum debris, dust from air filters, paint dust sludge from stripping, unfiltered liquid waste, rags, sponges, mops, HEPA filters, air monitoring cartridges, scrapers and other materials used for testing, abatement and cleanup may be hazardous or not, depending on the abatement conditions . . . .
> (iii) "Solid" wastes such as old woodwork, plaster, doors and similar bulky components were found generally to be hazardous when the lead level in the paint exceeded 4 mg/cm2, as determined by a laboratory analysis. The same types of waste may be disposed of as solid waste provided they are covered with paint containing lower lead levels.
> (iv) Plastic sheeting and tape used to cover floors during abatement may be hazardous, depending on the methods used.[170]

Both the HUD and EPA studies demonstrate that wastes generated by lead-based paint abatement may be hazardous under RCRA. Prior to beginning any lead-based paint abatement project, the Air Force should consider the possibility that some of the waste generated may be hazardous.

It should be noted that "EPA intends to issue a separate rulemaking specifically addressing the disposal of architectural debris waste from lead-based paint abatements."[171] The purpose of the rulemaking would be to "minimize potential regulatory impediments to conducting and financing lead-based paint abatements."[172] Such a rulemaking is long overdue. Lead-based

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[166] 40 C.F.R. § 261.20.
[167] 40 C.F.R. § 261.24.
[168] 55 Fed. Reg. 14556, 14604 (1990).
[169] *Id*.
[170] Brooks, *supra* note 140.
[171] 61 Fed. Reg. 45778, 45798 (1996).
[172] *Id*.

paint is the most common environmental disease in young children[173] and EPA has acknowledged "that the costs associated with managing debris is impeding progress in reducing lead-based paint hazards."[174] Yet, EPA has failed to even issue a draft regulation. Such inattention is inexcusable. In addition, the scope of the proposed rulemaking will purportedly address only architectural debris rather than all wastes generated by the most common types of lead-based paint abatement. A regulation which excludes certain lead-based paint abatement wastes from Subtitle C regulation would eliminate a significant barrier to the abatement of lead-based paint. However, until such a regulation is promulgated, the current RCRA regulations will continue to apply.

b. Household Hazardous Waste Exclusion for Lead-Based Paint Abatement

When Congress enacted RCRA in 1976, EPA was required to "promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to [RCRA Subtitle C requirements]."[175] Even though the statute does not provide for the exclusion of household wastes, the implementing regulation specifically excluded household wastes from the definition of hazardous waste.[176] EPA excluded household wastes from RCRA to implement Congressional intent as expressed in the legislative history.[177] In 1984, EPA clarified the household hazardous waste exclusion by stating that the applicability of the household hazardous waste exclusion depends on the following two criteria being met: (1) the waste must be generated by homeowners on the premises of a household; and, (2) the waste must be composed primarily of materials found in the wastes generated by consumers in their homes.[178] EPA further clarified the household hazardous waste exclusion by stating that wastes from building construction, renovation or demolition, even if generated at a household, are not covered under the household waste exclusion.[179] EPA later backed away from the first requirement which stated that household wastes must be generated by a homeowner. In Office of Solid Waste and Emergency Response (OSWER) Directive No. 9441.1990(09), *Applicability of the Household Hazardous Waste*

[173] 61 Fed. Reg. 29170, 29170 (1996).
[174] 61 Fed. Reg. 45778, 45798 (1996).
[175] Pub. L. No. 94-580, § 3001, 90 Stat. 2795, 2806 (1976) (codified at 42 U.S.C. § 6921(a) (1994)).
[176] 40 C.F.R. §261.4(b) (1996). "The following solid wastes are not hazardous wastes: (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered . . . or reused." *Id.*
[177] 45 Fed. Reg. 33084, 33098-99 (1980) (citing S. REP. NO. 94-988, 94th Cong., 2d Sess. 16 (1976) ("The hazardous waste program is not to be used to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances.").
[178] 49 Fed. Reg. 44978, 44978 (1984).
[179] *Id*.

Exclusion to Waste Generated by Contractors, EPA stated that the applicability of the household hazardous waste exclusion is based on the type of waste generated and the place of generation, and that "EPA does not distinguish between waste generated at a household by a homeowner and waste generated at a household by a person other than the homeowner [*e.g.*, a contractor]."[180]

OSWER Directive No. 9443.1994(03) addressed the applicability of the household hazardous waste exclusion to wastes generated by lead-based paint abatement. The Directive states:

> Under EPA's current reading of the household waste exemption, LBP waste is not similar to the waste typically generated by household (e.g., household trash comprising of discarded consumer goods), and should therefore, be evaluated for its potential to be RCRA hazardous waste. However, solid waste generated by a homeowner, resident, or a contractor at a home as part of routine residential maintenance (as opposed to building construction, renovation, and demolition) would be part of the household waste stream, and thus would be covered under the RCRA household waste exemption.[181]

Apparently, if the purpose of an activity is the abatement of lead-based paint, the activity is considered renovation and the resulting wastes are not included in the household hazardous waste exclusion. However, if during routine maintenance (*e.g.*, the chipping and sanding of old paint prior to the repainting), any lead-based paint is abated, the resulting wastes are not considered hazardous under RCRA. In practice, differentiating between routine maintenance and renovation may require the making of some fine distinctions. As such, it would be prudent to coordinate with EPA (or the appropriate state agency) prior to beginning any routine maintenance that may involve the abatement of lead-based paint.

Although current direction from EPA's Office of Solid Waste and Emergency Response does not include wastes from lead-based paint abatement in the household hazardous waste exclusion, such was not always the case. OSWER Directive No. 9443.1987(28), *Lead-Based Paint Residues and Lead Contaminated Residential Soil For Public/Private Housing Units*, published in 1987, stated

> [p]aint wastes are exempt from regulation as a hazardous waste if they are generated at individual households by the houseowner doing his own removal.[182] On the other hand, if the removal at an individual residence is done by a contractor, the residues are solid wastes and must be evaluated

[180] OSWER Directive No. 9441.1990(09), Applicability of the Household Hazardous Waste Exclusion to Waste Generated by Contractors (1990).
[181] OSWER Directive No. 9443.1994(03) (1994).
[182] The guidance concerning contractors was superseded by OSWER Directive No. 9441.1990(09), Applicability of the Household Hazardous Waste Exclusion to Waste Generated by Contractors (1990).

> with respect to their hazardousness (EP Toxicity) and must be disposed of according to hazardous waste regulations if found to be hazardous."[183]

Thus, until 1994, lead-base paint abatement wastes were included in the household waste exclusion and RCRA was not a barrier to lead-based paint abatement. However, in 1994, OSWER Directive No. 9443.1994(03) eliminated the household hazardous waste exclusion for lead-based paint abatement wastes. What is disturbing about this policy change is the lack of explanation. One would think that a significant policy change such as this (*i.e.*, a change which makes it more difficult and expensive to address the number one environmental health hazard facing young children) would be accompanied by a thoughtful, well-reasoned analysis. Instead, the OSWER Directive No. 9443.1994(03) restates the same precedents that justified the 1987 Directive, then summarily concludes that "[u]nder EPA's current reading of the household waste exemption, LBP is not similar to the waste typically generated by [a] household."[184] Absent a compelling, scientifically-based reason or a clear policy rationale, it is irresponsible for EPA to erect a formidable barrier to the abatement of residential lead-based paint by making it subject to RCRA Subtitle C regulation without any explanation.[185]

c. Soil Contaminated with Lead-Based Paint

Soil contaminated with lead-based paint may or may not be covered under EPA's current interpretation of RCRA's household hazardous waste exclusion. If routine residential maintenance, or the weathering or chalking of lead-based paint is the source of lead contamination in soil, "then the lead-contaminated soil in residential yards would be part of the household waste stream as defined in the household waste exclusion."[186] As such, the soil is not regulated under RCRA Subtitle C and could be disposed of off-site in accordance with RCRA Subtitle D or managed in place.[187]

If the lead contaminated soil resulted from lead-based paint abatement activities, the soil must be evaluated for toxicity. If the soil is found to be toxic for lead, "RCRA subtitle C regulation would apply to the generation, transportation, treatment, storage, or disposal of [the soil] (absent another exemption)."[188] However, even though the soil is regulated under RCRA

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[183] OSWER Directive No. 9443.1987(28), Lead-Based Paint Residues and Lead Contaminated Residential Soil For Public/Private Housing Units (1987).
[184] OSWER Directive No. 9443.1994(03) (1994).
[185] Returning to the 1987 interpretation of the household hazardous waste exclusion regarding wastes generated by lead-based paint abatement would obviate the need for the rulemaking noted in paragraph IV.A(2)(b).
[186] OSWER Directive No. 9441.1995(08), Applicability of the Household Waste Exclusion to Lead-Contaminated Soil (1995).
[187] *Id*.
[188] *Id.*

Subtitle C, the Air Force may engage in certain on-site, risk reducing activities without such activities being considered generation, treatment, storage or disposal of hazardous waste.[189] For example, according to OSWER Directive No. 9441.1995(08), *Applicability of the Household Waste Exclusion to Lead-Contaminated Soil*, "covering soils with sod, mulch, or gravel would not constitute the generation, transportation, treatment, storage, or disposal of hazardous waste."[190] As a result, the Air Force may use these risk reducing measures as a low cost means of mitigating the health hazards associated with lead-contaminated soil without being subject to RCRA Subtitle C regulation.[191]

3. Liability under CERCLA

In determining the appropriate method for disposing of wastes from lead-based paint abatement, the Air Force should evaluate potential CERCLA liability as well as RCRA requirements. Even if lead-based paint wastes are disposed of in accordance with the requirements of RCRA, the Air Force may still be liable under CERCLA should the disposal site subsequently pose a threat to human health or the environment.[192] Because liability under CERCLA may be joint and several,[193] the potential liability is staggering for the disposal of any hazardous substance, including lead contaminated wastes. Thus, even though the Air Force could dispose of some lead-based paint abatement wastes as solid waste, a careful evaluation of the potential CERCLA liability is warranted to determine if such disposal is in the Air Force's long-term best interest. The CERCLA ramifications for lead-based paint will be discussed more fully in Part V.

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[189] *Id*.

[190] *Id*.

[191] Under RCRA, "treatment" is defined as "any method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as . . . to render such waste . . . less hazardous." 40 C.F.R. § 260.10 (1996). It would appear that adding a soil, mulch or gravel cap to contaminated soil might satisfy the definition of treatment because it is arguably changing the physical character of the soil to make it less hazardous. However, for the purposes of lead-based paint, EPA interprets the definition of treatment narrowly. This narrow interpretation appears to be motivated by a desire to avoid the need for a RCRA permit for on-site abatement activities involving soil contaminated by lead-based paint.

[192] Compliance with environmental laws is not a defense under CERCLA § 107, 42 U.S.C. § 9607 (1994). United States v. Pretty Products, Inc., 780 F.Supp. 1488 (S.D. Ohio 1991); United States v. Marisol, Inc., 725 F.Supp. 833 (M.D. Pa. 1989). However, there is a narrow exception for federally permitted releases. 42 U.S.C. § 9607(j) (1994).

[193] Unless the harm is divisible, CERCLA liability is joint and several. United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); O'Neil v. Picillo, 883 F.2d 176 (5th Cir. 1989); United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983).

B. RCRA Corrective Action[194]

OSWER Directive No. 9502.1995(02), *Corrective Action Authorities*, lists five statutory provisions which authorize EPA to take corrective action:[195] RCRA § 3004(u)[196] (corrective action at permitted treatment, storage, and disposal (TSD) facilities); RCRA § 3004(v)[197] (corrective action beyond the boundary of the facility); RCRA § 3008(h)[198] (corrective action at interim status facilities); RCRA § 3005(c)(3)[199] (corrective action using RCRA's omnibus permitting authority); and RCRA § 7003 (corrective action for imminent and substantial endangerment). The RCRA corrective action program addresses releases from interim status facilities, permitted facilities, as well as releases which pose an imminent and substantial threat to health and the environment.

1. Interim Status Facilites[200]

To protect human health or the environment, EPA may require corrective action at interim status facilities under RCRA § 3008(h) if "there is or has been a release of hazardous waste into the environment."[201] The term release has been broadly interpreted to include "any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment."[202] If lead-based paint abatement activities at an interim status facility result in the release of hazardous waste into the environment, EPA may require a corrective action depending on the severity of

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[194] The RCRA corrective action process is not codified in the Code of Federal Regulations. However, the steps outlined in EPA's proposed Hazardous Waste Corrective Action Program, 55 Fed. Reg. 30798 (1990), are used as guidance and are common to most RCRA corrective actions. The corrective action process generally includes: a facility assessment (identification of releases or potential release sites to determine if further information is required); a facility investigation (characterize the nature and extent of contamination at a facility); a corrective measures study (identify a solution for the problem at the site); and corrective measures implementation (implement the solutions). Interim measures may also be required to address sites which pose a threat to human health and the environment or to prevent migration. *Id.* at 30801-2.

[195] OSWER Directive No. 9502.1995(02), Corrective Action Authorities (1995).

[196] 42 U.S.C. § 6924(u) (1994).

[197] *Id*. § 6924(v).

[198] *Id*. § 6928(h).

[199] *Id*. § 6925(c)(3).

[200] *Id*. § 6925(e).

[201] *Id*. § 6928(h).

[202] The term "release" is defined in CERCLA § 101(22), 42 U.S.C. §9601(22)(1994). However, the CERCLA definition is applicable in RCRA because "release" is considered a term of art in environmental law. Center for Creative Studies v. Aetna Life and Casualty Co., 871 F.Supp. 941 (E.D. Mich. 1994).

the release.[203] However, if lead-based paint was released into the environment due to weathering, chalking or routine household maintenance, EPA may not require corrective action under RCRA § 3008(h) because there has not been a release of a hazardous waste (*i.e.*, in these circumstances, the lead-based paint would not be a hazardous waste due to the household hazardous waste exclusion).

2. Permitted Facilities[204]

a. Corrective Action Within a Facility

Unlike interim status facilities, corrective action at permitted facilities is required when hazardous waste or hazardous constituents are released from solid waste management units. Under RCRA § 3004(u), EPA "shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under [RCRA] regardless of the time at which waste was placed in such a unit."[205] As such, corrective action at permitted facilities is much broader than at interim status facilities because it includes hazardous constituents. Because lead is a hazardous constituent,[206] waste from lead-based paint abatement could be included in RCRA corrective action at permitted facilities.[207]

Under RCRA § 3004(u), only releases from solid waste management units (SWMUs) are subject to corrective action. However, the term "solid waste management unit" is not defined in the statute or in the implementing regulations.[208] However, in the preamble for the 1985 final Hazardous Waste Management System rule, EPA referred to legislative history and developed the following working definition of a SWMU: "any unit at the facility 'from which hazardous constituents might migrate, irrespective of whether the units

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[203] OSWER Directive No. 9355.4-12, Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities (recommends a screening level of 400 ppm for residential soils).

[204] 42 U.S.C. § 6925 (1994).

[205] 42 U.S.C.§ 6924(u) (1994). Instead of using 42 U.S.C. § 6924(u), EPA could use its omnibus permitting authority, 42 U.S.C. § 6925(c)(3) (1994).

[206] 40 C.F.R. Part 261, app. VIII (1996).

[207] Because RCRA § 3004(u) corrective action includes hazardous constituents, it is irrelevant that some lead-based paint waste may be excluded from regulation under RCRA Subtitle C by the household waste exclusion. As long as abatement waste contains a hazardous constituent (*i.e.*, lead), it is potentially subject to RCRA § 3304(u) corrective action.

[208] In 1990, EPA proposed the following definition: "Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released." 55 Fed. Reg. 30798, 30808 (1990). However, this definition was not incorporated into the Code of Federal Regulation.

were intended for the management of solid and/or hazardous wastes.'"[209] Courts which have addressed the definition of SWMU have also referred to the legislative history and adopted a similar definition.[210] As such, the definition of SWMU is quite broad and would seem to include any location where there has been a spill of a hazardous waste or hazardous constituent. However, EPA has narrowed the definition in subsequent guidance by stating a SWMU does not include a one-time spill of hazardous waste.[211]

Given the broad definition of SWMU and the fact that lead is a hazardous constituent, it is possible that EPA could consider residential soil that has repeatedly been contaminated by the chipping, peeling or chalking of lead-based paint a SWMU. As such, Air Force installations may be required to remediate the lead-base paint hazards as a condition of their TSD permits. OSWER Directive No. 9355.4-12, *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities*, contemplates just such an eventuality. Directive 9355.4-12 recommends a screening level of 400 ppm for lead in residential soils.[212] If the lead contamination exceeds the screening level and poses a health risk, the Directive recommends that it be addressed under the RCRA corrective action program.[213]

b. Corrective Action Outside a Facility

Under RCRA § 3004(v), EPA may require the owner or operator of a permitted facility to take corrective action beyond the boundary of the facility "where necessary to protect human health and the environment."[214] However, an owner or operator will not be required to perform corrective action outside of the facility if he can demonstrate that he was unable to obtain the necessary permission to undertake such action. Although RCRA corrective action may extend beyond the boundary of a facility, this situation is not likely to occur in connection with residential lead-based paint abatement. Unless a home is close to a property line and the paint is being removed via a sand blasting technique, it is unlikely that the waste will migrate across an installation's boundary.

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[209] 50 Fed. Reg. 28702, 28712 (1985) (citing H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983)).
[210] Owen Elec. Steel Co. of South Carolina, Inc. v. Browner, 37 F.3d 146 (4th Cir. 1994); National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989).
[211] OSWER Directive No. 9502.1995(02), Corrective Action Authorities (1995).
[212] OSWER Directive No. 9355.4-12, Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities.
[213] *Id*.
[214] 42 U.S.C. §6924(v) (1994).

3. Imminent and Substantial Harm

RCRA § 7003 gives EPA considerable authority to address "past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste [which] may present an imminent and substantial endangerment to health or the environment."[215] EPA "may bring suit on behalf of the United States in the appropriate district court[216] . . . [or] after notice to the affected State, take other action under this section . . . as may be necessary to protect public health and the environment."[217] Because EPA may bring suit under RCRA § 7003, this provision is often considered an enforcement action rather that corrective action. However, EPA also lists RCRA § 7003 as a corrective action authority because its broad powers can be used to remedy past releases of solid and hazardous waste.[218]

Because RCRA § 7003 authority encompasses both solid and hazardous wastes, waste from lead-based paint located on an Air Force installation could be the subject of a RCRA § 7003 order.[219] However, EPA would have to demonstrate that the lead-based paint waste constitutes an imminent and substantial endangerment to health or the environment.[220]

C. RCRA Conclusion

Under EPA's current interpretation of RCRA's household hazardous waste exclusion, the abatement of lead-based paint hazards cannot be accomplished without regard for RCRA Subtitle C. As such, the Air Force must take RCRA Subtitle C into account when selecting an appropriate lead-based paint abatement method. If the Air Force selects an abatement method which may generate hazardous waste, great care should be taken to separate the hazardous waste from the non-hazardous waste to minimize the volume, and consequently the cost of the abatement. Failure to account for the possible

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[215] 42 U.S.C. § 6973 (1994).

[216] This is not meant to imply that EPA may bring suit against the Air Force as such a suit would violate the "Unitary Executive Theory." *Federal Facilities Hazardous Waste Compliance Manual*, OSWER Directive 9992.4 (1990).

[217] 42 U.S.C. § 6973 (1994).

[218] United States v. Rohm and Haas Co., 2 F.3d 1265 (3rd Cir. 1993).

[219] McClellan Ecological Seepage Situation (MESS) v. Cheney, 763 F.Supp. 431, 435 (E.D. Cal. 1988) ("The Government acknowledges that federal facilities are subject to [RCRA §§3004(u), 3008(h) and 7003].").

[220] Price v. United States Navy, 39 F.3d 1011, 1019 (9th Cir. 1994) (explaining "a finding that an activity may present an imminent and substantial harm does not require actual harm."); Dague v. City of Burlington, 935 F.2d 1343, 1355 (2nd Cir. 1991) (stating "[a] finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present."); United States v. Waste Indus. Inc., 734 F.2d 159, 167 (4th Cir. 1984) (holding "[t]he EPA need not prove that an emergency exists to prevail under section 7003, only that the circumstance may present an imminent and substantial endangerment.").

generation of hazardous waste when abating lead-based paint could result in cost overruns and possible RCRA violations.

V. CERCLA AND THE REGULATION OF LEAD-BASED PAINT IN AIR FORCE HOUSING

Like many hazardous substances, lead-based paint is regulated by a number of environmental statutes, including the Lead-Based Paint Poisoning Prevention Act, Title X, and RCRA. In addition, the Air Force may have an obligation to address residential lead-based paint hazards under the CERCLA. For example, at the Presidio of San Francisco, a closing Army installation where there are allegedly "high levels of lead contamination in soil in areas surrounding residential and non-residential structures," the EPA is asserting that soil contaminated with residential lead-based paint should be remediated under CERCLA.[221] However, the Department of the Army disagrees.[222] This article will explore the application of CERCLA to Air Force residential lead-based paint hazards.[223]

A. CERCLA at Department of Defense Facilities

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[221] *Lead-Based Paint Pits EPA Against Army on National Policy Question*, DEF. ENVIRON. ALERT (Jan. 29, 1997).

[222] *Id*. *See also, Dispute Over Lead in Soil Cleanup Could Trigger New Cleanup Procedures*, DEF. ENVIRON. ALERT (Jan. 28, 1998) (The State of Indiana and EPA assert that lead-based paint in residential soil at Fort Benjamin Harrison, a closing Army base in Indiana, should be remediated under CERCLA. The Army disagrees.).

[223] DOD and EPA are cooperating to develop a guide book that will address how to remediate lead-contaminated soil. The guide book will apparently rely on Title X standards and procedures for cleanup rather than CERCLA. If so, EPA will be backing away from its previous assertion that CERCLA is the appropriate vehicle to address the cleanup of lead-contaminated soil. *See, In Attempt to Lift Deadlock, DOD, EPA Developing Guidance for Lead in Soil,* DEF. ENVIRON. ALERT (Feb. 11, 1998).

CERCLA was made expressly applicable to federal facilities[224] by CERCLA § 120.[225] Under CERCLA § 120(a)(1), each federal department, agency and instrumentality is required to comply both procedurally and substantively with the provisions of CERCLA to the same extent as any nongovernmental entity.[226] Section 120(a)(1) explicitly states that federal facilities should be subject to CERCLA "in the same manner and to the same extent" as private facilities.[227] As then Representative Fazio, one of the primary authors of CERCLA § 120, stated on the eve of Superfund Amendments and Reauthorization Act (SARA) passing the House of Representatives, "a State cannot create special rules for federal facilities that are not otherwise applicable to similar situations at private sites and then expect these rules to be enforced under Superfund."[228] Thus, while Congress intended federal facilities to comply with CERCLA, Congress did not intend for federal facilities to be subject to a double standard.

However, there are provisions in CERCLA which are only applicable to federal facilities. For example, DOD facilities have an affirmative duty to look for potential CERCLA sites,[229] are required to sign an interagency agreement with EPA for National Priority List (NPL) sites,[230] and are not required to comply with "any requirements relating to bonding, insurance, or financial responsibility."[231] In addition, DOD, not EPA, has been designated by the President as the lead agency for DOD sites.[232] Pursuant to Executive Order 12580, the President has delegated CERCLA § 104 response authority to

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[224] Section 211 of the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499 § 211, 100 Stat. 1613, 1719, codified the Defense Environmental Restoration Program (DERP) (10 U.S.C. §§ 2701-2708 (1994)). Under DERP, the Secretary of Defense is given primary responsibility for all response actions with respect to releases of hazardous substances at facilities or sites owned, leased to, or otherwise possessed by the DOD, and at facilities or sites owned, leased to, or otherwise possessed by the DOD at the time of actions leading to contamination by hazardous substances. 10 U.S.C. § 2701(c)(1) (1994). Response actions must be carried out "subject to, and in a manner consistent with, section 120 (relating to federal facilities) of [CERCLA]" and "in consultation with the Administrator of the Environmental Protection Agency." 10 U.S.C. §§ 2701(a)(2) & (3) (1994). In addition, DERP incorporates the CERCLA definitions for "release," "facility," "person," "environment" and "hazardous substance." 10 U.S.C. § 2707(1) (1994). Because the DERP must be consistent with CERCLA § 120 and incorporates the definitions contained in CERCLA, a separate analysis regarding DOD's obligation to address residential lead-based paint hazards under DERP is not warranted.

[225] 42 U.S.C. § 9620 (1994) (CERCLA § 120 was added by SARA, Pub. L. No. 99-499 § 120, 100 Stat. 1613, 1666 (1986)).

[226] 42 U.S.C. § 9620(a)(1) (1994).

[227] *Id*.

[228] 132 Cong. Rec. 29,756 (1986).

[229] 42 U.S.C. § 120(d) (1994) (Preliminary assessments were to be completed by April 17, 1988.).

[230] 42 U.S.C. § 9620(e)(2) (1994).

[231] 42 U.S.C. § 9620(a)(3) (1994).

[232] *See*, Exec. Order No. 12580, 3 C.F.R. 193 (1988).

the Secretary of Defense "with respect to releases or threatened releases, where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of [the department]."[233]

As the lead agency, DOD is responsible for planning and implementing response actions in accordance with the National Contingency Plan (NCP).[234] Response actions may include, *inter alia*, preliminary assessments,[235] site inspections,[236] remedial investigations,[237] feasibility studies,[238] and remedial designs/remedial actions.[239] At DOD NPL sites, DOD and EPA jointly select the remedy.[240] If DOD and EPA are unable to agree, EPA selects the final remedy.[241] At non-NPL sites, DOD selects the appropriate response actions.[242]

Even though DOD is the lead agency with respect to DOD sites, EPA guidelines, rules, regulations and criteria are still applicable.[243] In addition, DOD "may not adopt or utilize any . . . guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under [CERCLA]."[244] Thus, while DOD is the lead agency at DOD CERCLA sites, its actions are constrained by EPA guidance.[245]

B. Response Authority under CERCLA § 104

CERCLA § 104 establishes the scope of the President's response authority under CERCLA. CERCLA § 104(a)(1) states: "Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment . . . the President is authorized to act . . . to remove . . . and provide for remedial action relating to such hazardous substance."[246] As such, the President (or his delegate) may not respond to an environmental concern (including lead-based paint hazards) under CERCLA unless the

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[233] *Id*. ¶ 2.d.
[234] 40 C.F.R. § 300.5 (1996) (To recover response costs under CERCLA § 107, federal agency response costs must not be inconsistent with the NCP. 42 U.S.C. § 9607(a)(4)(A) (1994)).
[235] 40 C.F.R. §§ 300.410(b) & 300.420(b) (1996).
[236] *Id*. §§ 300.410(d) & 300.420(c).
[237] *Id*. § 300.430(d).
[238] *Id*. § 300.430(e).
[239] *Id*. § 300.435(b).
[240] 42 U.S.C. § 9620(e)(4) (1994).
[241] *Id*.
[242] Exec. Order No. 12,580, ¶ 2.d., 3 C.F.R. 193, 195 (1988) (delegating authority under CERCLA § 104(a)).
[243] 42 U.S.C. § 9620(a)(2) (1994).
[244] *Id*.
[245] DOD is not subject to EPA guidance concerning removal actions. 42 U.S.C. § 9620(a)(2) (1994).
[246] 42 U.S.C. § 9604(a)(1) (1994).

following three conditions are met: (1) a hazardous substance; (2) has been released or there is a threat of such a release; (3) into the environment. Absent one of these elements, the President is not authorized to respond under CERCLA.

1. Hazardous Substance

Under CERCLA, hazardous substances are primarily designated by referring to other environmental statutes (*i.e.*, the Clean Water Act, the Solid Waste Disposal Act, the Clean Air Act, the Toxic Substances Control Act).[247] However, EPA may also designate hazardous substances pursuant to CERCLA § 102.[248] CERCLA § 102 authorizes EPA to "promulgate and revise as may be appropriate, regulations designating as hazardous substances . . . such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment."[249] EPA used its authority under CERCLA § 102 to list lead as a hazardous substance.[250] Because lead is a component of lead-based paint, lead-based paint is considered a hazardous substance under CERCLA.[251]

a. Threshold Quantity

CERCLA and its implementing regulations do not list a threshold quantity or a minimum concentration for hazardous substances. Faced with this silence, courts have declined to impose such a limit.[252] In *Amoco Oil Co.*

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[247] *Id.* § 9601(14).
[248] *Id*.
[249] *Id.* § 9602(a) (1994).
[250] 40 C.F.R. § 302.4 (1996).
[251] Louisiana-Pacific Corp. v. ASARCO Inc., 24 F.3d 1565 (9th Cir. 1994) (stating that if product is not specifically listed as hazardous substance, but its components include hazardous substances, product is regulated by CERCLA), *cert. denied*, 513 U.S. 1103 (1995); United States v. New Castle County, 769 F.Supp. 591, 596 (D. Del. 1991) (explaining that "[w]hen a defendant's waste is a mixture, like lead-based paint, the dissociation of the hazardous substance from the waste can be presumed and the party disposing of the mixture should be held liable under CERCLA."); United States v. Carolawn Co., 14 Envtl. L. Rep. 20, 696 (D. S.C. 1984) (rejecting the defendant's argument that water-based paint was not a hazardous substance because water-based paint "is not specifically listed as a hazardous substance under any of the statutory provisions referenced in CERCLA Section 101(14)." The court said, "whether a material is hazardous under CERCLA depends on the character of its constituents. If a waste material contains hazardous substances, then the waste material is itself a hazardous substance for the purposes of CERCLA.").
[252] B. F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) (holding that in determinations whether a substance is hazardous under CERCLA § 101(14), quantity or concentration are not factors); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) (noting that listing establishes that a substance is hazardous); United States v. Wade, 577

v. Borden, Inc.,[253] the Court of Appeals for the Fifth Circuit did not impose a quantitative requirement for radium-222 (radium-222 was designated as a hazardous substance pursuant to CERCLA § 102).[254] The Fifth Circuit held that "the plain statutory language fails to impose any quantitative requirement on the term hazardous substance and we decline to imply that any is necessary."[255] The Court of Appeals for the Third Circuit in *United States v. Alcan Aluminum Corp.*,[256] agreed with the Fifth Circuit and held that CERCLA's definition of hazardous substance "does not, on its face, impose any quantitative requirement or concentration level on the definition of 'hazardous substances.'"[257] The Third Circuit went on to observe that "courts that have addressed this issue have almost universally held that CERCLA liability does not depend on the existence of a threshold quantity of a hazardous substance."[258] Because courts have declined to impose a quantity or concentration limit on the term "hazardous substance," the mere presence of lead-based paint on the interior or exterior of a home or in the soil satisfies CERCLA's "hazardous substance" requirement.

2. Release or Threatened Release

a. Release

In CERCLA, the term "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . ."[259] Faced with this expansive definition, courts have justifiably given the term "release" a broad interpretation.[260] In *United States v. Northernaire Plating*

F.Supp. 1326 (E.D. Pa. 1983) (explaining a listed substance is hazardous regardless of the concentration or amount).

[253] 889 F.2d 664 (5th Cir. 1989).

[254] *Id*. at 669.

[255] *Id*.

[256] 964 F.2d 252 (3rd Cir. 1992).

[257] *Id*. at 260.

[258] *Id*.

[259] 42 U.S.C. § 9601(22) (1994).

[260] Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) (holding the definition of "release" should be broadly construed); Washington v. Time Oil Co., 687 F.Supp. 529, 531 (W.D. Wash. 1988) (explaining "the presence of hazardous substances on the Time Oil property has resolved to the court's satisfaction that there clearly has been a 'release' within the meaning of CERCLA . . . . It is enough that the substances are there, and it is not necessary for the purposes of this motion to trace their release to one entity or another."); United States v. Bliss, 667 F.Supp. 1298, 1305 (E.D. Mo. 1987) (stating that "the presence of dioxin and TCP in soil at the six sites constitute a release at the six sites.").

Co.,[261] the United States brought suit against the Northernaire Plating Company under CERCLA to recover response costs associated with a removal action. The United States District Court for the Western District of Michigan concluded that evidence which showed that cyanide, lead, cadmium and other hazardous substances were found in the soil at the Northernaire site was sufficient to demonstrate that a "release did occur."[262] In *HRW Sys., Inc. v. Washington Gas Light Co*.,[263] the United States District Court of Maryland was even more expansive in its interpretation of the term release. In *HRW Systems*, the plaintiff brought suit under CERCLA to recover response costs for coal-tar that had become located on its property. Regarding the issue of a release, the court held that given "the breadth of the definitional language in CERCLA, it seems virtually impossible to conceive of a situation where hazardous substances are found in the soil and not *ipso facto* 'released' into the environment."[264] In light of the broad interpretation of the term "release," it is likely a court would conclude that the presence of lead-based paint in soil constitutes a release under CERCLA.

b. Threatened Release

One court has addressed the issue of whether the flaking of lead-based paint constitutes a threatened release of a hazardous substance. In *ABD Assoc. Ltd. Partnership v. American Tobacco Co*.,[265] the plaintiff brought suit under CERCLA to recover, *inter alia*, the response costs associated with the cleanup of lead-based paint from the exterior of several buildings.[266] The District Court for the Middle District of North Carolina concluded that, assuming lead-based paint existed on the property, "there was no genuine issue of material fact as to whether there was a release or threatened release"[267] because the plaintiff introduced uncontroverted evidence "that the lead-based paint could enter the environment or be emitted into the air."[268] In this case, the court acknowledged lead-based paint was a hazardous substance under CERCLA and went on to conclude that the mere presence of lead-based paint on the exterior of a building constituted a threatened release into the environment.

c. Threshold Quantity

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[261] 670 F.Supp. 742 (W.D. Mich. 1987) *aff'd*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*., 494 U.S. 1057, 110 S.Ct. 1527, 108 L.E.2d 767 (1990).
[262] *Id*. at 746-47.
[263] 823 F.Supp. 318 (D. Md. 1993).
[264] *Id*. at 341.
[265] 1995 U.S. Dist. LEXIS 11094 (M.D. N.C. 1995).
[266] *Id*. at 10.
[267] *Id*. at 18.
[268] *Id*.

The definition of "release," like the definition of "hazardous substance," does not contain a quantitative limit and courts have been equally reluctant to imply one.[269] In *Burlington Northern R.R. Co. v. Woods Indus., Inc*.,[270] the United States District Court for the Eastern District of Washington held, "nothing in the definition of the term 'release' can be construed to require proof of some threshold quantity."[271] In *Stewman v. Mid-South Wood Prod. of Mena, Inc.*,[272] the Court of Appeals for the Eighth Circuit held "that there is no minimum quantitative requirement to establish a release or threat of a release of a hazardous substance under CERCLA."[273] As such, a release or threatened release of any quantity or any concentration of a hazardous substance, constitutes a release or threatened release under CERCLA.

3. Release into the Environment

The final requirement for a response action under CERCLA § 104 is a release "into the environment."[274] Under CERCLA, the term "environment" includes "land surface or subsurface strata or ambient air within the United States or under the jurisdiction of the United States."[275] As such, the flaking, chipping or chalking of lead-based paint into soil or into the ambient air would be considered a release "into the environment."[276]

However, the phrase "into the environment" does not include the interior of a building.[277] In *G.L. Leasing Co. v. Union Electric Co.*,[278] the Court of Appeals for the Seventh Circuit held that "the release of asbestos inside a building, with no leak outside … is not governed by CERCLA."[279] In

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[269] Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) (holding that "the plain statutory language fails to impose any quantitative requirement on the term 'release.'"); Mid Valley Bank v. North Valley Bank, 764 F.Supp. 1377, 1386 (E.D. Cal. 1991) (explaining "CERCLA imposes no quantitative requirement on the term 'release.'"); United States v. Western Processing Co., Inc., 734 F.Supp. 930, 936 (W.D. Wash. 1990) (stating that the statutory definition of "release" [does not] contain a threshold requirement).

[270] 815 F.Supp. 1384 (E.D. Wash. 1993).

[271] *Id*. at 1390.

[272] 993 F.2d 646 (8th Cir. 1993).

[273] *Id*. at 648.

[274] The phrase "into the environment" is redundant in CERCLA § 104(a)(1) because the definition of "release" also includes the same phrase. 42 U.S.C. 9601(22) (1994). By definition, a "release" must be "into the environment."

[275] 42 U.S.C. §9601(8) (1994).

[276] Yellow Freight Sys., Inc. v. ACF Indus., Inc., 909 F.Supp. 1290 (E.D. Mo. 1995) (stating presence of asbestos in soil outside building constitutes a release into the environment.); HRW Sys., Inc. v. Washington Gas Light Co., 823 F.Supp. 318 (D. Md. 1993) (holding hazardous substances in soil are a release into the environment).

[277] First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989) (pointing out that CERCLA cannot be reasonably interpreted to encompass the asbestos removal problem in buildings), *cert. denied*, 493 U.S. 1070 (1990).

[278] 54 F.3d 379 (7th Cir. 1995).

[279] *Id*. at 384.

Reading Co. v. City of Philadelphia,[280] the United States District Court for the Eastern District of Pennsylvania observed that "[c]ase law exists supporting the contention that the environment referred to by CERCLA includes the atmosphere external to a building, but not the air within a building."[281] As a result, it is unlikely a court would extend CERCLA response authority to include the remediation of interior lead-based paint.

4. Limitation of CERCLA §104

CERCLA § 104(a)(3)(B) limits the President's response authority by prohibiting a response action under circumstances where there has been a release or threatened release "from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures."[282] The provision is clear on its face and courts have interpreted it to preclude a response action under CERCLA when a release from a structure results in exposure within that structure.[283] In *United States v. N.L. Indus., Inc.*,[284] the United States District Court for the Southern District of Illinois acknowledged that CERCLA § 104(a)(3)(B) prevented EPA from remediating lead-based paint in homes at a NPL site even though EPA was remediating residential soil that had been contaminated by lead from a smelter.[285] Thus, CERCLA § 104(a)(3)(B) prohibits response actions for interior lead-based paint but does not preclude response actions for exterior lead-based paint and soil contaminated with lead-based paint.

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[280] 823 F.Supp 1218 (E.D. Pa. 1993).

[281] *Id*. at 1238.

[282] 42 U.S.C. §9604(a)(3)(B) (1994). This limitation is subject to exception if the President determines that a release or threatened release "constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner." 42 U.S.C. § 9604(a)(4) (1994).

[283] 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1358-9 (9th Cir. 1990) (explaining "[o]ther courts considering this language have concluded that the 'environment' referred to in the statute 'includes the atmosphere, external to the building,' but not the air within a building."), *cert. denied*, 500 U.S. 917 (1991); Covalt v. Carey Canada, Inc., 860 F.2d 1434, 1439 (7th Cir. 1988) (stating "[t]he interior of a place of employment is not 'the environment' for purposes of CERCLA."); *See also* California v. Blech, 976 F.2d 525, 527 (9th Cir. 1992) (holding the "President was not authorized by CERCLA to respond; specifically, when the release or threatened release is (1) from a product that is part of the structure of the building; and (2) the resulting exposure is wholly within the structure.").

[284] 936 F.Supp. 545 (S.D. Ill. 1996).

[285] *Id*. at 554. The City of Granite City sought to enjoin the clean up of residential soil at a NPL site that was contaminated from the emissions of lead from smelting operations. The City argued, *inter alia*, that irreparable harm would be done if the clean up only addressed lead contaminated soil because "the City's residents [would have] a false sense of security that could result [from] the residents failing to appreciate the health risk of lead-based paint in their homes." In addressing the City's concern, the court explained "CERCLA § 104(a)(3)(B) . . . precludes the EPA from conducting remedial actions in residential buildings." *Id.*

In the context of exterior lead-based paint and soil contaminated by residential lead-based paint, the language of CERCLA § 104(a)(3)(B) is significant because of what it does not say. CERCLA § 104(a)(3)(B) was added by Congress in the Superfund Amendments and Reauthorization Act (SARA) of 1986.[286] The purpose of this provision was to limit the scope of CERCLA. The Senate Report concerning CERCLA § 104(a)(3) states, "CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be life-threatening, which are not within the scope of the law's scope."[287] The Senate Report also states that CERCLA § 104(a)(3) "makes more explicit the fact that certain circumstances which may present genuine threats to human health, welfare or the environment are not within the scope of CERCLA."[288] It is clear that Congress intended CERCLA § 104(a)(3) to limit the scope of CERCLA. However, prior to SARA being enacted, there was a disagreement between the Senate and House of Representatives regarding the extent to which the scope of CERCLA should be limited. The Senate version of CERCLA § 104(a)(3) was eventually adopted.

The House of Representatives version of CERCLA § 104(a)(3) contained a much broader limitation to CERCLA response authority by prohibiting the Administrator[289] from responding under CERCLA § 104 if there was a "release or threat of a release of a hazardous substance or pollutant or contaminant from residential dwellings or businesses or community structures where such dwellings or structures are not used for the deposition, storage, processing, treatment, transportation, or disposal of hazardous substances."[290] Under the House of Representatives version of CERCLA § 104(a)(3), the Administrator would have no authority to respond to a release of hazardous substances from a residential dwelling regardless of whether such a release occurred inside or outside the dwelling. As a result, if Congress had adopted the House of Representatives version, the Administrator would have been precluded from responding under CERCLA to internal or external lead-based paint hazards as well as to soil contaminated by residential lead-based paint.

The Conference Committee, in reconciling the Senate and House of Representatives versions of SARA, adopted the Senate version of § 104(a)(3) over the House of Representatives version.[291] In reconciling the two competing versions of the statutory provision, the Conference Committee had to squarely address the issue of whether CERCLA should apply to releases of hazardous substances from residential dwellings. The Conference Committee chose the narrower limitation which only precluded CERCLA response actions

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[286] Pub. L. No. 99-499, § 104(c), 100 Stat. 1613, 1618 (1986).
[287] S. REP. NO. 11, 99th Cong., 1st Sess. 16 (1985).
[288] *Id*. at 15-16.
[289] The House of Representatives version used "Administrator" instead of "the President."
[290] H.R. REP. NO. 253, Part V, 99th Cong., 1st Sess. 159 (1985).
[291] H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 190 (1986).

for releases within buildings from products within the structure of the building. The choice of the Conference Committee was subsequently adopted by the Congress and indicates that Congress intended CERCLA to regulate releases of hazardous substances from residential dwellings that are not part of the dwelling and not contained within the dwelling. As such, the legislative history of CERCLA § 104(a)(3) supports the interpretation that CERCLA may be used to regulate exterior lead-based paint as well as soil contaminated by residential lead-based paint.

C. Liability Under CERCLA § 107

To establish liability under CERCLA §107, a plaintiff must prove four elements:[292] (1) that the defendant is one of the four classes of persons described in CERCLA § 107(a);[293] (2) the site on which the hazardous substance is located is a "facility";[294] (3) a release or threatened release of a hazardous substance has occurred from the facility; and, (4) the release or threatened release has caused the plaintiff to incur response costs that were necessary and consistent with the National Contingency Plan (NCP).[295]

At Air Force housing, it is likely that the Air Force will be the only potentially responsible party under CERCLA § 107 for response costs associated with the remediation of residential lead-based paint hazards because it is unlikely that there are other past "owners" and "operators" who could share liability. In addition, it is unlikely that the vendors who sold the lead-based paint to the military would be liable because they "arranged for the disposal" of a hazardous substance. Courts have refused to extend CERCLA § 107 liability this far, generally concluding that the "sale of a product which

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[292] 42 U.S.C. § 9606(a) (1994) (Defenses are limited to those outlined in 42 U.S.C. § 9607(b) (1994)) (an act of God; an act of war; or act or omission by a limited class of third parties).

[293] 42 U.S.C. § 9607(a) (1994). The four classes of persons are:

> (1) the owner and operator of a vessel or facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances . . . at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sits.

[294] 42 U.S.C. § 9601(9) (1994) defines facility as "(A) any building, structure, installation, equipment, pipe . . . (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."

[295] For response costs incurred by the United States government, response actions must be necessary and not inconsistent with the NCP. 42 U.S.C. § 9607(a)(4)(A) (1994).

contains a hazardous substance cannot be equated to the disposal of the hazardous substance itself or even the making of arrangements for its subsequent disposal. [Otherwise] the sale of an automobile would be the disposal of a hazardous substance."[296] Under CERCLA § 107, DOD is likely to be the sole potentially responsible party. However, liability for lead-based paint hazards is not a foregone conclusion, as some provisions of CERCLA limit the scope of CERCLA § 107.

[296] G.L. Leasing Co., Inc. v. Union Elec. Co., 54 F.3d 379, 384 (7th Cir. 1995); Dayton Indep. School Dist. v. U.S. Mineral Prod., 906 F.2d 1059, 1065 (5th Cir. 1990) (holding "[i]t is clear that Congress did not intend CERCLA to target legitimate manufactures or sellers of useful products.… The sale of asbestos-containing products for useful consumption is not the 'arranging for disposal' of a hazardous substance at a 'facility.'"); *see also* 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1358-9 (9th Cir. 1990) (explaining "no federal court which has considered the placement of asbestos as part of the structure of a building has concluded that it falls within the scope of Section 107(a)."), *cert. denied*, 500 U.S. 917 (1991). If placement of asbestos in a building is not disposal of a hazardous substance, then painting a structure with lead-based paint should likewise not be considered as disposal.

1. Facilities and Consumer Products

There is a split among United States Courts of Appeals regarding what constitutes a release or threatened release from a "facility" when such a release involves a consumer product, like lead-based paint. The definition of "facility" specifically excludes "any consumer product in consumer use."[297] In *Electric Power Bd. of Chattanooga v. Westinghouse Elec. Corp.*,[298] the United States District Court for the Eastern District of Tennessee used the consumer products exemption to dismiss a CERCLA § 107 claim even though a hazardous substance (*i.e.*, PCBs) had been released into the environment.[299] The court held that the transformer which leaked PCBs when a nearby piece of electrical equipment exploded was a commercial product in commercial use, and therefore not a "facility."[300] Because the PCBs were not released from a facility, there was no liability under CERCLA § 107.

In asbestos cases, courts are split concerning whether structures containing asbestos are "facilities" under CERCLA. Some courts have concluded they are not. In *Kane v. United States*,[301] the plaintiff sued the United States under CERCLA after discovering the house which they purchased from the Veteran's Administration contained asbestos.[302] The Court of Appeals for the Eighth Circuit held that the plaintiff's property was not a facility because it "was a consumer product in consumer use and thus exempt under CERCLA."[303] In *Dayton Indep. School Dist. v. U.S. Mineral Prod. Co.*,[304] the Court of Appeals for the Fifth Circuit held that the building "into which the asbestos-containing material [was] installed, constitute[s] 'useful consumer products' within the meaning of the statute" and therefore was not a facility.[305]

Other courts have reached the opposite conclusion.[306] In *California v. Blech*,[307] a tenant brought suit against the landlord for costs of cleaning up

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[297] 42 U.S.C. § 9601(9) (1994).
[298] 716 F.Supp. 1069 (E.D. Tenn. 1988).
[299] *Id.* at 1079. *But see* KN Energy, Inc. v. Rockwell Int'l., Corp., 840 F.Supp. 95 (D.Colo. 1993) (holding pipeline and natural gas facilities are not consumer products because the consumer products exemption was intended to cover individual consumers, not businesss); Reading Co. v. City of Philadelphia, 823 F.Supp. 1218 (E.D. Pa. 1993) (stating railroad car leaking PCBs was not a consumer product).
[300] 716 F.Supp. at 1080.
[301] 15 F.3d 87 (8th Cir. 1994).
[302] *Id*.
[303] *Id*. at 89.
[304] 906 F.2d 1059 (5th Cir. 1990).
[305] *Id*. at 1065.
[306] Yellow Freight Sys., Inc. v. ACF Indus., Inc., 909 F.Supp. 1290, 1296 (E.D. Mo. 1995) (stating "[s]tructures containing asbestos building materials satisfy the broad definition of 'facility' in CERCLA."); National R.R. Passenger Corp., v. New York City Hous. Auth., 819 F.Supp. 1271 (S.D.N.Y. 1993) (holding that buildings containing asbestos are facilities for CERCLA purposes).

asbestos dust accidentally released during a fire.[308] Although ultimately dismissing the suit, the Court of Appeals for the Ninth Circuit held that "structures containing asbestos building material as distinguished, for example, from containers of such materials for consumer use, satisfy the broad definition of 'facility' in CERCLA section 101(9)."[309] In *C.P. Holdings, Inc. v. Goldberg-Zoino and Assocs., Inc.*,[310] the United States District Court for New Hampshire held that the defendant's "second argument, that the building itself is a consumer product for the purposes of CERCLA is equally without merit."[311]

Based on the foregoing case law, it is uncertain whether a house painted with lead-based paint would be considered a "facility." If a court follows the reasoning in *Dayton Indep. School Dist.* and *Kane*, a house painted with lead-based paint would be considered a consumer product in consumer use and therefore not a facility. As such, any release or threatened release of lead-based paint from a home would not constitute a release or threatened release from a facility and therefore no liability would attach under CERCLA §107. However, if a court follows the reasoning in *Blech* and *CP Holding*, a house would be a facility (*i.e.*, not a consumer product) and CERCLA § 107 liability would attach. In *ABD Assocs. Ltd. Partnership*, the United States District Court for the Middle District of North Carolina did not analyze the issue of whether a building coated with lead-based paint was a consumer product. Instead, the court summarily concluded that it "is undisputed that the site in question is a 'facility' as defined by 42 U.S.C. § 9601(9)."[312]

2. Threshold Quantity

Although courts have not imposed a threshold quantity or concentration limit for the terms "hazardous substance" and "release" under CERCLA § 104, some courts have held that the "necessary response cost" language of CERCLA § 107 does impose such a requirement.[313] In *Amoco Oil Co., Inc.. v.*

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[307] 976 F.2d 525 (9th Cir. 1992).
[308] *Id*. at 526.
[309] *Id*. at 527.
[310] 769 F.Supp. 432 (D.N.H. 1991).
[311] *Id*. at 439.
[312] ABD Assocs. Ltd. Partnership v. American Tobacco Co., 1995 U.S.Dist LEXIS 11094, *11 (M.D.N.C. 1995).
[313] Stewman v. Mid-South Wood Prod. of Mena, Inc., 993 F.2d 646, 649 (8th Cir. 1993) (explaining "a 'factual inquiry' is required in order to determine whether the particular hazard justifies any response action."); United States v. Alcan Aluminum Corp., 964 F.2d 252, 266 (3rd Cir. 1992) (stating "the Government must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs."); Jastram v. Phillips Petroleum Co., 844 F.Supp. 1139 (E.D. La. 1994); *but see* United States v. Western Processing Co., Inc., 734 F.Supp. 930 (W.D. Wash. 1990).

Borden, Inc.,[314] the Court of Appeals for the Fifth Circuit held that response costs are necessary only if they remediate "a release threatening the public health or the environment."[315] The court went on to explain that any release threatens the public health and the environment if it violates "any applicable state or federal standard."[316] Response costs for releases which do not violate a federal or state standard are not necessary and therefore not recoverable under CERCLA § 107. For lead-based paint hazards, EPA's screening level for lead concentration in residential soil is 400 ppm.[317] There is no generally applicable, quantitative federal standard which requires the remediation of interior or exterior lead-based paint.

D. EPA Guidance

EPA's guidance concerning lead-based paint hazards has been somewhat contradictory. Two EPA guidance documents indicate that soil contaminated by lead-based paint may be remediated under CERCLA.[318] However, one guidance document implies just the opposite.[319]

1. OSWER Directive No. 9355.4-12: Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities.

OSWER Directive No. 9355.4-12, dated July 14, 1994, is EPA's current guidance on lead contaminated soils at NPL sites, and it recommends a screening level of 400 ppm for residential land use.[320] For lead contamination below this level, a response under CERCLA is generally not recommended.[321] However, for lead concentrations which are greater than 400 ppm and pose a health risk, Directive No. 9355.4-12 recommends that the soil be remediated.[322] This recommendation does not consider the source of the lead in the soil. If lead is present in the soil at an NPL site in concentrations greater than 400 ppm, Directive No. 9355.4-12 recommends that it be addressed under CERCLA. Directive No. 9355.4-12 does not distinguish between soil contaminated by lead-based paint and soil contaminated by another source of lead.

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[314] 889 F.2d 664 (5th Cir. 1989).
[315] *Id*. at 670.
[316] *Id*. at 671.
[317] OSWER Directive, No. 9355.4-12, Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facility.
[318] *Id*.; Guidance on Identification of Lead-Based Paint Hazards, 60 Fed. Reg. 47248 (1995).
[319] OSWER Directive, No. 9360.0-19, Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent-Setting Issues.
[320] OSWER Directive No. 9355.4-12, Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facility.
[321] *Id*.
[322] *Id.*

Directive No. 9355.4-12 also asserts that EPA has authority to remediate exterior lead-based paint under CERCLA. However, the Directive states that exterior lead-based paint should be remediated "only in conjunction with soil."[323] The reason for this limitation is not provided in the text. On one hand, EPA is clearly indicating that it has authority under CERCLA to address exterior lead-based paint. However, EPA is also clearly recommending that this authority not be exercised to the maximum extent possible. This constraint may be based on EPA's reluctance to take enforcement actions against owners of residential property.[324]

Finally, the Directive acknowledges that "interior exposures from interior paint generally are not within the jurisdiction of . . . CERCLA." [325]

2. Guidance on Identification of Lead-Based Paint Hazards[326]

Under Title X, EPA is required to identify residential lead-based paint hazards.[327] On July 14, 1994,[328] EPA issued interim guidance concerning these hazards and explicitly stated that the guidance was "not to be applied in addressing potential threats from lead at CERCLA and RCRA Corrective Action sites. Guidance developed by the Office of Solid Waste and Emergency Response is the appropriate tool for addressing these types of sites."[329] Thus, the interim guidance for Title X also acknowledges EPA's authority under CERCLA to address lead-based paint hazards at NPL sites.

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[323] *Id*.

[324] OSWER Directive, No. 9834.6, Policy Towards Owners of Residential Property at Superfund Sites. "EPA, in the exercise of its enforcement discretion, will not take enforcement action against an owner of residential property to require such owner to undertake response actions or pay response costs, unless the residential homeowner's activities lead to a release or threatened release of hazardous substances, resulting in the taking of response action at the site."

[325] OSWER Directive, No. 9355.4-12, Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facility. The Directive also states "CERCLA [has] very limited authority regarding the clean up of interior paint." Apparently, the use of the terms "generally" and "limited" refers to CERCLA § 104(a)(4), which gives the President the discretion to respond to a release or threatened release of a hazardous substance that constitutes a public health or environmental emergency. However, this is not stated in the Directive. Absent CERCLA § 104(a)(4) authority, a review of case law reveals that EPA has no authority to remediate interior lead-based paint under CERCLA.

[326] 60 Fed. Reg. 47248 (1995).

[327] 15 U.S.C. § 2683 (1994).

[328] The interim guidance was republished on Sept. 11, 1995, 60 Fed. Reg. 47248 (1995).

[329] 60 Fed. Reg. 47248, 47249 (1995).

3. OSWER Directive No. 9360.0-19, Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent-Setting Issues.

Headquarters EPA issued OSWER Directive No. 9360.0-19 to the Regional Offices to control nationally significant or precedent-setting removal actions at non-NPL sites. Directive No. 9360.0-19 required Headquarters EPA concurrence before a Regional Office could proceed with certain categories of removal actions. One such category was "[r]emoval actions at sites involving releases from consumer products in consumer uses (*e.g.*, lead-contaminated soil resulting from peeling lead-based paint on houses)."[330] Directive No. 9360.0-19 went on to explain that "[Head Quarter] concurrence will ensure that the Agency avoids a commitment to the cleanup of widespread non-point source contamination that is beyond the intended scope of CERCLA."[331] Directive No. 9360.0-19 clearly implies that EPA, in 1989,considered the remediation of soil contaminated by residential lead-based paint beyond the scope of CERCLA.[332]

E. Past Practices - Records of Decisions (ROD)

According to EPA, "[l]ead is commonly found at hazardous waste sites and is a contaminant of concern at approximately one-third of the sites on the National Priority List."[333] Yet, a search of LEXIS' ENVIRN-ROD database and WESTLAW's EDR-ROD database revealed no RODs addressing exterior lead-based paint or soil contaminated by residential lead-based paint.[334] One ROD specifically excluded soil which had been contaminated by residential lead-based paint. The Commencement Bay - Nearshore/Tideflats ROD, dated June 1993, addressed an NPL site encompassing an area of approximately one mile radius around a lead smelter.[335] The NPL site was primarily residential and included approximately 1,820 housing units.[336] In response to a public

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[330] OSWER Directive, No. 9360.0-19, Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent-Setting Issues.

[331] *Id.*

[332] Although the scope of Directive No. 9360.0-19 is limited to removal actions at non-NPL sites, the underlying rational for the policy (*i.e.*, that lead-contaminated soil resulting from peeling lead-based paint on houses is beyond the intended jurisdiction of CERCLA) would seem to be equally applicable to all response actions at NPL sites.

[333] OSWER Directive, No. 9355.4-02, Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites.

[334] The ROD for the National Zinc Corporation site (an area within a three mile radius of the smelting facilities, including residential properties) in Bartlesville, Oklahoma, recognized lead "may also have other non-smelter related sources in a typical urban environment", and acknowledged that "peeling or chalking lead-based paint" from homes may be an important exposure pathway. However, the ROD did not attempt to differentiate the lead contamination due to residential lead-based paint.

[335] Commencement Bay-Nearshore/Tideflats ROD, June, 1993.

[336] *Id.*

comment concerning the cleanup of lead contamination in soils, the ROD stated:

> It is possible that some exceedances of 500 ppm soil lead may occur in the Study Area unrelated to releases from the Asarco smelter. Under this remedial action, EPA will take or compel remedial actions at the site that address current contamination from smelter operations and releases, but not similar contamination resulting from other sources, such as lead-based paints or automotive emissions, that are widespread. The Superfund law limits the extent to which EPA can address releases from these other sources (see CERCLA § 101(22) and § 104(a)(3)).[337]

In this ROD, Region X stated that a response action for soils contaminated with residential lead-based paint was outside the scope of CERCLA. This assertion is consistent with OSWER Directive No. 9360.0-19 but contrary to the legal position outlined the following year in OSWER Directive No. 9355.4-12. Obviously, one of the two legal positions is mistaken concerning the intended scope of CERCLA.

F. Specific Statute Excluding a General Statute

As a general rule of statutory construction, "when two statutes arguably apply to the same subject matter, the more specific statute applies to the exclusion of the general statute."[338] Because the Lead-Based Paint Poison Prevention Act (as amended by Title X) and CERCLA potentially apply to Air Force residential lead-based paint hazards, it is arguable the specific lead-based paint statute excludes the general statute. However, the aforementioned rule of statutory construction is contrary to "the cardinal principle of statutory construction that repeals by implication are not favored."[339] As a result, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective."[340] Thus, absent clear congressional intent, courts are required to regard both the Lead-Based Paint Poisoning Prevention Act and CERCLA as applicable to Air Force lead-based paint hazards.

However, courts need not struggle with the doctrine of repeal by implication in the context of residential lead-based paint hazards. Congress has explicitly allowed EPA to regulate lead-based paint hazards by stating "[t]his section may not be construed to affect the responsibilities of the Environmental Protection Agency with respect to the protection of the public

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[337] *Id.*
[338] AMREP Corp. v. F.T.C., 768 F.2d 1171, 1176 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986).
[339] United States v. Continental Tuna Corp., 425 U.S. 164 (1976).
[340] Morton v. Mancari, 417 U.S. 535 (1974).

health from hazards posed by lead-based paint."[341] Thus, even though the provisions of the Lead-Based Paint Poison Prevention Act and CERCLA may at times overlap, the plain language of the Lead-Based Paint Poisoning Prevention Act makes it unlikely that a court will conclude that Congress intended it to preclude the application of CERCLA to residential lead-based paint hazards.

G. CERCLA Conclusion

Based on the broad statutory language of CERCLA and the expansive interpretation given to it by federal courts, it appears CERCLA § 104 response authority (and possibly CERCLA § 107 liability) extends to exterior lead-based paint and soil contaminated by residential lead-based paint. However, it is also appears that EPA has been extremely reluctant to use this authority. Until Region IX singled out the Department of the Army at the Presidio, EPA has never tried to use CERCLA to address residential lead-based paint hazards at NPL sites. The question becomes whether the Air Force, as the lead agency at Air Force sites, should do so now.

OSWER Directive No.9355.4-12, *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities*, and the interim guidance for Title X both recommend that lead-based paint hazards be addressed under CERCLA at NPL sites. Because EPA guidance is applicable to the Air Force via CERCLA § 120(a), it would appear the Air Force should use CERCLA to address residential lead-based paint hazards at NPL sites.

However, CERCLA § 120(a) also states that federal agencies "shall be subject to, and comply with [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity."[342] When Congress enacted CERCLA § 120, it was clearly concerned about federal facilities being held to a double standard. Yet, EPA is apparently promoting this type of double standard. EPA appears to be trying to hold federal facilities to a higher standard regarding the remediation of residential lead-based paint hazards at NPL sites. The Air Force, as the lead agency, has an obligation to resist the imposition of double standards and should try to ensure that federal facilities comply with CERCLA to the same extent as any non-governmental entity. As such, the Air Force should not follow EPA guidance documents which recommend addressing residential lead-based paint hazards under CERCLA at NPL sites, but instead follow the precedent established by years of EPA enforcement. The Air Force should not use CERCLA to remediate residential lead-based paint hazards until EPA consistently uses CERCLA to address residential lead-based paint hazards at non-governmental NPL sites. Instead, the Air Force should continue to

[341] 42 U.S.C. § 4822(g) (1994).
[342] 42 U.S.C. § 9620(a)(1) (1994).

identify, evaluate, control and eliminate lead-based paint hazards in accordance with its established lead-based paint policy[343] as this policy has proven to be effective.

VI. STATE LEAD-BASED PAINT PROGRAMS

In 1978, President Carter signed Executive Order No. 12,088[344] which required all federal facilities to comply with "applicable pollution control standards," including state and local pollution control standards.[345] As a result of Executive Order No. 12,088, federal facilities are required to comply with state and local lead-based paint laws. According to Executive Order No. 12,088, if an Executive agency is notified by a state or local agency that it is in violation of a pollution control standard, "the Executive agency shall promptly consult with the notifying agency and provide for its approval a plan to achieve and maintain compliance with the applicable pollution control standard."[346] However, Executive Order No. 12,088 is not enforceable by any party, including federal or state agencies, and does not provide for sanctions for noncompliance.[347] As a result, federal facilities did not vigorously implement the Executive Order. Regardless of whether Executive Order No. 12,088 is enforceable, federal facilities are still obligated to abide by its provisions and comply with state and local lead-based paint laws.[348]

Although state and local agencies may not enforce Executive Order No. 12,088, such agencies may enforce their laws and regulations against federal facilities if Congress has enacted a valid waiver of sovereign immunity.

A. Sovereign Immunity

The doctrine of sovereign immunity has been traced to the English concept of royal supremacy, *i.e.*, "the king can do no wrong."[349] Because the king could do no wrong, he could not be sued under English common law

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[343] A.F. Lead Paint Policy, *supra* note 10, Attach. 1, ¶ 6.a.
[344] Exec. Order No. 12,088, 3 C.F.R. 243 (1979).
[345] *Id*.
[346] *Id*. at 1-601.
[347] Exec. Order No. 12580, 3 C.F.R. 193 (1988). Exec. Order No. 12,580 amended Exec. Order 12,088 by renumbering the current section 1-802 as 1-803, and adding the following as 1-802: "Nothing in this Order shall create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."
[348] The relationship between Exec. Order No. 12,088 and the discretionary function exception to the Federal Tort Claims Act is discussed *infra* note 422.
[349] Note, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263, 263 (1994) (citing WILLIAM BLACKSTONE, COMMENTARIES 238-39).

without his consent.[350] Courts in the United States adopted the doctrine of sovereign immunity even though the country has never had a sovereign.[351] Courts did so by imputing the king's sovereignty "to the United States government because [the government] is the institutional descendant of the Crown."[352] As such, the United States government, including its departments, agencies and instrumentalities, may not be sued without a valid waiver of sovereign immunity. However, "[w]riting an effective waiver of sovereign immunity is one of Congress' more daunting challenges."[353] The "Supreme Court has repeatedly taken the position that any such waivers must be 'clear and unequivocal'[354] in their statutory text[355] with any ambiguity being resolved in favor of the government (*i.e.* that there is no waiver)." [356] For example, in *United States Department of Energy v. Ohio,* the Supreme Court narrowly interpreted the waiver of sovereign immunity in the Resource Conservation and Recovery Act (RCRA) and held that the statute did not waive sovereign immunity for punitive fines.[357] In response, Congress, in an effort to make the waiver of sovereign immunity "as clear and unambiguous as humanly possible,"[358] passed the Federal Facilities Compliance Act of 1992[359] which, *inter alia*, broadened RCRA's waiver of sovereign immunity to include punitive fines.[360] The waiver of sovereign immunity in RCRA was apparently used as a pattern for the waiver of sovereign immunity in Title X.

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[350] Randall S. Abate and Carolyn H. Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENVTL. L.J. 1, 4 (1995)

[351] Note, *supra* note 349, at 263.

[352] *Id.*

[353] LAURENT R. HOURCLÉ, FEDERAL FACILITIES 7 (1997).

[354] Hancock v. Train, 426 U.S. 167 (1976); Ruckelshaus v. Sierra Club 463 U.S. 680 (1983); United States v. Nordic Village, Inc., 503 U.S. 30 (1992); and United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992).

[355] 503 U.S. at 37 (stating "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.").

[356] 503 U.S. at 615 ("Waivers of immunity must be 'construed strictly in favor of the sovereign' [citation omitted] and not enlarge[d] . . . beyond what the language requires."); Hourclé, *supra* note 353, at 7-8 (1997).

[357] 503 U.S. at 611. The Supreme Court also held that the waiver of sovereign immunity in the Clean Water Act did not subject the government to liability for civil fines for past violations of the Clean Water Act.

[358] Daniel Horne, *Federal Facility Environmental Compliance After United States Department of Energy v. Ohio*, 65 COLO. L. REV. 632, 638 (1994).

[359] Pub. L. No. 102-386, § 102(a), 106 Stat. 1505 (1992) (codified at 42 U.S.C. § 6961(a) (1994)).

[360] 42 U.S.C. § 6961(a) (1994).

B. Sovereign Immunity and Lead-Based Paint

Title X includes a waiver of sovereign immunity which subjects both federal property and federal actions[361] to "all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting lead-based paint, lead-based paint activities, and lead-based paint hazards in the same manner, and to the same extent as any nongovernmental entity is subject to such requirements."[362] While the lead-based paint waiver of sovereign immunity was patterned after RCRA's waiver, it is different in that it does not require federal facilities to be treated in the same manner as state or local governmental agencies.[363] The lead-based paint waiver only requires federal facilities to be treated as any other "nongovernmental entity." As such, state or local governments may exempt themselves from certain lead-based paint provisions and yet still require federal agencies to comply with those provisions.

The lead-based paint waiver of sovereign immunity is applicable to federal agencies "(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a lead-based paint hazard."[364] Because the Air Force has jurisdiction over its housing, Air Force housing falls squarely within the scope of the lead-based paint waiver of sovereign immunity. As such, the Air Force is subject to sanctions for not complying with state and local requirements regarding "lead-based paint, lead-based paint activities and lead-based paint hazards."[365] Such requirements may be substantive or procedural and may include any requirement for certification, licensing, record keeping or reporting.[366] As a result, it is difficult to imagine a generally applicable state or local lead-based paint program which would not be included in this expansive waiver of sovereign immunity.

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[361] Sovereign immunity is only waived for actions which result, or may result in, a lead-based paint hazard. 15 U.S.C. § 2688 (1994).
[362] 15 U.S.C. § 2688 (1994).
[363] The waiver of sovereign immunity in RCRA requires federal facilities to be subject to state and local requirements to the same extent as any person is subject to such requirements. 42 U.S.C. § 6961(a) (1994). Because RCRA's definition of "person" includes states, political subdivisions of states and municipalities, federal facilities must only comply with state and local laws to the same extent as governmental entities.
[364] 15 U.S.C. § 2688 (1994).
[365] *Id*.
[366] *Id*.

C. State Lead-Based Paint Programs[367]

Faced with possible fines and injunctions, Air Force installations must be cognizant of state and local lead-base paint programs. States have responded to the hazards associated with lead-based paint with a variety of programs. Although some states have failed to enact any laws regarding residential lead-based paint,[368] most states regulate residential lead-based paint in some manner. However, state lead-based paint programs vary widely and range from comprehensive programs requiring abatement, to programs which merely provide information to the general public concerning the dangers posed by residential lead-based paint. The lead-based paint laws from Massachusetts, Illinois and California are discussed below as a representative sample of state lead-based paint programs which may affect Air Force installations.

1. The Massachusetts Lead-Based Paint Program[369]

Massachusetts has one of the oldest and most comprehensive lead-based paint programs in the country. Massachusetts enacted its first lead-based paint statute in 1971.[370] The statute established a lead-based paint program that was broad in scope and required, *inter alia*, reporting by physicians of lead poisoning in children,[371] a public information program to promote awareness concerning the danger of lead poisoning,[372] a program to detect the sources of lead poisoning,[373] and the establishment of a state laboratory to test samples and specimens for lead.[374] The program also required that "[w]henever a child or children under six years of age resides in any residential premises in which any paint, plaster or other accessible materials contain dangerous levels of lead …the owner shall remove or cover said paint, plaster or other material so as to make it inaccessible to children under six years of age."[375] The statute specifically excluded repainting with non-lead-based paint as a means of

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[367] Title X explicitly allows states to regulate lead-based paint and impose more stringent requirements. 15 U.S.C. § 2685(e) (1994). In addition, states may administer and enforce the federal lead-based paint training and certification program (15 U.S.C. § 2682) and the lead hazard information pamphlet program (15 U.S.C. § 2686). 15 U.S.C. § 2684 (1994). However, state programs to implement these federal programs are not discussed in this section.

[368] Alabama, Alaska, Colorado, Florida, Hawaii, Idaho, Kansas, Mississippi, Montana, Nevada, New Mexico, North Dakota, South Dakota, Tennessee, Utah, Washington, West Virginia and Wyoming.

[369] MASS. GEN. LAWS ANN. ch. 111, §§ 89A-199B (West 1996).

[370] 1971 Mass. Acts 1076-82.

[371] 1971 Mass. Acts 1077 (codified at MASS. GEN. LAWS ANN. ch. 111, § 191 (West 1996)).

[372] *Id*. (codified at §192).

[373] *Id*. at 1078 (codified as amended at § 194).

[374] *Id*. at 1079 (codified as amended at § 195).

[375] *Id*. at 1080 (codified as amended at § 197).

complying with the statute.[376] By requiring abatement or covering of lead-based paint hazards in private homes, Massachusetts' program greatly exceeded any federal requirement. However, Massachusetts' program did not have the far reaching impact intended. For example, "between 1981 and 1986, only 2260 of 450,339 lead-contaminated units in the selected area were abated. The limited success of the regulatory program [was] attributed to 'organized opposition from real estate interests and limited funding for enforcement.'"[377] Even though most owners of property were not complying with Massachusetts law, in fiscal years 1992 and 1993, Hanscom Air Force Base, Massachusetts, removed all lead-based paint in base housing at a cost of $6.3 million.[378]

In 1993, Massachusetts amended and expanded its lead-based paint program.[379] However, the most notable change scaled back the abatement provisions and allowed owners to "contain" lead-based paint hazards by painting over such hazards with non-lead-based paint which had been approved by the state for such use.[380]

Massachusetts' current lead-based paint program requires sellers to notify prospective purchasers of lead-based paint hazards,[381] requires the use of state certified contractors for lead-based paint abatement,[382] requires owners to notify the local board of health before beginning lead-based paint abatement work,[383] and requires a licensed inspector to perform a post-abatement inspection and issue a letter of full compliance.[384] In addition, Massachusetts' program imposes strict liability on the owner of any premises for damages to a child under six years of age for lead-poisoning caused by failure to comply with the lead-based paint abatement provisions.[385]

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[376] *Id*.

[377] Note, *Recent Development: Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265, 267 (1994).

[378] Telephone interview with First Lieutenant Brian W. MacDonald, Lead-Based Paint Officer, Hanscom Air Force Base, Massachusetts (Jun. 23, 1997).

[379] 1993 Mass. Acts 1422-1442.

[380] *Id*. at 1426, 1423 (codified at MASS. GEN. LAWS ANN. Ch. 111, §§ 89A and 197 (West 1996).

[381] *Id*. § 197A.

[382] *Id*. § 197(d).

[383] *Id*. § 197(c).

[384] *Id*.

[385] *Id*. § 199. Owners with letters of compliance are not strictly liable for damages caused by lead poisoning. Under the Federal Tort Claims Act (FTCA), the Air Force may liable for damages due to the negligence of its employees acting within the scope of their employment. 28 U.S.C. 1346(b) (1994). The Air Force may not be held strictly liable under the FTCA. However, violating a state statute may be evidence of negligence.

2. The Illinois Lead-Based Paint Program[386]

The Illinois lead-based paint program is not as extensive as the Massachusetts program. Illinois' program was first enacted in 1973[387] and significantly amended in 1991[388] and 1995.[389] The most important facet of Illinois' program is the requirement that physicians "screen children 6 months to 6 years of age for lead poisoning who reside in an area defined as high risk."[390] If a child is found to have an elevated blood lead level, the physician must make a report to the Illinois Department of Public Health.[391] Upon receipt of such a report, representatives from the Department of Public Health may inspect the child's dwelling.[392] If the inspection identifies a lead hazard,[393] the owner is required to mitigate the hazard.[394] A lead hazard is deemed to have been mitigated if "the surface identified . . . is no longer in a condition that produces a hazardous level of leaded chips, flakes, dust . . . that can be ingested or inhaled by humans,"[395] or the lead coated surface is removed, covered or is no longer accessible by children.[396]

Illinois' program does not require the inspection or abatement of lead-based paint in housing unless a child has been identified as having an elevated blood lead level. This general approach has been referred to as the "canary in the coal mine" approach and has been criticized for using children as the indicator species.[397] However, Illinois' program also tries to prevent lead

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[386] ILL. COMP. ANN. STAT. ch. 410, ¶ 45/1 - 45/17 (Smith-Hurd 1993 and supp. 1997).
[387] 1973 Ill. Laws 1559-1562.
[388] 1991 Ill. Laws 1238-1245.
[389] 1995 Ill. Laws 3984-4000.

[390] ILL. COMP. ANN. STAT. ch. 410, ¶ 45/6.2 (Smith-Hurd 1993 and supp. 1997). A high risk area is defined as "an area in the State determined by the Department to be high risk for lead exposure for children under 6 years of age. The Department shall consider, but not be limited to, the following factors . . . age and condition of housing, proximity to highway traffic or heavy local traffic or both, percentage of housing determined as rental or vacant, proximity to industry using lead, established incidence of elevated blood lead levels in children . . ." *Id.* at ch. 410, ¶ 45/2. The stringency of the screening requirement was reduced in 1995. The 1991 amendment to paragraph 45/6.2 required physicians to screen all children for elevated blood lead levels from 6 months to 6 years of age. 1991 Ill. Laws 1238, 1240.

[391] ILL. COMP. ANN. STAT. ch. 410, ¶ 45/7 (Smith-Hurd 1993 and supp. 1997).

[392] *Id*. ¶ 45/8.
[393] Lead hazard is defined as "a lead bearing substance that poses an immediate health hazard to humans." *Id*. at ch. 410, ¶ 45/2.

[394] *Id*. ¶ 45/9.
[395] *Id*.
[396] *Id*.
[397] Mahoney, *supra* note 1, at 54. This approach has also been referred to as using children as "lead detectors."

poisoning rather than merely react to it by providing information to the general public about the hazards associated with lead-based paint.[398]

In addition, Illinois law provides that failure to remove a lead hazard which has been identified by the Department of Public Health is *prima facie* evidence of negligence.[399] This provision should be of concern to Air Force installations because the United States may be liable under the Federal Tort Claims Act for damages caused by the negligent acts or omissions of its employees.[400]

3. California's Residential Lead-Based Paint Program[401]

California enacted its first lead poisoning prevention act in 1986.[402] Although the program was amended in 1989[403] and recodified in 1995, it has changed little since 1986. California's program does not require the inspection or abatement of lead-based paint hazards. Instead, the program focuses on studying California's lead poisoning problem,[404] developing a blood lead screening program,[405] and requiring laboratories to report elevated blood levels.[406] However, the California statute does allow for the promulgation of regulations which would govern "the abatement of lead paint in and on housing, including, but not limited to, standards for enforcement, testing, abatement and disposal."[407] These regulations have not been promulgated as of yet. If these regulations are ever promulgated, they may have a significant impact on abatement activities at Air Force installations located in California.

D. Tort Implications

Under the Federal Tort Claims Act (FTCA), the United States may be liable for damages caused by the negligent acts or omissions of its employees acting within the scope of their employment.[408] However, the waiver of sovereign immunity in the FTCA is subject to the discretionary function exception.[409] Under the discretionary function exception, the United States

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[398] ILL. COMP. ANN. STAT. ch. 410, ¶ 45/14. (Smith-Hurd 1993 and supp. 1997).
[399] *Id*. ¶ 45/15.
[400] 28 U.S.C. § 1346(b) (1994).
[401] CAL. HEALTH & SAFETY CODE §§ 124125-165 (West 1996).
[402] 1986 Cal. Stat. 1794-1796.
[403] 1989 Cal. Stat. 6491-6493.
[404] CAL. HEALTH & SAFETY CODE §§ 124125, 124135 (West 1996).
[405] *Id*. §§ 124140, 124155, 124160.
[406] *Id.* § 124130.
[407] *Id*. § 124160.
[408] 28 U.S.C. § 1346(b) (1994).
[409] 28 U.S.C. § 2680(a) (1994) (The government may not be held liable under the FTCA for claims "based upon the exercise or performance or the failure to exercise or perform a

may not be liable for damages resulting from a decision that is committed to the discretion of a federal agency or employee.[410] The FTCA does not define "discretionary function." However, the Supreme Court in *United States v. Gaubert*[411] outlined a two-part test to determine the applicability of the discretionary function exception.[412] First, the discretionary function "exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'"[413] Second, the action must be "of the kind that the discretionary function exception was designed to shield. . . . [That is,] legislative and administrative decisions grounded in social, economic, and political policy."[414] If a federal action satisfies both parts of the *Gaubert* test, the discretionary function exemption precludes the United States from being held liable under the FTCA.

In 1996, in *Angle v. United States*,[415] the Court of Appeals for the Sixth Circuit, in an unpublished opinion, relied on the discretionary function exception and held that the Air Force was not liable under the FTCA for "failure to remove lead-based paint from military housing or to warn residents of the dangers of such paint."[416] The court found that the base commander's decision to control lead-based paint hazards by encapsulation (*i.e.*, painting over lead-base paint with non-lead paint) was a policy decision that fell within the discretionary function exemption.[417] While the *Angle* decision was a clear victory for the Air Force, it has little value in current lead-based paint litigation[418] because the cause of action in *Angle* arose prior to the enactment of Title X and the implementation of the current Air Force lead-based paint policy.[419] Both Title X and the current Air Force lead-based paint policy may negate the discretionary function exception in lead-based paint cases.

To fall within the first part of the discretionary function test, agency action must "involve[] an element of judgment or choice."[420] "[W]hen a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow,"[421] the discretionary function exception does not

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discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.").

[410] *Id*.

[411] 499 U.S. 315 (1991).

[412] *Id*. at 322-23.

[413] *Id*. at 322.

[414] *Id*. at 322-23.

[415] No. 95-1015, 1996 WL 343531 (6th Cir. Jun. 20, 1996).

[416] *Id*.

[417] *Id*.

[418] Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case.

[419] Angle v. United States, 931 F.Supp. 1386 (W.D. Mich. 1994) (Cause of action arose between March, 1989 and January, 1991).

[420] Berkovitz v. United States, 486 U.S. 531, 536 (1988).

[421] *Id*.

apply.[422] The lead-based paint waiver of sovereign immunity prescribes just such a course of action by requiring federal agencies to "comply with all Federal, State, interstate, and local requirements . . . respecting lead-based paint, lead-based paint activities, and lead-based paint hazards."[423] Because the lead-based paint waiver of sovereign immunity imposes a specific, mandatory duty to abide by state lead-based paint laws, failure to do so may negate the discretionary function exception and subject the Air Force to tort suits under the FTCA.

In addition, the Air Force lead-based paint policy establishes mandatory duties regarding lead-based paint which may also negate the discretionary function exception. In *Pierre v. United States*,[424] the United States District Court for Massachusetts held that HUD was liable for failing to remove lead-based paint from a home as required by HUD regulations.[425] The court found that the decision not to remove the lead-based paint from the home was not a discretionary decision beyond the reach of the FTCA.[426] The court stated that

> the decision by the Secretary of HUD to implement a particular policy of lead-based paint removal falls within the discretionary function exemption of the FTCA. . . . [But], [t]he regulations and manuals which implement HUD's lead-based paint removal policy do not contemplate a policy-making discretionary function for those at the operational or implementational level."[427]

As such, failure to properly implement the Air Force lead-based paint policy may eliminate the discretionary function exception and subject the Air Force to tort actions under the FTCA.

The lead-based paint waiver of sovereign immunity and the Air Force lead-based paint policy may have eliminated the discretionary function exception for many lead-based paint tort cases. As such, the Air Force may be liable for negligent acts or omissions involving lead-based paint if those acts or omissions violate state law or Air Force policy.

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[422] Exec. Orders may eliminate the discretionary function exemption. The Court of Appeals for the Ninth Circuit held that Exec. Order No. 11,258 "constitute[d] a specific and mandatory direction . . . to provide secondary treatment for waste" and thereby prevented the application of discretionary function exception. Starrett v. United States, 847 F.2d 539, 541 (9th Cir. 1988). However, no case has held that Exec. Order No. 12,088, discussed in Part VI of this article, eliminates the discretionary function exception. In the context of lead-based paint and the discretionary function exception, Exec. Order No. 12,088 is largely irrelevant due to the expansive lead-based paint waiver of sovereign immunity.

[423] 15 U.S.C. § 2688 (1994).

[424] 741 F.Supp. 306 (D. Mass. 1990).

[425] *Id*. at 309-10.

[426] *Id*. at 309.

[427] *Id*. at 319.

E. Review of State Lead-Based Paint Programs

State lead-based paint programs range from stringent to non-existent and are subject to change at any time by the state legislature. As such, the impact of state lead-based paint programs on Air Force installations will vary from state to state over time. However, the expansive lead-based paint waiver of sovereign immunity necessitates that Air Force installations be mindful of state and local lead-based paint programs to avoid the possible imposition of sanctions as well as potential tort liability.

VII. CONCLUSION

Residential lead-based paint has been the subject of federal legislation since 1971. Yet, despite numerous statutes and amendments regulating lead-based paint, Air Force housing which is currently in use by Air Force personnel is only subject to RCRA, the disclosure rule, the training and certification rule for personnel engaged in lead-based paint activities, and applicable state requirements. Air Force housing which is being sold may be subject to additional inspection and abatement requirements. Despite the overall lack of federal regulation, the Air Force has developed an effective program to manage lead-based paint hazards. The incidence rate of elevated blood lead levels for children living on Air Force installations is 0.7 percent, well below the national average of 8.9 percent. Despite the adage "it is best not to fix things which are not broken," clearly implementation of the Air Force lead-based paint program could be improved. The forthcoming Air Force Instruction and Air Force Manual should distinguish between requirements and guidance, then allow each installation the flexibility to adopt a lead-based paint management plan which is best suited to its particular circumstances. In this way, installations will be given the information they need to develop effective, cost-conscious lead-based paint management plans.

Criminal Liability: Transferred and Concurrent Intent

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I. INTRODUCTION

A disgruntled military member comes into the base legal office, looking for his estranged wife. She is a witness in a pending court-martial against him. He finds her, shoots and kills her. He goes in search of another target, his aunt. He finds her in the trial counsel's office. He shoots at the trial counsel, intending to kill him, but trial counsel's quick dive behind his desk saves his life. The member then shoots at his aunt, intending to kill her as she huddles behind the door with her husband, who struggles to keep the office door from opening wide enough to let the member in. The member fires his weapon at them, trying to hit the couple through the 18 inch crack in the door. Fortunately for the aunt and her husband, he never really aims the weapon and after several attempted shots, the weapon jams. The member escapes, but is later caught. He is charged with, among other offenses, murder and three specifications of attempted murder; one for the attempt on trial counsel, one for the attempt on the aunt, and one for the attempt on the aunt's husband.[1]

Murder may be committed by someone who has a specific intent to kill, whether that specific intent to kill was premeditated or not.[2] Murder may also be committed by someone with no specific intent to kill, but who acts in a way which is inherently dangerous to others.[3] Attempted murder, because it is an attempt, always requires proof of a specific intent to kill.[4] In the scenario above, the member intended to kill his aunt, but did not intend to kill her husband. The husband just happened to be hiding behind the office door with his wife. Where is trial counsel's proof of the specific intent to kill the aunt's husband?

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[1] *See* United States v. Willis, 46 M.J. 258 (1997).

[2] *See* UCMJ art. 118(1) or (2) (1995).

[3] *See id.* art. 118(3); United States v. Berg, 30 M.J. 195 (C.M.A. 1990).

[4] *See* UCMJ art. 80 (1995); *See also* United States v. Carroll, 10 U.S.C.M.A. 16, 27 C.M.R. 90 (1958).

The answer lies in a legal fiction. As with any legal fiction, the idea is to permit prosecution, and conviction, of a person for what he or she intended to do. A fortuitous circumstance should not benefit a wrongdoer who was prevented from accomplishing his or her intended wrong. This is only fair. [5]

Many offenses require a specific intent to do some wrongful act.[6] Even if the underlying crime does not require proof of a specific intent, proving an attempt to commit a crime requires proof of a specific intent on the part of the wrongdoer.[7] This article looks at two theories of criminal liability; transferred and concurrent intent. These two theories are, in essence, legal fictions created to allow punishment for criminal culpability when an otherwise guilty party would escape punishment for his wrongful actions. This article also explores the differences between transferred and concurrent intent and offers practical suggestions for use of these theories.

II. TRANSFERRED INTENT

Criminal acts require a particular mental state or *mens rea*.[8] As Justice Jackson, speaking for the Court in *Morissette v. United States*, observed:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'"[9]

The mental element of a crime, the *mens rea*, may exist in varying degrees. A wrongdoer may specifically intend to commit a crime, or may engage in reckless misconduct resulting in criminal actions, or the wrongdoer's

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[5] *"In fictione juris semper aequitas existit"*–In the fiction of law there is always equity. BLACK'S LAW DICTIONARY 700 (5th ed. 1979).

[6] *See e.g.*, UCMJ art. 85 (1995) (desertion with intent to avoid hazardous duty or shirk important service); *Id.* art. 106 (spying); *Id.* arts. 118(1) and (2) (premeditated or intentional murder); *Id.* art. 121 (larceny); *Id.* art. 124 (maiming); *Id.* art. 128(4)(b) (assault with the intent to inflict grievous bodily harm).

[7] *Id.* art. 80.

[8] Dennis v. United States, 341 U.S. 494, 500 (1951); *see also* United States v. Freed, 401 U.S. 601, 613 (1971) (Brennan, J., concurring in judgment); United States v. Balint, 258 U.S. 250, 251-53 (1922); United States v. Anzalone, 43 M.J. 322 (1995).

[9] Morissett v. United States, 342 U.S. 246, 250-51 (1952) (footnotes omitted).

negligent misconduct may be criminally culpable.[10] Without evidence of some degree of *mens rea*, proof of, and conviction for, the criminal act charged would be impossible. There are, however, instances when a wrongdoer has an intent to commit a criminal act, but that intent is not effectuated. For example, a wrongdoer may intend to kill or harm a specific person, but instead harms or kills a different, unintended person. "The question of criminal liability when there has been an injury or killing of an unintended victim has bedeviled the commentators and the courts."[11] In some instances, the doctrine of transferred intent is applied to hold the wrongdoer criminally liable for his actions in killing or injuring the unintended victim.

"The common law doctrine of transferred intent was applied in England as early as the 16th century . . . and became part of common law in many American jurisdictions . . . ."[12] The doctrine of transferred intent exists when "a defendant, who intends to kill one person but instead kills a bystander, is deemed the author for whatever kind of homicide would have been committed had he killed the intended victim."[13] The legal fiction of transferred intent–transferring a wrongdoer's intent to kill one person to prove an intentional crime against another person–is necessary to avoid an otherwise unjust result.[14] Without being able to use the wrongdoer's specific intent to kill one person to punish the actual killing of an unintended victim, the wrongdoer would not be punished for his specific intent crime.[15]

There is a sound policy reason for allowing the wrongdoer's intent to be transferred to prove the crime which actually occurred. The Supreme Court of California described the policy as:

> Under such circumstances the accused is deemed as culpable, and society is harmed as much, as if the defendant has accomplished what he had initially intended, and justice is achieved by punishing the defendant for a crime of the same seriousness as the one he tried to commit against his intended victim.[16]

An application of the doctrine of transferred intent thus allows an accused to be prosecuted for his wrongful actions just as if the intended victim had been harmed. "In effect, transferred intent makes a whole crime out of two component halves."[17]

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[10] 46 M.J. at 261.
[11] *Id.* (footnotes omitted).
[12] People v. Scott, 927 P.2d 288 (Cal. 1996); *see also* Jackson v. Follette, 462 F.2d 1041, 1047 (2d Cir. 1972).
[13] 2 C. Torcia, WHARTON'S CRIMINAL LAW § 144 (14th ed. 1979).
[14] Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65 (1996).
[15] *Id.* at 66-67.
[16] People v. Scott, 927 P.2d 288, 291 (Cal. 1996).
[17] Ford v. Maryland, 625 A.2d 984 (Md. 1993).

The legal fiction behind transferred intent is easily rationalized in situations involving "bad aim," such as the classic example: A shoots at B with the intent to kill B, but misses B and hits C resulting in C's death.[18] In this classic "bad aim" scenario, A could be convicted of attempting to kill B, but could not be convicted of the intentional death of C, without using the doctrine of transferred intent. Application of the fiction of transferred intent is necessary to hold A accountable for what A set out to do; intentionally kill another human being. The doctrine of transferred intent becomes more difficult to apply when C is not injured, or does not die.[19] Both courts and commentators have split on whether transferred intent can properly be applied in these situations.[20]

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[18] *See* Husak, *supra* note 14, at 69.

[19] *Id.* at 75.

[20] *See* 46 M.J. at 261. Much of the difficulty arises in how a particular jurisdiction applies the theory of transferred intent to situations other than the classic "bad aim" scenario. Some jurisdictions allow the wrongdoer's intent to be transferred, whether or not the contemplated crime was completed. These jurisdictions include:

Arizona	State v. Rodriguez-Gonzales, 790 P.2d 287 (Ariz. 1990)	the intent to kill is transferable to each unintended victim once there is an intent to kill someone
Connecticut	State v. Hinton, 630 A.2d 593 (Conn. 1993)	intent is not a limited commodity that once used is totally expended and cannot be transferred to hold wrongdoer accountable for other unintended criminal acts
District of Columbia	Brooks v. United States, 655 A.2d 844 (D.C. 1995)	intent to murder intended victim could be transferred to prove specific intent to assault two unintended victims
Illinois	People v. Hill, 658 N.E. 2d 1294 (Ill. 1995)	intent to kill a certain victim can be transferred to prove attempted murder of unintended victim even though attempted murder of intended victim also charged
Indiana	Straub v. State, 567 N.E.2d 87 (Ind. 1991)	transferred intent instruction was appropriate as applied to attempted murder or battery
Minnesota	Minnesota v. Ford, 539 N.W.2d 214 (Minn. 1995)	proof that the defendant intended to kill the victim who was shot and died could be used to prove the attempted murder of the unintended victim who was also shot, but did not die, using the theory of transferred intent, even though the defendant could be convicted of the intended murder
New Mexico	State v. Abeyta, 901 P.2d 164 (N.M. 1995)	transferred intent applies to attempted murder

On the other hand, both California and Maryland courts reason that a resort to the legal fiction of transferred intent is unnecessary when the wrongdoer can be held accountable for the crime he intended to commit. These courts base their analysis on the belief that a wrongdoer who intends to kill or injure multiple victims is more culpable than the wrongdoer who intends to

The more persuasive weight of authority holds that "when the intent being transferred is for the same type of harm"[21] a wrongdoer's intent may be transferred, regardless of whether the intended crime could be charged or not.[22] These courts hold that intent is not a finite commodity, that once used to prove one crime cannot be used again to prove the commission of another. These courts allow prosecution for all natural and probable results of the wrongdoer's intended act. For example, transferred intent has been applied in situations where a single bullet, aimed at one person, strikes and passes through the intended victim, then strikes and kills an unintended victim.[23]

On the other hand, jurisdictions such as California and Maryland question whether intent can be transferred when the wrongdoer can be held accountable for the crime he intended to commit without resorting to the use of a legal fiction.[24] For example, in *California v. Czahara,*[25] the First Appellate District of the California Court of Appeals discussed the use of transferred intent to convict for attempted murder of an unintended victim. The defendant, Czahara, fired at least two shots through a window of a car from a distance of five or six feet, in order to kill his estranged girlfriend. The ex-girlfriend, who was driving the car, and her passenger, were both seriously injured. Czahara was convicted of attempting to murder both victims.

On appeal, Czahara challenged his conviction for attempting to murder the passenger, claiming the trial judge erred when he instructed the jury that his specific intent to kill his ex-girlfriend could be transferred to convict for attempted murder of the passenger, because his intended victim was injured in the attempt. The California Court of Appeals reversed Czahara's conviction for attempting to murder the passenger, holding:

> The purpose of the transferred intent rule–to insure that prosecution and punishment accord with culpability–would not be served by convicting a defendant of two or more attempted murders for a single act by which he intended to kill only one person. In *People v. Birreuta*, . . . the court noted

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harm only a single individual, but through a mistake or bad luck ends up harming or killing other victims in addition to the intended victim. *See* California v. Czahara, 250 Cal. Rptr. 836 (Cal. Ct. App. 1988); California v. Calderon, 283 Cal. Rptr. 833 (Cal. Ct. App. 1991); and Ford v. State, 625 A.2d 984 (Md. 1993). Commentators have also accepted this position. *See* J. Dressler, *Understanding Criminal Law* 108 (1987); M. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. Rev. 319, 322-23 (1996).

[21] Minnesota v. Ford, 539 N.W.2d 214 (Minn. 1995). In *Ford*, the defendant was convicted of intentional murder and attempted murder after a gang shooting of a uniformed officer sitting in a restaurant also injured an innocent bystander. The court held the jury instruction allowing the transfer of specific intent from the murder charge to prove an attempted murder charge was permissible.

[22] *See* cases cited *supra* note 20.

[23] Poe v. Maryland, 671 A.2d 501 (Md. 1996).

[24] *Supra* note 20.

[25] California v. Czahara, 250 Cal. Rptr. 836 (Cal. Ct. App. 1988).

> that there is a difference in culpability between an assailant who deliberately sets out to kill one person and in addition kills another accidentally, and one who deliberately kills two victims. Application of the transferred intent rule to the former would wipe out that distinction. Similarly, the attacker who shoots at two or more victims, with the intent of killing all, is more culpable than the one who aims at a single individual, even when the latter also injures a bystander. In the circumstances of this case, the transferred intent instruction obscured that difference.[26]

The California Appeals court determined there was "no need to employ the legal fiction of transferred intent" to hold Czahara accountable for attempted murder of the passenger.[27]

When applying the theory of transferred intent, the Maryland courts have also made a clear distinction between cases in which the unintended victim dies and cases in which the unintended victim does not die.[28] The Maryland courts struggled with the complexity of applying such a theory to "inchoate criminal [acts] such as assault with the intent to murder, attempted murder and attempted voluntary manslaughter."[29] Ultimately, Maryland courts concluded that "the doctrine of transferred intent does not apply to attempted murder . . . ."[30]

It is this minority analysis of transferred intent that creates the need for an additional theory of criminal liability in order to hold those wrongdoers who harm multiple victims through one act of violence accountable for the harm done to all the victims injured by the wrongful act. The Maryland court in *Ford v. State*[31] recognized this need even while refusing to extend the theory of transferred intent when the wrongdoer could be held accountable for death or injury to the intended victim.[32]

There is also the need for a different theory of criminal liability when there is no proof the wrongdoer specifically intended to kill, yet is charged with attempted murder. To transfer intent there must be proof that the wrongdoer intended to kill.[33] As an example, under the Uniform Code of Military Justice, a servicemember may commit murder in violation of Article 118 in four different ways. The member may murder with a premeditated design to kill,[34] an unpremeditated intent to kill or inflict great bodily harm,[35]

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[26] *Id*. at 839 (citing People v. Birreuta, 208 Cal. Rptr. 635 (Cal. Ct. App. 1984) (citation omitted)).
[27] 250 Cal. Rptr. at 839.
[28] Harvey v. State, 111 Md. App. 407, *cert. denied*, 344 Md. 330 (1996); Poe v. State 341 Md. 523 (1996); Ford v. State, 625 A.2d 984 (Md. 1993).
[29] Harvey, 111 Md. App. at 422-23.
[30] Poe v. Maryland, 671 A.2d 501, 503 (Md. 1996).
[31] Ford v. State 625 A.2d 984, 999 (Md. 1993).
[32] *Id.*
[33] "Under the doctrine of transferred intent, the essential element is present if the accused intended to kill someone." Norris v. Indiana, 419 N.E.2d 129, 133 (Ind. 1981).
[34] UCMJ art. 118(1) (1995).

by engaging in an act inherently dangerous to another and which demonstrates a wanton disregard for human life,[36] or if a death occurs during the course of certain specified felonies.[37] Only premeditated and unpremeditated murder require proof of a specific intent to kill.[38] Since attempted murder is an attempt under Article 80 of the Uniform Code of Military Justice, attempted murder requires proof of a *specific* intent to kill.[39]

> Although a serviceperson may be convicted of murder if he commits homicide without an intent to kill, but with an intent to "inflict great bodily harm," *see* Article 118(2), or while "engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life," *see* Article 118(3), these states of mind do not suffice to establish attempted murder.[40]

Consequently, transferred intent can not be used to prove murder of an unintended victim when the murder was committed by engaging in an act inherently dangerous, because there is no specific intent to kill. Since attempted murder requires a specific intent to kill, some courts have held that the doctrine of transferred intent cannot be used to prove attempted murder.[41] When there is a question of the applicability of transferred intent, there is a need to rely, instead, on the similar, but distinct, theory of concurrent intent.

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[35] *Id.* art. 118(2).
[36] *Id.* art. 118(3).
[37] *Id.* art. 118(4). Specified felonies include: the perpetration or attempted perpetration of burglary, sodomy, rape, robbery or aggravated arson. *Id.*
[38] United States v. Roa, 12 M.J. 210, 212 (C.M.A. 1982); UCMJ arts. 118(1) or (2) (1995).
[39] 12 M.J. at 212.
[40] *Id.*
[41] People v. Calderon, 232 Cal. App. 3d 930 (4th App. Dist. 1991); People v. Czahara, 203 Cal. App. 3d 1468 (1st App. Dist. 1988); Ford v. State, 625 A.2d 984 (Md. 1993); Harvey v. Maryland, 681 A.2d 628 (Md. 1996); *see also,* R. Perkins & R. Boyce, CRIMINAL LAW, 924-25 (3d ed. 1982). *But see* State v. Dexter, 616 N.Y.S.2d 733 (N.Y. App. Div. 1994); State v. Rodriguez-Gonzales, 790 P.2d 287 (Ariz. 1990); People v. Hill, 658 N.E.2d 1294 (Ill. App. 1995); State v. Ford, 539 N.W.2d 214 (Minn. 1995); State v. Abeyta, 901 P.2d 164 (N.M. 1995); State v. Hinton, 630 A.2d 593 (Conn. 1993).

III. CONCURRENT INTENT

Concurrent intent is similar to transferred intent in that it is a legal fiction used to convict a wrongdoer for the natural and probable consequences of his actions.[42] Nevertheless, concurrent intent is distinct from the theory of transferred intent. Transferred intent involves *unanticipated* consequences to an *unintended* victim.[43] Concurrent intent involves *anticipated* results to an *intended* primary victim, with coexisting *anticipated* results to *secondary* victims.[44] Proof that the secondary victims were in the "killing zone" established by the wrongdoer's method of attacking the primary victim is circumstantial evidence of the wrongdoer's concurrent intent to harm all the victims.[45]

An example of concurrent intent is when a wrongdoer throws a grenade into a room intending to kill A, knowing B, C, and D are in the same room. Even though the wrongdoer's motive, and primary interest, was killing only A, the wrongdoer has demonstrated the requisite intent to kill B, C, and D by his use of a grenade that would kill everyone in the room. Similarly, when a terrorist places a bomb on an airplane, intending to kill the diplomat in first class, the terrorist knows the bomb's explosion will cause the airplane to fall from the sky and kill everyone on board. The terrorist has a concurrent intent to kill everyone on the airplane.

Transferred intent is different. Transferred intent applies when a wrongdoer shoots at A with an intent to kill A, misses A, but hits and kills a passerby, B. The wrongdoer can be prosecuted for the intentional death of B, even though the wrongdoer did not know B would be anywhere near A at the time of the shooting.

Concurrent intent, the idea that a person may have more than one intent during a single event, is not a novel theory of law. Courts have long recognized that it is possible for a wrongdoer to intend two different crimes at the same time. For example, a wrongdoer may intend to commit one crime, such as robbery, and have an additional or concurrent intent to commit another crime at the same time, such as an aggravated assault.[46] As the Illinois

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[42] United States v. Willis, 46 M.J. 258, 261 (1997).
[43] Ford v. State, 625 A.2d 984, 1000 (Md. 1993).
[44] *Id.*
[45] 46 M.J. at 261-62; 625 A.2d at 1001.
[46] State v. Coolidge, 187 N.E.2d 694, 697 (Ill. 1963); *see also* People v. Kimble, 749 P.2d 803 (Cal. 1988). In *Kimble*, the defendant was charged, among other things, with murder, rape and burglary after he broke into a couple's home, raped the wife, killed the couple and left with the keys to their stereo store, which he used the following day to steal stereo equipment. The California Supreme Court, in discussing the trial court's instruction on special circumstances based on rape and robbery felony murder, held that there was sufficient evidence that the rape and robberies were not incidental to the murders so as to preclude a special circumstance instruction, and that the evidence clearly showed a concurrent intent to rape the wife and steal

Supreme Court said in *State v. Murff*, "The existence of a concurrent intent to both kill and rob is not uncommon in . . . patterns of criminal conduct."[47]

Although the concept that a wrongdoer could have concurrent intent to commit different types of criminal acts at the same time has been a part of American jurisprudence for some time, the Maryland Supreme court in *Ford v. State*[48] applied the concept of concurrent intent to crimes involving multiple deaths from one act, or multiple victims of a single assaultive offense. Ford was charged on a 90 count indictment, with charges ranging from assault with the intent to murder to malicious destruction of property. The charges resulted from an incident where Ford, along with three other youths, stood along the Capitol Beltway near Washington D.C. and threw "large landscaping rocks"[49] at rush hour traffic. The rocks hit between 15 and 40 cars, causing both property damage and injury to the occupants.

The most severely injured person suffered a skull fracture and would have died but for the immediate medical treatment she received. However, because of the skull fracture, the victim received permanent brain damage. A passenger in another car suffered a broken jaw and permanent hearing loss in one ear. Others received only minor cuts from broken windshield glass. Ford explained that he and his friends threw the rocks while they were drunk, and that they did not intend to hurt anyone.

At trial, the judge instructed the jury that if they believed Ford threw the rocks with the intent to maim the vehicle's *drivers*, the jury could use the doctrine of *transferred* intent to convict Ford of assault with the intent to maim certain named *passengers* in those vehicles.[50] Although the appellate court declined to specifically rule on the applicability of that instruction to Ford's case, it discussed the doctrine of transferred intent at length, concluding that transferred intent is inapplicable to assault with the intent to disable and other related crimes when the defendant could be tried for the crime he intended to commit, as in this case.[51] The court explained,

> The underlying rationale for the doctrine [of transferred intent] . . . suggests that transferred intent should apply only when, without the doctrine, the defendant could not be convicted of the crime at issue because the mental and physical elements do not concur as to either the intended or the actual victim . . . . Thus, transferred intent makes a whole crime out of two halves by joining the intent as to one victim with the harm caused to another victim. Transferred intent does not make two crimes out of one. Where the crime

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the stereo store keys. As recognized by the California court, even though a criminal may have a focus on committing a particular crime, that focus does not preclude the criminal mind from formulating multiple criminal intents to achieve that particular crime.

[47] State v. Murff, 194 N.E.2d 226, 227 (Ill. 1963).

[48] Ford v. State, 625 A.2d 984 (Md. 1993).

[49] *Id.* at 994.

[50] *Id.* at 996.

[51] *Id.* at 997.

> intended has actually been committed against the intended victim, transferred intent is unnecessary and should not be applied to acts against unintended victims.[52]

The court went on to discuss an earlier transferred intent case, *State v. Wilson,*[53] in which the court applied transferred intent to attempted murder. In the *Ford* case, the court questioned the reliance on transferred intent to affirm the conviction in *Wilson* because "the purpose of transferred intent is not to multiply criminal liability, but to prevent a defendant, who has committed all the elements of a crime (albeit not upon the same victim), from escaping responsibility for that crime."[54] Even though the court questioned the rationale for the *Wilson* decision, the *Ford* court justified the result in *Wilson* by finding "the convictions [in *Wilson*] could have been properly upheld on the basis of . . . concurrent intent,"[55] drawing a clear distinction between the two theories.

The *Ford* court explained that instead of transferring intent from an intended victim to an unintended victim, when a defendant

> intentionally creates a "kill zone" to ensure the death of his primary victim, [then] the trier of fact may reasonably infer from the method employed an intent to kill others *concurrent* with the intent to kill the primary victim. When the defendant escalated his mode of attack from a singe bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was *concurrent* with his intent to kill A. Where the means employed to commit the crime against a primary victim create[s] a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.[56]

Thus, the *Ford* court concluded the *Wilson* decision reached the right result, but used the wrong analysis.

Other cases have also used an analysis of intent similar to that found in the *Ford* discussion of concurrent and transferred intent. In most cases, although the term "concurrent intent" may not have been used, or the analytical process shoehorned into the label of "transferred intent," the analysis of the intent is the same analysis of concurrent intent found in the *Ford* decision. In *Al Qaadir v. Gallegos*[57] the Ninth Circuit Court of Appeals

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[52] *Id.* at 997-98.
[53] State v. Wilson, 546 A.2d 1041 (Md. 1988).
[54] 625 A.2d at 999.
[55] *Id.* at 1000.
[56] *Id.* (emphasis added).
[57] Al Qaadir v. Gallegos, 56 F.3d 70 (9th Cir. 1995).

refused to consider whether a transferred intent instruction given in a murder case violated the defendant's due process. There, the defendant was involved in an incident where several assailants sought to kill a person named Jackson. They shot at Jackson and then riddled the truck in which he was riding with bullets to ensure the absence of witnesses to their crime. Jackson and three others were shot multiple times. Multiple bullet casings were found at the scene. The court found any potential error in giving the transferred intent instruction was harmless, because there was sufficient evidence presented at trial to show an intent to kill all the victims charged, without resorting to transferred intent. The court said, "Such thoroughness suggests an intent to kill all occupants of the vehicle."[58]

Concurrent intent, as clarified in *Ford*, has been applied in at least two other cases, *Ruffin v. United States*[59] and *United States v. Willis*.[60] In *Ruffin*, the defendant and four others, all carrying firearms, stopped their vehicle at a stoplight next to a car driven by George Younger. The defendant and his cohorts had an ongoing dispute with Younger, and they sought to resolve the dispute by shooting him as he sat in his car. They fired 10 to 15 shots at Younger, wounding him. During the shooting, Marcia Williams, who was driving her car in the vicinity, was killed when one of the rounds fired at Younger hit her in the head. One of Williams' children, riding in the passenger seat of her car, was also wounded.

Ruffin challenged his conviction for assault with the intent to kill while armed for the injury to the Williams child, arguing that the trial court improperly allowed the jury to transfer his intent to harm Younger to prove an intent to kill the child, even though the assault with the intent to kill while armed charge against Younger was complete. The District of Columbia court disagreed, and found the act of spraying a car with a hail of bullets while the

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[58] *Id.* *See also* State v. Dexter, 616 N.Y.S.2d 733 (N.Y. App. 1994). In *Dexter*, the defendant fired multiple shots inside a club, killing one victim and hitting his intended victim, who survived. The court upheld the defendant's conviction for attempted murder of the surviving victim as well as the murder of the deceased victim. Although labeling its analysis as one of transferred intent, it really is an application of concurrent intent. The court said:

> Although some of the shots may have gone wild, and may have been fired in a struggle between the defendant and the surviving victim, *the jury still has ample basis upon which to conclude that all the shots were fired under a single design to effect death.* *Id.* at 734 (emphasis added).

In other words, the defendant's act of firing multiple shots at an intended victim created a "killing zone" around the victim such that the factfinders could infer an intent to kill everyone in the path of the bullets fired. This is a concurrent intent analysis.

[59] Ruffin v. United States, 642 A.2d 1288 (D.C. 1994).

[60] United States v. Willis, 46 M.J. 258 (1997).

car was stopped at a light permitted finding the defendant had a concurrent intent to kill everyone in the path of the bullets.[61]

The Court of Appeals for the Armed Forces has also applied concurrent intent to uphold an attempted murder conviction. In *United States v. Willis*,[62] the accused plead guilty to three specifications of attempted murder, among other offenses. During the guilty plea inquiry, the accused told the military judge that he headed towards an office where he intended to kill his aunt. He knew she was in the office with two other people, her husband and an attorney. Upon reaching the office, he found the door would only open about 6 inches; and he could only see the attorney. The accused told the military judge that when he saw the attorney, he decided to kill him, and fired a shot at the him, but missed. The accused then tried to fire his weapon at his aunt and her husband by pointing his weapon at the area behind the door, which the husband was trying to keep closed over the accused's arm, and pulling the trigger multiple times. He was unsuccessful in harming them because the weapon jammed. The accused admitted that he intended to kill the attorney and his aunt. While acknowledging that he probably would have shot his aunt's husband under the circumstances, he denied ever having an intent to kill the husband.

On appeal, the accused challenged the providency of his guilty plea to the attempted murder of his aunt's husband, arguing that attempted murder requires specific intent to kill, which could not be proven by transferred intent when the crime against the intended victim, here the attempted murder of the aunt, was complete. The United States Court of Appeals for the Armed Forces found the accused's plea provident, holding that when there is "an intent to kill and an act designed to bring about the desired killing, the defendant is responsible for all natural and probable consequences of [his] act, regardless of the intended victim."[63] The court applied the theory of concurrent intent to hold that there was sufficient evidence to find the accused had the specific intent to kill his aunt's husband in order to achieve his goal of killing his aunt. The court stated:

> Under a concurrent-intent approach, we infer the intent when the result was the same as that intended or at least a natural and probable consequence of the intended result. As long as the defendant has the requisite intent for the intended crime, the defendant will be responsible for the natural and probable consequences of the act.
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> Appellant's admitted actions are sufficient to establish that he had the concurrent intent to kill both his aunt and his uncle. Appellant believed his aunt was located behind the door in the room. He was also aware that his uncle was somewhere in the room because he has seen him there earlier.

[61] 642 A.2d at 1298.
[62] 46 M.J. at 258.
[63] *Id.* at 261.

> Appellant tried to shoot behind the door in three different spots, moving his pistol randomly between shots.
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> Appellant asserts he did not have the intent to "kill" his uncle. However, by shooting behind the door, appellant created a killing zone. The natural and probable consequence of appellant's actions was the death or grievous bodily harm of whoever was behind the door.[64]

The court concluded that the accused's act of shooting into an occupied room, coupled with his stated intent to kill his aunt, was sufficient evidence for the military judge to find his guilty plea to the attempted murder of his aunt's husband provident.[65]

Even though the courts consider the natural and probable consequences of a wrongdoer's actions when applying the theory of concurrent intent, it is important not to confuse this legal theory with the intent required to prove murder by an act inherently dangerous to others under Article 118(3), UCMJ. Murder by an inherently dangerous act does not require an intent to kill.[66] "Article 118(3) was intended to deal with the situation where death has occurred as a result of conduct which revealed the actor's wanton disregard for human life, but was not directed at a particular individual."[67] The mental state that allows a wrongdoer to have a wanton disregard for human life is not the same as having an intent to kill.[68] For this reason, a servicemember may not be convicted of attempted murder by committing an act inherently dangerous or by committing a homicide with an intent to inflict grievous bodily harm.[69] Attempted murder requires proof of a specific intent to kill; the *mens rea* sufficient to prove murder by an act inherently dangerous or to prove murder when the intent is to inflict grievous bodily harm, is insufficient to prove an attempt to murder.[70] This is an important distinction.

For example, if a wrongdoer throws a grenade into a room, and everyone is killed by the explosion, he could be prosecuted for murder by an act inherently dangerous, if the wrongdoer only sought to teach a lesson and did not intend to cause the death of anyone in the room.[71] But, if no one in the room died as a result of the explosion, the wrongdoer could not be charged with and convicted of attempted murder based only on the inherently

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[64] *Id.* at 261-62.
[65] *Id.* at 262.
[66] United States v. Berg, 30 M.J. 195 (C.M.A. 1990).
[67] United States v. Roa, 12 M.J. 210, 212 (C.M.A. 1982).
[68] *Id.*
[69] *Id.*
[70] *Id*. There are also other offenses where the *mens rea* necessary for committing the offense is not sufficient to support a conviction for an attempt of that offense. For example, a service member may not attempt to commit involuntary manslaughter by culpable negligence. Similarly, rape is a general intent crime, but to prove attempted rape or assault with the intent to commit rape, there must be proof that the member specifically intended to commit rape.
[71] 12 M.J. at 213.

dangerous act shown by a wanton disregard for the lives of those in the room.[72] While the wrongdoer may be prosecuted for other assaults, the specific intent to kill is lacking.[73] On the other hand, if the accused intended to kill one person in the othewise crowded room, and chose a method that created a "killing zone," he could be convicted of attempting to kill all the people in the room using the theory of concurrent intent.[74]

IV. PRACTICAL APPLICATION

Undoubtedly, the facts in *Willis* are unusual. However, what makes *Willis* an interesting, as well as instructive, piece of military jurisprudence is its potential applicability to other assaultive-type offenses requiring proof of specific intent. For example, suppose Airman A had the specific intent to inflict grievous bodily harm on his wife by throwing acid at her to punish her for an infidelity. Instead, he inflicts grievous bodily harm on an unintended victim, his child, whom his wife was using as a shield during this domestic altercation. Can Airman A be charged with assault by intentionally inflicting grievous bodily harm on the child, when Airman A did not specifically intend to harm anyone other than his wife? Using the theory of transferred intent, the answer is yes. Airman A is accountable for the natural and probable consequences of his actions.[75] Airman A's intent to inflict grievous bodily harm on his wife can be transferred to prove the specific intent element of the crime actually committed; assault in which grievous bodily harm is actually committed.[76] Moreover, if the acid also falls on and injures anyone else in a "zone" created by the flying acid, Airman A could be prosecuted for that aggravated assault using the theory of concurrent intent.[77]

The theory of concurrent intent can also be used to prove specific intent in crimes other than murder and attempted murder. For example, Airman Z is jealous of Airman X's selection to the MAJCOM softball team. Airman Z, as the alternate, would play if Airman X were to get hurt. Airman Z lights a fire

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[72] *Id.* United States v. Creek, 39 C.M.R. 666 (A.B.R. 1968). In *Creek*, the Army Board of Review overturned a soldier's conviction for attempted murder, based on the insufficiency of the pleading and an incorrect instruction. The accused was tried for attempted murder of "unknown persons" after he allegedly booby trapped an outdoor latrine with a hand grenade. No one was in the latrine at the time of the explosion. The law officer had instructed that the court-martial panel could convict of the charged offense based on either proof of an intent to kill or proof of an act inherently dangerous to others. The Army Board, relying on *United States v. Carroll*, 10 U.S.C.M.A. 16, 27 C.M.R. 90 (1958), concluded the instruction was erroneous "[a]s the offense of attempted murder involved a specific intent to kill." 39 C.M.R. at 668.

[73] 12 M.J. at 212; United States v. Thomas, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962).

[74] United States v. Willis, 46 M.J. 258, 262 (1997).

[75] *Id.* at 261.

[76] UCMJ art. 128(4)(b) (1995).

[77] 46 M.J. at 261.

outside Airman X's dormitory room, knowing that the only way Airman X could escape the fire is to jump out the window. Unfortunately, Airman X is having a party to celebrate his selection to the team. Airman X, along with five of his friends, suffer grievous bodily injury when they jump out the window to escape the fire. Along with arson, could Airman Z be prosecuted for aggravated assault by the intentional infliction of grievous bodily harm on Airman X and his five friends? The answer is, arguably, yes. Airman Z, by using a fire to effectuate his intent to inflict grievous bodily harm on Airman X, had the concurrent intent to harm everyone forced out of the room by the fire he set. The use of fire created a zone of harm to anyone within reach of the fire, in this case Airman X and his five friends. Airman Z is criminally responsible for the natural and probable consequences of his actions.[78]

With the decision in *Willis*, the Court of Appeals has recognized the applicability of the theories of transferred and concurrent intent in military jurisprudence. However, the scope of this decision remains to be seen. The *Willis* court specifically limited its ruling to the case at hand and declined to "delineate . . . the outer limits of concurrent intent or transferred intent."[79] In doing so, the court recognized the complexity of these two theories of criminal liability.

V. CAVEAT

Whatever limits that may ultimately be placed on the applicability of the theories of transferred and concurrent intent, these theories operate only to allow the fact finder to infer an accused's specific intent to commit a certain act from the particular circumstances of the case. Allowing a fact finder to infer an accused's specific intent based on either of these theories should not be confused with creating a presumption of intent. The Supreme Court in *Francis v. Franklin* explained the difference between a mandatory presumption and a permissible inference:

> A mandatory presumption instructs the jury that it must infer the presumed fact if the state proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the state proves predicate facts, but does not require the jury to draw that conclusion.[80]

The danger in applying the theories of concurrent and transferred intent to create a presumption of intent instead of a permissive inference is that such application may run afoul of the Due Process Clause.[81] As the Court in *Francis* opined:

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[78] *Id.*.
[79] 46 M.J. at 262.
[80] Francis v. Franklin, 471 U.S. 307 (1985).
[81] *See* Sandstrom v. Montana, 442 U.S. 510 (1979).

> Such presumptions violate the due process clause if they relieve the state of the burden of persuasion on an element of an offense . . . . A permissive inference does not relieve the state of its burden of persuasion because it still requires the state to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven . . . . A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.[82]

They are merely methods of proving a necessary element of a crime in order to hold a wrongdoer accountable for the natural and probable consequences of his actions.[83]

VI. CONCLUSION

Both transferred and concurrent intent are legal fictions. *"In fictione juris semper aequitas existit"*–In the fiction of law there is always equity.[84] Equity, and the perception of fairness, demands that a wrongdoer be properly prosecuted for what he did. With the increased awareness of victim's rights, this need for a perception of fairness in our military justice process is even more important. Without the ability to use these theories of legal liability, a wrongdoer might be acquitted because of a "legal technicality." Wrongdoers should be accountable for the natural and probable consequences of their actions, and to do so, it is important to understand and properly apply the legal fictions that allow successful prosecutions in cases like *Willis.*

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[82] 471 U.S. at 314-15.
[83] 46 M.J. at 261.
[84] BLACK'S LAW DICTIONARY 700 (5th ed. 1979).

United Services Automobile Association v. Perry

MAJOR GUILLERMO R. CARRANZA*

I. INTRODUCTION

For over 50 years the federal government has continually expanded its right to recover the cost of military medical and hospital care from non-federal sources.[1] Initial efforts pursuant to the Federal Medical Care Recovery Act (hereinafter FMCRA) focused on third-party tortfeasors.[2] The driving force behind these efforts was primarily fiscal.[3] However, public policy also dictated that tortfeasors, insurance companies and injured parties should not "receive a windfall at the [g]overnment's expense"[4] because the Federal

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[1] Major Bruce E. Kasold, *Medical Care Recovery–An Analysis of the Government's Right to Recover its Medical Expenses*, 108 MIL. L. REV. 161, 163 (1985) (citing U.S. Dept. of the Army, Reg. No. 25-220, Claims in Favor of the United States (13 May 1943)).

[2] Federal Medical Care Recovery Act, Pub. L. No. 87-693, § 1, 76 Stat. 593 (1962) (codified as amended at 42 U.S.C.A. §§ 2651-53 (West 1994 & Supp. 1997)).

[3] *See* S. REP. No. 1945, *reprinted in*, 1962 U.S.C.C.A.N. 2637, 2639-40. *See also* Kasold, *supra* note 1, at 163 n.10 (approximately 450 potential claims had been identified between 1943 and 1946, with 40 new cases being reported monthly by 1946). *See also* Comment, *The Right and Remedies of the United States under the Federal Medical Care Recovery Act*, 74 DICK. L. REV. 115, 116 (1969-70).

[4] Joseph C. Long, *The Federal Medical Care Recovery Act: A Case Study in the Creation of Federal Common Law*, 18 VILL. L. REV. 353, 369 (1973).

> Whether the tortfeasor or injured party would receive the windfall depended on whether the injured party could recover medical costs which he had not incurred. If the jurisdiction recognized the collateral source rule, then he could recover; if not then the windfall went to the tortfeasor.

Id. at 353 n.6 (citation omitted). The same concern was raised during drafting of the FMCRA. The Department of Health, Education and Welfare argued that tortfeasors in states which did not recognize the collateral source rule would receive a windfall if the original statutory language was not amended, giving the United States an independent right of action rather than just one of subrogation. *See Id.* at 369 (citing DEPT. OF HEALTH EDUCATION AND WELFARE REPORT ON H.R. 298, *reprinted in*, 1962 U.S.C.C.A.N. 2637, 2646-47). *But see* Heusle v. Nat'l Mut. Ins. Co., 628 F.2d 833, 838 (3rd Cir. 1980) (explaining the concept of windfall is misleading because one large group [taxpayers] or another [policyholders] must ultimately shoulder the costs). Under the collateral source rule, compensation received by an injured person from an independent third party is not deducted from the damages he or she would otherwise collect from the tortfeasor. BLACK'S LAW DICTIONARY 262 (6th ed. 1990).

government fortuitously pays for the medical care of military personnel and their family members.[5]

This "windfall" justification was later used to expand government recovery from uninsured motorist and medical payments coverage (hereinafter Medpay) in the injured parties' own insurance coverage; recovery of which was not contingent on a finding of tort liability.[6] The theory was that insurance companies would normally have paid a civilian hospital for medical care in these instances and should not get a windfall just because the covered individual(s) were entitled to free medical care. Insurance companies, however, started fighting against expanded government recovery using new no-fault insurance laws,[7] and by specifically excluding the government from direct contractual recovery.[8] Congress responded by expanding the government's recovery rights under 10 U.S.C. § 1095.[9] This comment presents a historical overview of federal recovery efforts and focuses on one of the most recent battles against expanded government recoveries: *United Services Automobile Ass'n v. Perry* (hereinafter *Perry).*[10] Finally, this comment places the *Perry* decision into a historical perspective in the war over government recoveries under section 1095.[11]

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[5] Active duty military personnel are entitled to free medical and dental care. Active duty dependents, retired members of the armed forces, and their dependents may receive free medical care at a military medical treatment facility or subsidized medical care outside a military facility [individuals entitled to the various forms of military medical care are hereinafter referred to as Department of Defense or DoD beneficiaries]. 10 U.S.C.A. §§ 1071-1106 (West 1983 & Supp. 1997).

[6] *See* United States v. Gov't Employees Ins. Co., 461 F.2d 58, 60 (4th Cir. 1972); United States v. State Farm Mut. Ins., 455 F.2d 789, 791-92 (10th Cir. 1972); United States v. Allstate Insurance Co., 910 F.2d 1281, 1282-84 (5th Cir. 1990). *See also* Captain Dominique Dillenseger and Captain Milo H. Hawley, *Sources of Medical Care Recovery in Automobile Accident Cases*, ARMY LAW., October 1991, at 54-56. *See generally* Kasold, *supra* note 1, at 191 n.207; John C. Cruden, *Government Recovery: Federal Medical Care Recovery Act, Automobile Insurance and Workmen's Compensation*, 13 SANTA CLARA L. REV. 720, 736 (1973); Joseph C. Long, *Government Recovery Beyond the Federal Medical Care Recovery Act*, 14 S.D. L. REV. 20 (1969). *But see* United States v. Metro. Life Ins., 683 F.2d 1250,1251 (9th Cir. 1982).

[7] *See infra* notes 57-58, and accompanying text.

[8] *See infra* note 61.

[9] *See* Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-272, § 2001, 100 Stat. 100 (1986) (codified as amended at 10 U.S.C.A. § 1095 (West Supp. 1997)). *See also infra* note 18.

[10] United Services Auto. Ass'n v. Perry, 886 F. Supp. 596 (W.D.Tex. 1995), *rev'd*, 102 F.3d 144 (5th Cir. 1996), *reh'g & reh'g en banc denied*, 108 F.3d 335 (5th Cir. 1997).

[11] The current regulatory authority for DoD third party collections is U. S. DEPARTMENT OF DEFENSE, DIR. 6010.15, THIRD PARTY COLLECTION (TPC) PROGRAM (March 10, 1993) (on file with author). Service implementing regulations are as follows: Army: Legal Proceedings Initiated by the United States Medical Care and Property Claims, 32 C.F.R. pt. 516, Subpart E; Navy: Coordination of Benefits-Third Party Payers, 32 C.F.R. pt. 728, Subpart D and Medical Care Recovery Act (MCRA) Claims, 32 C.F.R. pt. 757, Subpart B; and Air Force: Hospital Recovery Claims, 32 C.F.R. pt. 842, Subpart N. For a discussion of Air Force procedural

II. THE PERRY DECISION

The facts in *Perry* were undisputed.[12] Twelve individuals were injured in separate, unrelated automobile accidents. Each individual was insured under an individual automobile insurance policy issued by United Services Automobile Association (hereinafter USAA). All of their policies "contained liability coverage, uninsured motorist coverage, coverage for damage to the insured's vehicle and medical payments coverage . . . which covered the insureds for medical costs arising from automobile accidents."[13] The Medpay provision was an optional item providing medical coverage for the insured regardless of fault for any automobile accident. These individuals received treatment for their injuries "at Army medical facilities in Georgia, Missouri, California and Alabama and Air Force facilities in Arkansas, Illinois and Ohio."[14] Because free treatment was sought at military hospitals, "USAA incurred no obligation to reimburse the insureds for their costs."[15] However, Department of Defense (hereinafter DoD) agencies filed claims against USAA seeking reimbursement for the value of medical care rendered in these cases pursuant to 10 U.S.C. § 1095.[16] USAA filed for declaratory judgement against the United States and both parties moved for summary judgement.

The District Court in San Antonio framed the issue as follows:

> The issue before this Court is whether the amended definition of third-party payer includes an automobile insurer who has provided voluntary first-party coverage for a military-related insured's medical expenses for injuries sustained in an auto accident which is neither mandated by state law nor designed to replace tort liability . . . .[17]

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guidelines see Timothy J. McGrath, *Medical Care Recovery Claims: A Working Guide for Claims Officers*, 33 A.F. L. REV. 163 (1990). For a discussion of Army procedural guidelines see U.S. DEPT. OF THE ARMY, HEADQUARTERS, U.S. ARMY HEALTH SERVICES COMMAND, REG. 27-1, LEGAL SERVICES: THIRD PARTY COLLECTION PROGRAM DISPUTED CLAIMS (April 15, 1994) (on file with author).

[12] 886 F. Supp. at 597.

[13] 102 F.3d at 145.

[14] 886 F. Supp. at 597.

[15] *Id*. *See generally supra* note 5.

[16] The pertinent clause reads as follows:

> (a)(1) In the case of a person who is a covered beneficiary, the United States shall have the right to collect from a third-party payer the reasonable costs of health care services incurred by the United States on behalf of such person through a facility of the uniformed services to the extent that the person would be eligible to receive reimbursement or indemnification from the third-party payer if the person were to incur such costs on the person's own behalf.

10 U.S.C.A. § 1095(a)(1) (West Supp. 1997).

[17] 886 F. Supp. at 598.

USAA took the position that it was not a "third-party payer" as defined by the statute.[18] Essentially, USAA's position was that the government mischaracterized the attributes of medical payments coverage by likening it to automobile liability insurance and no-fault insurance.

> Under USAA's interpretation of the amended statute, "three key characteristics" distinguish its insurance from automobile liability insurance and no fault insurance:
> 1. USAA's coverage is "first party" insurance, meaning that the insured obtains benefits directly from USAA. Automobile liability insurance is "third party" coverage obligating the insurance company to pay for damages incurred by a person injured by the insured;
> 2. USAA's coverage is not no fault insurance because it is not designed to replace tort liability; and
> 3. USAA's coverage is voluntary add-on insurance, meaning that USAA is not mandated by statute to provide the insurance. No fault insurance is, by definition, mandated by statute.[19]

USAA also argued that DoD implementing regulations promulgated in 1992,[20] defining Medpay benefits as no-fault insurance, were an impermissible agency action because they exceeded the scope of the statute.[21]

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[18] 886 F. Supp. at 598. The 1990 version of the code section reads as follows:

> (h) In this section:
> (1) The term "third-party payer" means an entity that provides insurance, medical service, or health plan by contract or agreement, including *an automobile liability insurance or no fault insurance carrier*.

10 U.S.C.A. § 1095(h)(1) (emphasis added). Prior to November 1990, the statute did not contain language defining automobile liability insurance or no fault insurance carriers as "third-party payers." *See* U.S. v. United Services Auto. Ass'n, 5 F.3d 204 (7th Cir. 1993). In this Seventh Circuit case, the United States sought to recover the costs of medical care, rendered before November 1990, to five individuals injured in unrelated automobile accidents and who were subsequently treated in military hospitals. The court found that prior to the 1990 statutory amendments USAA was not a "third-party payer" within the meaning of the law because the initial legislative effort was limited to health and medical insurance plans. *Id.* at 207-208. *See also infra* note 67, and accompanying text. For later codification of the statute see *infra* note 69.

[19] 886 F. Supp. at 598.

[20] Collection from Third Party Payers of Reasonable Costs of Healthcare Services, 57 Fed. Reg. 41,103 (1992) (codified as amended at 32 C.F.R. pt. 220).

[21] 866 F. Supp. at 598. The pertinent regulatory clause read as follows:

> (i) No-fault insurance. No-fault insurance means an insurance contract providing compensation for health and medical expenses relating to personal injury arising from the operation of a motor vehicle in which the compensation is not premised on who may have been responsible for causing such injury. No-fault insurance includes personal injury protection and

The United States, of course, took the opposite position and argued a two-pronged approach. With regard to the statutory language, the government noted Congress' definition of a third-party payer was written to encompass "an automobile liability insurance or no fault insurance *carrier*."[22] According to the government's argument, inclusion of the word "carrier" indicates Congress intended the statute apply to the insurer, in this case the entity known as USAA, rather than just the type of insurance coverage.[23] The government also took the position that use of the term "insurance" in the statute has broad meaning and, therefore, makes the statute applicable to all automobile insurance plans, including first-party medical payments coverage.[24] Additionally, the government asserted Congress used the phrase "including an automobile liability insurance or no-fault insurance carrier" in section 1095(h)(1) merely to give "examples of types of insurance covered by the statute" rather than intending it to be an exhaustive list.[25] The government's second approach asserted that regulations promulgated by DoD, which included medical payments coverage in the definition of no-fault insurance, were entitled to deference.[26] Since the definition of no-fault insurance in the DoD regulation included Medpay coverage, judicial deference to this regulation would have made recovery from Medpay a foregone conclusion.

The District Court granted summary judgement in favor of USAA relying on several factors. First, it dismissed the government's arguments regarding statutory language by indicating the sole issue before it was "[w]hether the first-party Medpay coverage insurance is encompassed by section 1095 . . . ."[27] The court then noted:

> Because Congress wrote the [1990] amendment to apply to specific categories of plans, . . . including two types of automobile insurance, it can be inferred that Congress did not intend to include other genres of insurance . . . . Had it desired, Congress could have easily included all first-party coverage in the amendment.[28]

Concluding that Congress did not intend section 1095 to apply to all forms of automobile insurance plans, but rather only to those specifically enumerated in

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> medical payments benefits in cases involving personal injuries from operation of a motor vehicle.

32 C.F.R. § 220.12(i) (1994). This section has not since been amended.

[22] 886 F. Supp. at 599 (citing 10 U.S.C. § 1095(h)(1) (emphasis added)).

[23] 886 F. Supp. at 600.

[24] *Id.*

[25] *Id.*

[26] *Id*. at 605.

[27] *Id*. at 600.

[28] *Id*. (citing Quarles v. St. Clair, 711 F.2d 691, 699 n.22 (5th Cir. 1983), which noted that when Congress says one "thing" it "does not mean something else." (citation omitted)).

the statute, the court then went on to consider whether Medpay coverage could be classified as either automobile liability insurance or no-fault insurance.

With regard to automobile liability insurance, the court simply held that first-party insurance which reimburses an insured for medical expenses after an automobile accident was different from third-party automobile liability insurance that "indemnifies the insured from liability to others."[29] The court opined automobile liability insurance requires evidence of a tortious act before a "legal liability" requiring payment arises. "Because Medpay coverage does not require evidence of a tortious act, circumstances of liability are not implicated."[30] Simply put, without a requirement of tortious liability, Medpay coverage could not be classified as "automobile liability insurance."

The real battle in the District Court, however, came over the issue of Medpay coverage being included in the definition of no-fault insurance by DoD in the implementing regulations. The court declined to defer to DoD's definition of no-fault insurance, citing the proposition that "a [f]ederal agency is . . . not entitled to expand a statute beyond its intended scope under the guise of interpretation."[31] However, before it could reach this conclusion, the court had to distinguish Medpay coverage from no-fault insurance.

Referring to several treatises,[32] the meaning of no-fault contained in the legislative history of the FMCRA,[33] and a proposed federal no-fault insurance law,[34] the court rejected a government argument that "Congress intended to generically refer to any type of automobile insurance where there is 'no' requirement of 'fault' [in section 1095]."[35] The District Court specifically found the phrase "no fault insurance" to be a term of art meaning "first party automobile insurance provided pursuant to state law that places limits on tort recovery."[36] Given that Medpay coverage is not required by state statute and that it does not limit tort recovery, the court held Medpay coverage is not no-fault insurance. Once the court had concluded that Congress intended to limit the scope of section 1095 to two narrowly defined types of automobile insurance, it logically followed that no agency regulation extending the definition of no-fault insurance to Medpay coverage could, or would, be

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[29] 886 F. Supp. at 601.
[30] *Id.*
[31] *Id.* at 606 (citing Brown v. Gardner, 513 U.S. 115 (1994)).
[32] *See* R. LONG, THE LAW OF LIABILITY INSURANCE § 27.01, at 27-3 (Matthew Bender 1994); COUCH CYCLOPEDIA OF INSURANCE LAW 2d § 45.661, at 246 (1981); I. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 323 (7th ED. 1980); W. ROKES, NO-FAULT INSURANCE 5 (1971).
[33] 42 U.S.C.A. §§ 2651-53 (West 1994 & Supp. 1997).
[34] *See* S. 354, 93rd Cong. §§ 104, 105, 206; *see also* S. REP. No. 382, 93rd Cong. 68, 70, 104 (1974).
[35] 886 F. Supp. at 602.
[36] *Id.*

granted deference.[37] This is the issue the Fifth Circuit Court of Appeals undertook to resolve on appeal.

In its review, the Fifth Circuit narrowed the issue to one question. Relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[38] the court stated the only issue before it was whether the agency regulations, classifying Medpay coverage as a form of no-fault insurance, were a permissible construction of the statute.[39] The court noted *Chevron* established the following two-part test:

> First, always, is the question whether Congress has directly spoken to the precise question at issue . . . If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction, as would be necessary in the absence of administrative interpretation. Rather if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on *a permissible construction* of the statute.[40]

With this in mind the court went on to define the term "no-fault insurance." It found this was a term of art that could have two distinct meanings. One meaning, advocated by the government, was that "no-fault" refers to a *type of insurance policy* that pays regardless of fault. This would make any policy that pays benefits regardless of fault a "no-fault" policy from which the government could recover under section 1095. The other definition, advocated by USAA, was that "no-fault" is a *state system*, not an insurance policy that required payment regardless of fault. This would mean a policy not mandated by a statutory "no-fault" system would not be amenable to collection under section 1095. Each definition was plausible, and depending on the one applied to this situation, the term would either bring USAA's Medpay coverage within reach of the government's recovery efforts or exempt it from the paying the government for medical care rendered to DoD beneficiaries.

It was this very ambiguity that led the court to conclude that DoD's definition of Medpay coverage as "no-fault insurance" was a permissible interpretation of the statute, ultimately settling the issue:

> We have no difficulty concluding [DoD's construction of the term is a permissible one]. DoD's construction is consistent with the language of the statute, dictionaries, and insurance treatises. It is not, of course, the only permissible construction, but it is one permissible construction, and that is enough. We are *Chevron*-bound to conclude that Medpay is a form of no-

[37] *Id.* at 606 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).
[38] Chevron, 467 U.S. at 843.
[39] 102 F.3d at 146.
[40] *Id.* (emphasis added).

> fault insurance within the meaning of [section] 1095, and USAA is liable to the government for reimbursement of medical expenses.[41]

Based on this interpretation of C*hevron*, so long as the government can choose one of at least two permissible interpretations of statutory language, its interpretation will stand.[42]

III. HISTORICAL PERSPECTIVE

Efforts to recover the cost of military medical care began as early as the World War II era. In 1948 the War Department amended existing Army regulations to authorize collection of medical and related expenses in cases where servicemembers were injured by the tortious acts of third parties.[43] The legal theory underpinning recovery efforts, which was later successfully challenged in *United States v. Standard Oil Co. of California, et al.*[44] was one of *per quod servitium amisit*.[45] This common law doctrine essentially permits a master to recover damages related to the loss of his servant.[46] In *Standard Oil*, the government persuaded the District Court that this principle should apply to the state-soldier relationship.[47] However, the Ninth Circuit Court of Appeals rejected this analysis.[48] Affirming the Ninth Circuit's decision, the United States Supreme Court held that state law did not govern the federal government's right to recover, and that in the absence of a federally sanctioned cause of action, the government simply could not pursue this type of recovery.[49]

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[41] *Id*. at 148.
[42] *But see* 102 F.3d at 148 n.1 (DeMoss, J., dissenting).
[43] Kasold, *supra* note 1, at 163. For a discussion of earlier federal recovery efforts, *see* Long, *supra* note 4, at 358-59.
[44] United States v. Standard Oil Co. of Cal. et al., 332 U.S. 301 (1947).
[45] "Whereby he lost the service of his servant." BLACK'S LAW DICTIONARY 1141 (6th ed. 1990).
[46] Kasold, *supra* note 1, at 164. *See generally* Long, *supra* note 4, at 355-59, 360-62.
[47] United States v. Standard Oil Co. of Cal. et al., 60 F. Supp. 807, 810 (S.D. Cal. 1945). Kasold notes the District Court never actually mentions this particular cause of action, but that it is clear from the Supreme Court's discussion this was the cause of action the government sought to have applied to its case. Kasold, *supra* note 1, at 164 n.16 (citing Standard Oil, 322 U.S. at 312-314).
[48] Standard Oil Co. of Cal. et al. v. United States, 153 F.2d 958, 960-61 (9th Cir. 1946). The Ninth Circuit's decision noted the absence of federal law authorizing such a cause of action, but differed from the Supreme Court's ruling in that it looked to state law to determine whether or not this action was cognizable. It later found the state-soldier relationship was not authorized by the California statute codifying this particular cause of action. *See* Kasold, *supra* note 1, at 164.
[49] 322 U.S. at 305-308.

A. Federal Medical Care Recovery Act

One significant part of the Supreme Court's rationale in rejecting the government's position in *Standard Oil* was that Congress is in the best position to decide matters of federal fiscal policy.[50] It was precisely this fiscal purpose which finally prompted Congress to act some 15 years later.[51] The impetus was a 1960 report by the Comptroller General which revealed to Congress that this lack of statutory authority was preventing the government from recovering millions of dollars each year from individuals who negligently injured servicemembers.[52] In 1962, Congress passed legislation authorizing the federal government to recover the reasonable value of medical care and treatment furnished to DoD beneficiaries in cases where injuries were the result of a tortious act by a third person.[53]

Recovery pursuant to the FMCRA was conditioned on finding tort liability.[54] However, Congress did not intend to create a new form of federal tort liability with the FMCRA.

> [W]hen Congress acted to create a right of recoupment in the Government by passage of the FMCRA, it did so not by creating a new tort, but merely by conferring a right that arises when a beneficiary is injured by conduct that would have been deemed tortious prior to passage of the act . . . . The cause of action created by the act, therefore, is simply one where rights under state tort law become material to the application of a Federal statute . . . . Local law determines the legal relations, and the latter, in turn create liability under the pertinent Federal statute. [55]

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[50] *Id.* at 310-311.

[51] S. REP. No. 1945, *reprinted in*, 1962 U.S.C.C.A.N. 2637, 2639-40. S. REP. No. 1945 *supra* note 3, at 2640.

[52] It was estimated that $10.5 million was spent annually providing hospital and medical care to military personnel injured in private automobile accidents. This study showed that in one 30 month period $4.2 million was spent as a result of 5,400 accidents where injured military personnel were passengers or pedestrians and an additional $6.3 million was spent in 8,100 cases were the injured person was the vehicle driver. While the Comptroller General could not tell how many of these cases involved negligent third parties, it was assumed that it was a significant number of incidents. *Id. See* COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF THE GOVERNMENT'S RIGHTS AND PRACTICES CONCERNING RECOVERY OF THE COSTS OF HOSPITAL AND MEDICAL SERVICES IN NEGLIGENT THIRD PARTY CASES (1960) [hereinafter *Review of Government's Rights and Practices*]. By 1983, calculated collections by the three branches of the armed forces, the Veterans' Administration and the Public Health Service stood at nearly $30 million annually. Kasold, *supra* note 1, at 161 n.1.

[53] 42 U.S.C.A. §§ 2651-53 (West 1994 & Supp. 1997).

[54] *Id.* at § 2651(a).

[55] Eli P. Bernzwieg, *Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 COLUM. L. REV. 1257, 1262-63 (1964).

This means, "the [g]overnment acquires no greater rights with the respect to third party tort liability than those possessed by the injured party."[56] This reliance on state law to establish a viable cause of action foreshadowed a significant problem that would arise when states passed no-fault insurance laws beginning in 1970.

> This language, which predates enactment of any no-fault insurance statute, limits the right of recovery to situations where state law imposes tort liability upon some negligent person. Thus, the right of recovery granted in the literal language of the Federal Medical Care Recovery Act is not triggered when there is no tort liability imposed by state law.[57]

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[56] *Id.* at 1265-66. *See* United States v. Neal, 433 F. Supp. 1307 (D. Neb. 1978) (denying Government recovery because existing tort liability could not be enforced due to a state family immunity statute and because the state guest statute required a finding of gross negligence, which was not present in the case, in order to establish an alternative cause of action). *See also* Kasold, *supra* note 1, at 174-75.

[57] Note, *The Federal Medical Care Recovery Act in No-Fault Automobile Insurance Jurisdictions: Extension of the Federal Right of Reimbursement Against No-Fault Insurers*, 21 B.C. L. REV. 623, 624 (1980). This note provides an excellent summary of the different types of no-fault insurance laws in force at the time:

> a. *Pure no-fault* – These statutory schemes theoretically would abolish all tort liability and rely solely on no-fault benefits to compensate injured persons. Although no state has gone as far as complete abrogation of tort liability for automobile drivers, the use of highly restrictive thresholds in Michigan has severely limited the right to sue in tort for automobile accident injuries. Michigan grants a right to sue in tort only if a narrative threshold is satisfied (a narrative threshold describes the type of injury that must be sustained before the right to sue arises): "noneconomic loss if the injured person suffered death, serious impairment of body function or permanent serious disfigurement." MICH. STAT. ANN. § 24.13135 (Supp. 1979). Along with severe limitation on the right to sue, the statute provides for unlimited no-fault benefits for medical expense. MICH. STAT. ANN. § 24.13107 (Supp. 1979). Severe or complete abrogation of tort liability and generous benefits are characteristic of a pure no-fault system.
> b. *Modified no-fault* – These statutory schemes usually modify the right to sue in tort through the use of less restrictive thresholds. The statutory threshold is either a dollar threshold stating a minimum out-of-pocket loss necessary to sue in tort, a narrative threshold describing the types and extent of injury, or a combination of the two. Modified no-fault plans provide a range of medical benefits from $2,000 to unlimited liability for no-fault insurers.
> c. *Add-on no-fault* – These statutory schemes typically provide no-fault benefits in addition to usual liability insurance found in fault based jurisdictions. Such a scheme is not a no-fault system in the true sense because there is no limitation on the right to sue in tort. Instead, such systems are more like a fault based system with an expanded form of medical payments insurance. Medical payments insurance, operative in every fault based jurisdiction, pays medical expense of injured parties without regard to fault. Add-on plans typically result in higher

This created a significant problem for the DoD recovery effort since the overwhelming majority of FMCRA claims arise from motor vehicle accidents.[58] To some extent, DoD's eroding ability to collect reimbursement in the late 1970s and early 1980s was masked by the government's ability to "recover significant sums of money as a third party beneficiary to automobile insurance policies."[59] Recovery efforts pursuant to this contract theory simply allowed the federal government to take advantage of broadly worded third-party beneficiary clauses in automobile insurance policies. Given that recovery is based on a specific contract's language, there was no need for proof of an underlying tort as would have been required by the FMCRA.[60] By the early 1980s, however, Congress noted many insurers were putting exclusionary clauses into policies that specifically barred federal agencies from reimbursement.[61] At a time of rapidly increasing budgetary pressure, this

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> insurance premiums since 1) they provide larger benefits for injured persons than medical payments insurance in fault based states, and 2) the insurer must continue to charge the usual premiums for liability insurance since there is no abrogation of tort liability.

Id. at 623, n.2. *See also* Note, *No-Fault Automobile Insurance: An Exhaustive Survey*, 30 RUTGERS L. REV. 909 (1977). By 1990, 21 states, the District of Columbia and Puerto Rico had some version of no-fault insurance laws. The impact of these laws varied, but DoD's recovery efforts were particularly stymied in six states. *See* GENERAL ACCOUNTING OFFICE (GAO), MILITARY HEALTH CARE, RECOVERY OF MEDICAL COSTS FROM LIABLE THIRD PARTIES CAN BE IMPROVED 31 (1990) [hereinafter *Recovery of Medical Costs Can be Improved*].

[58] *See Recovery of Medical Costs can be Improved*, *supra* note 57, at 11 (GAO estimates "[a]pproximately 90% of all third party liability recoveries involve injuries sustained as a result of motor vehicle accidents.").

[59] Kasold, *supra* note 1, at 184. The author notes that in 1983 the Air Force alone recovered $3.6 million dollars, or approximately 47 percent of it collections from the contractual or statutory obligations of third parties. *Id.* at 162 n.4.

[60] *Id.* at 185 (citing Dugan v. United States, 16 U.S. (3 Wheat) 172 (1818) (rejecting contention that the federal government could not enforce its rights under an existing contract without a statute specifically authorizing that purpose)). *See also* United Services Auto. Ass'n v. Perry, 102 F.3d at 150 n.2 ("In some circumstances, the government can recover under state law as a third party beneficiary to the insurance contract . . .This is separate from the FMCRA and [section] 1095…."). *See generally* Kasold, *supra* note 1, at 184-193.

[61] CONGRESSIONAL BUDGET OFFICE (CBO), OPTIONS FOR CHANGE IN MILITARY MEDICAL CARE 23 (1984) [hereinafter *Options for Change*]. Exclusionary clauses in automobile insurance policies mirrored those found in many health insurance policies. Exclusionary clauses in insurance contracts were first recognized as viable in United States v. St. Paul Mercury Indem. Co., 133 F. Supp. 726 (D. Neb. 1955). As the Comptroller General noted:

> [The] U.S. District Court ruled that an insurance carrier was not liable for payment to VA for treatment furnished to a veteran policyholder since the insurance policy insured against expenses actually incurred by the insured veteran, and the veteran incurred no medical or hospital expenses while being treated in a VA hospital. Since then, most health insurance policies have had exclusionary clauses which state that they will not pay the Federal

combination of diminished recoveries due to the spread of no-fault insurance laws and increasingly successful exclusion of the federal government from a contractual right of recovery led to calls for enactment of legislation improving the government's ability to seek reimbursement for the cost of medical care.[62]

B. 10 U.S.C. § 1095

Contemporaneous with the events outlined above, Congress passed additional medical care recovery legislation for the Veterans' Administration (hereinafter VA) targeting workers' compensation plans and no-fault automobile insurance coverage.[63] Then in 1982, President Reagan created the President's Private Sector Survey on Cost Control, also known as the Grace Commission.[64] One of the Grace Commission's 2,478 recommendations was "that the VA and the Department of Justice actively pursue legislation to eliminate exclusionary clauses."[65] Much of this effort, however, was aimed at increasing recoveries from private health insurers, rather than automobile insurance carriers. This occurred because the VA, rather than the DoD, was leading the effort to legislate exclusionary clauses out of existence and the VA already had legislation on the books which allowed it to recover from workers' compensation and no-fault insurance coverage.[66] The end result was an

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> government for medical care when it was provided at a government facility, a Federal agency provided such care at no charge, or the policyholder had no legal obligation to pay for the care.

COMPTROLLER GENERAL OF THE UNITED STATES (GAO), LEGISLATION TO AUTHORIZE VA RECOVERIES FROM PRIVATE HEALTH INSURANCE WOULD RESULT IN SUBSTANTIAL SAVINGS 4 (1985) [hereinafter *Legislation to Authorize VA Recoveries*]. For a discussion regarding exclusionary clauses in automobile insurance policies, see United States v. Allstate, 306 F. Supp. 1214 (N.D. Fla. 1969). *See also* United States v. Commercial Union Ins. Group, 294 F. Supp. 768, 771 (S.D.N.Y. 1969); Kasold, *supra* note 1, at 187-88.

[62] *Options for Change*, *supra* note 61, at 23. The Congressional Budget Office estimated it could save approximately $190 million in 1984 and an additional $1.4 billion dollars between 1985 and 1989 if military medical costs could be recovered from insurers of patients with private health insurance. This amounted to approximately 8 percent of the direct hospital costs and 4 percent of direct outpatients costs for the period under consideration (direct costs were defined as pay for medical personnel and operations and maintenance). *Id*. at 21-22.

[63] Veterans Health Care, Training, and Small Business Loan Act of 1981, Pub. L. No. 97-72, § 106, 95 Stat. 1047, 1050-51 (1981) (current version at 38 U.S.C.A. § 1729 (West 1991 & Supp. 1997)).

[64] Exec. Order No. 12,369, 47 Fed. Reg. 28,899 (1982).

[65] *Legislation to Authorize VA Recoveries*, *supra* note 59, at 7.

[66] 38 U.S.C. § 1729. The General Accounting Office had been recommending legislation eliminating exclusionary clauses and authorizing recovery from health insurers since 1970. Nine years later, S. 759, 96th Cong. (1979) was introduced in Congress, at the VA's request, and parts of the bill authorizing recovery from workers' compensation and no-fault insurance eventually became part of the Veterans Health Care, Training, and Small Business Loan Act, *supra* note 63. However, "provisions relating to recoveries from private health insurance were

amendment to 38 U.S.C. § 1729 and creation of 10 U.S.C. § 1095 authorizing the VA and the DoD to recover medical and hospital costs from private health insurance.

Similar to the VA's version of the law, the original enactment of section 1095 was aimed exclusively at collecting reimbursement from private health insurers.[67] Therefore, it did nothing to improve recovery from automobile insurers that excluded the federal government from recovering medical and hospital costs or in states where FMCRA recovery was limited by no-fault insurance laws. It was not until 1990 that provisions similar to 38 U.S.C. § 1729 were enacted permitting recovery from automobile insurance carriers.[68] It was the wording of these provisions that was eventually questioned in the *Perry* litigation. Only in September 1996 did Congress amend the statute settling this issue once and for all.[69]

IV. CONCLUSIONS

The key issue in the *Perry* litigation was the intent of Congress when it enacted the 1990 amendments to section 1095. Although the Fifth Circuit

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excluded because of concerns raised during Senate hearings on the bill." *See Legislation to Authorize VA Recoveries*, *supra* note 59, at 5 (citations omitted).

[67] H.R. REP. No. 99-300, *reprinted in*, 1986 U.S.C.C.A.N. 756, 763.

[68] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 713, 104 Stat. 1485, 1583-84 (1990) (codified at 10 U.S.C.A. § 1095(h)(1)). *See supra* note 18 and accompanying text. When creation of section 1095 was being considered in H.R. 441, 99th Cong. (1985), the removal of the tort requirement from the FMCRA was considered, but this bill was never enacted. By 1990, the GAO was advising that revision of section 1095, giving the DoD statutory authority comparable to those of other government agencies, could accomplish much the same purpose. *See Recovery of Medical Costs can be Improved*, *supra* note 57, at 31-32.

[69] The pertinent provision reads as follows:

> (h) In this section:
>
> > (2) The term "insurance, medical service, or health plan" includes a preferred provider organization, an insurance plan described as Medicare supplemental insurance, *and a personal injury protection plan or medical payments benefit plan for personal injuries resulting from the operation of a motor vehicle*.

National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, § 735, 110 Stat. 2599 (1996) (codified as 10 U.S.C.A. § 1095(h)(2) (emphasis added)). As part of the same Act, Congress also moved to enhance government recovery rights under the FMCRA in states with no-fault insurance laws. This amendment deems the United States a third party beneficiary to insurance contracts, regardless of any exclusionary clauses, so long as the state has "a system of compensation or reimbursement for expenses of hospital, medical, surgical, or dental care and treatment or for lost pay pursuant to a policy of insurance, contract, medical, or hospital service agreement, or similar arrangement. . . ." *Id*. at § 1075, 110 Stat. at 2422 (codified as 42 U.S.C.A. § 2651(c)(1)).

decided the case in the government's favor, it did so on a very narrow rule of statutory interpretation.[70] This leaves the question of Congressional intent largely unanswered by the courts.[71] However, it is clear from the whole history of federal medical care recovery legislation, including subsequent amendments to section 1095, that Congress has always intended to authorize broad recovery efforts in this area. In fact it has done just that with each piece of VA and DoD legislation in this area. The District Court's inference that Congress did not intend to include a broad category of automobile insurance in its recovery effort, because "[h]ad it desired, Congress could have easily included all first-party coverage in the [1990] amendment [to section 1095],"[72] simply failed to take into account the historical trend evident throughout the history of medical care recovery legislation.

Fiscal concerns have been, and are, clearly the catalyst for much of this legislation. Given the history of medical care recovery legislation, it is also clear public policy trends do not favor permitting insurers to charge policyholders full rates for Medpay coverage and then refuse to reimburse the government when the federal government has paid for all or most of the medical and hospital care.[73]

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[70] 102 F.3d at 148.
[71] 102 F.3d at 148 n.1 (DeMoss, J., dissenting).
[72] 886 F. Supp. at 600.
[73] *See* Kasold, *supra* note 1, at 191 n.207. *See also* Cruden, *supra* note 6, at 733-38.